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LIABILITY FOR VIOLATIONS OF ARTICLE 5 (PROHIBITED AGREEMENTS) OF THE LAW OF THE REPUBLIC OF LITHUANIA ON COMPETITION

Master Thesis

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LIST OF ABREVIATIONS

TFEU - Consolidated version of the Treaty on the Functioning of the European Union

EU – European Union

The Court of Justice – the Court of Justice of European Union

The General Court – the General court of the European Union

The Commission – the Commission of European Union

The Guidelines of setting fines – Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003

The Fining Rules – The description of the order for setting the amount of the fines imposed for the infringements of the Law of the Republic of Lithuania on Competition

Law on Competition - Law of the Republic of Lithuania on Competition

The Competition Council – the Competition Council of the Republic of Lithuania

The CDO – the Competition disqualification order

Directive on antitrust damage actions – Directive of the European Parliament and of the Council of on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

The SACL – the Supreme Administrative Court of the Republic of Lithuania

The VRAC - Vilnius Regional Administrative Court

1. INTRODUCTION

Statement of Topic. Protection of fair competition on the market, enhancing consumer welfare and ensuring efficient allocation of resources – these are the main values which competition law seeks to promote and protect. There is no doubt that the harm of competition law infringements is highly damaging by distorting the balance of particular markets and consumers prosperity. For instance, the additional revenue achieved worldwide by cartels[1] price above the competitive equilibrium has been estimated to exceed EUR 25 billion per year[2]. In comparison the national budget of the Republic of Lithuania in 2014 approximately exceeded a bit over EUR 8.5 billion[3]. However, in order to fight with offenders of competition law particular liability forms are established among which sanctions plays the most important role. While the most common sanctions are fines for undertakings. Thus, taking this into account, it is noted the tendencies of growing fines[4] imposed on undertakings for infringements of competition law and common practice of neighbouring countries regarding the adoption of additional types of sanctions[5]. These trends should lead to reconsideration - whether the present competition law liability measures in Lithuania is sufficiently effective in order to protect main values of competition law? Answering such a question is possible by engaging with analyses of European Union (hereinafter – EU), United States of America (hereinafter – US) and separate European countries competition law provided sanctions and assessing practical tendencies in Lithuania.

EU competition law sanctions policy is widely debated and constantly criticised. Most scholars draw attention that amounts of fines imposed on undertakings for violation of Article 101 and Article 102 of Treaty on the Functioning of the European Union (hereinafter - TFEU) are growing at enormous speed[6]. At the same time it is discussed that maybe this phenomenon is the result of the successful competition law enforcement. In case of revealed high numbers of

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[1] A cartel is a group of independent firms which collectively agree to coordinate their supply, pricing or other policies in order to make larger profits than they would in market where "natural competition" would prevail (Allain, M. L., et al. Are cartels Fines Optimal? *Theory and Evidence from the European Union. Scientific Series*, [interactive]. 2013, [accessed on 31-03-2015]. <http://www.cirano.qc.ca/pdf/publication/2013s-24.pdf>, p. 2.).

[2] Kokkinaki, K. An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle? *IES Working Paper* [interactive]. 2013 [accessed on 31-03-2015]. <http://www.ies.be/files/Working%20Paper%20Kokkinaki.pdf>, p. 8.

[3] Operating data on collection of the National Budget Revenues of the Republic of Lithuania 2014 [interactive], [accessed on 31-03-2015]. <http://www.finmin.lt/finmin.lt/failai/nacionalinio_biudzeto_surinkimas/ketv/2014_metai_EN__.pdf>.

[4] "The fines imposed by the European Commission for infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") have risen significantly over the last 20 years. To illustrate, while the total amount of fines imposed for infringements of antitrust rules in the period 1990-1994 was 580 million Euros, fines reached the spectacular level of 11030 million Euros in the period 2005-2009" (Geradin, M. The EU Competition Law Fining System: A Reassessment. *TILEC Discussion Paper* [interactive]. 2011 [accessed on 31-03-2015]. <http://ssrn.com/abstract=1937582>, p. 4).

[5] For instance, in EU a significant number of Member States have already adopted criminal sanctions for some kind for competition law infringements (such as Estonia, United Kingdom, Slovakia, Greece and etc.).

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

cartels, it is considered "*whether the increasing number of cartel decisions results from an increase tendency by firms to adopt collusive behaviour in more concentrated and globalised economy or whether it arises from better enforcement of competition law"*[7].

Additionally, as result of rising numbers of fines imposed on undertakings some scholars[8] distinguish the fact that the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (hereinafter – the Guidelines of setting fines[9]) in 2006 have been adopted. The established Guidelines of setting fines clearly declares that deterrence effect of fines is the most important aim therefore only with the huge amount of fines it is possible to achieve it. On the other hand, such an aim was not successfully achieved mostly because of the high rate of recidivism[10]. As prof. John Connor stated: „*a high rate of recidivism would demonstrate the failure of specific (or special) deterrence, i.e., that many companies sanctioned for cartel offenses nonetheless were not deterred from engaging in future cartel activity. A conspicuous failure of specific deterrence also would suggest that cartel enforcement is failing to achieve its primary goal - general deterrence*"[11].

Furthermore, scholars state that present liability for violations of competition law needs to be improved because fines are doubtfully sufficient to deter possible offenders no matter how large they would be[12]. As an additional solution alternative (or imposed in addition) individual sanctions are mostly proposed by scholars because only particular individual employees are responsible for breaches of competition law which commit undertakings. In this case, individual sanctions include: personal fines, directors' disqualification[13] or even imposition of criminal sanction - custodial sentences. Moreover, it is proposed that favourable legal rules for private enforcement as well should be adopted as an additional liability form.

However, while EU competition law sanctions policy is broadly analysed and criticised, competition law of Lithuania enforcement policy, types of sanctions or practical issues related to rules of sanctions imposition are not analysed very comprehensively. On the one hand, it is

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[7] Faull, J.; Nikpay, A. *The EC Law of Competition. Second edition*. Oxford: Oxford University Press, 2007, p. 1119.
[8] Folz, J. M., et al. On assessing penalties for infringements of competition law. Report [interactive]. 2010 [accessed on 31-03-2015]. <http://www.economie.gouv.fr/files/finances/services/rap10/100920rep-competition.pdf>.
[9] Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003. [2006] OJ C 210/02.
[10] According to the General Court 'recidivism', as understood in a number of national legal systems, implies that a person has committed fresh infringements after having been penalised for similar infringements" (Case T-141/94, *Thyssen Stahl v Commission* [1999] II-00347, para 617).
[11] Connor, M. J. Recidivism Revealed: Private International Cartels 1999-2009. *Competition Policy International* [interactive]. 2010, 6(2) [accessed on 31-03-2015]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1688508>, p. 10.
[12] Geradin, D.; Henry, D. The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments. *GCLC Working Paper No. 2/05* [interactive]. 2005 [accessed on 31-03-2015]. <http://ssrn.com/abstract=671794>, p. 5.
[13] Stephan, A. Disqualification Orders for Directors Involved in Cartels. *Journal of European Competition Law & Practice* [interactive]. 2011, 2(6): 529-536 [accessed on 31-03-2015]. <http://www.oxfordjournals.org/en/>.

agreeable that the main rules and principles of EU competition law, including sanctions policy, are cornerstone for competition law of Lithuania. On the other hand, regarding the absent of researches it is hardly to evaluate whether the present sanctions policy of Lithuania competition law should be assessed and improved in the same way as EU. Moreover, in the beginning of 2012 the description of the order for setting the amount of the fines imposed for the infringements of the Law of the Republic of Lithuania on Competition (hereinafter - the Fining Rules[14]) came into force. But nobody assessed whether the same tendencies regarding growth of fines prevail as after adoption of EU Commission's (hereinafter – the Commission) Guidelines of setting fines in 2006? Whether the fine is sufficient instrument to deter possible offender or it is important to implement additional sanctions (e.g. criminal)? It is considered that answers to these and similar questions are important in order to protect the main competition law values.

Scientific research problem. Taking into consideration broad range of issues related to competition law sanctions in EU and Lithuania, it is important to define narrower research problem in order to perform better assessment. In this case, it is important to take into account the fact that the usual violations of competition law which as well are mostly related with the highest fines are imposed for collusions of prohibited agreements[15], especially horizontal price-fixing agreements. Therefore, the main research question and further analysis will be mostly related with infringements of Article 101 TFEU and Article 5 Law of the Republic of Lithuania on Competition[16]. The main research question of the Master thesis **– whether the present liability types established in the Law on Competition is deterrent enough to stop potential offenders for conclusion of prohibited agreements?**

Relevance. The absent of analysis of present competition law of Lithuania sanctions, including researches of violations related to sanctions imposed for prohibited agreements, causes uncertainty whether the present sanctions policy is enough deterrent and effective in order to achieve main sanctioning goals. Moreover, more than three years have passed since the Fining Rules came in to force but what are the consequences and practical significance in fines imposition process it is still hard to evaluate. In drafting the Fining Rules the Government of the Republic of Lithuania have chosen similar and in some cases even same rules as in the Guidelines of setting fines. Even though, it is not clear, whether the fining practice in Lithuania is evolving to same direction as the Commission fining practice. Noteworthy, fines are the main

[14] Resolution No. 64 of the Lithuanian Government of 18/01/2012 on approval of the description of the order for setting the amount of fines imposed for the infringements of the Law on Competition of the Republic of Lithuania. Official Gazette. 2012, No. 12-511.

[15] The term of 'Prohibited agreements' is used to shortly define agreements between undertakings which are prohibited under Article 5 Law of the Republic of Lithuania on Competition and equivalent Article 101 TFEU.

[16] Law of the Republic of Lithuania on Competition. Official Gazette. 1999, No. 30-856. (New version from 01/05/2012. 2012, No 42-2041).

sanction for the infringements of prohibited agreements but what role plays individual administrative sanctions in practice? Also, it is relevant to evaluate additional liability form, i.e. actions for damages compensation suffered regarding violation of competition law.

Scientific novelty. Notwithstanding continuing wide debates at EU level regarding competition law sanctions, especially with an increasing level of fines and the necessity of additional or alternative sanctions, there were no comprehensive analyses regarding liability measures applied for violation of Law on Competition breaches. Admittedly, that there were scholars who analysed fines imposition peculiarities after the adoption of the Fining Rules[17] or economic efficiency of fines imposed on cartels in the country of small economy with developing culture of competition[18]. Thus, these general analyses only partly reveal the main critical aspects of the present liability for violations Law on Competition, therefore the Master thesis is mainly concentrated on liability for infringements of prohibited agreements.

Significance. There are no doubts that the breaches of Competition law including the concluded prohibited agreements, are very harmful for economy and competitiveness of European or internal market. For example, it is calculated that the price-fixing agreements as one of the most serious infringements inflict price increase in some cases even more than 40 %[19] regarding international cartels in longer perspective. Despite of the fact that market of the product or similar is distorted, the most part of the burden is felt upon consumers. Consequently, it is important examine whether the legal sanctions imposed by the competition law of Lithuania for conclusion of prohibited agreements are effective and sufficient in order to deter potential offenders.

Review of the literature. In order to achieve the main aim of the Master thesis various foreign researchers' scientific works have been analysed. Some of them examined EU fining policy and the practical imposition aspects, such as, for instance, Damien Geradin[20], Eric Barbier de La Serre and Eileen Lagathu[21] et al., the others were analysing and looking for optimal fines

[17] Novosad, A.; Moisejevas, R. Novelties of Method of Setting Fines Imposed for Infringements of the Lithuanian Law on Competition. *Jurisprudence* [interactive]. 2012, 19(2): 625–642 [accessed on 31-03-2015]. <https://www3.mruni.eu/ojs/jurisprudence/article/view/52/47>.

[18] Bruneckiene, J.; Pekarskiene, I. Economic Efficiency of Fines Imposed on Cartels. *Engineering Economics* [interactive]. Kaunas. 2015, 26(1): 49-60 [accessed on 31-03-2015]. <http://www.inzeko.ktu.lt/index.php/EE/article/view/7763>.

[19] Combe, E.; Monnier, C. Fines against hard core cartels in Europe: The myth of over enforcement. *The Antitrust Bulletin* [interactive]. 2011, 56(2): 235 – 275 [accessed on 31-03-2015] [accessed through EBSCO Host]. p. 270.

[20] Geradin, M. The EU Competition Law Fining System: A Reassessment, *supra* note 4; Geradin, D.; Henry, D. The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments, *supra* note 12.

[21] Barbier, L. S. E.; Lagathu, E. The Law on Fines Imposed in EU Competition Proceedings: Faster, Higher, Harsher. *Journal of European Competition Law & Practice* [interactive]. 2013, 4(4): 325-344 [accessed on 31-03-2015], [accessed through <http://www.oxfordjournals.org/en/>]; Barbier, L. S. E.; Lagathu, E. The Law on Fines Imposed in EU Competition Proceedings: Fifty Shades of Undertakings. *Journal of European Competition Law & Practice* [interactive]. 2015 [accessed on 31-03-2015], [accessed through <http://www.oxfordjournals.org/en/>]; Barbier, L. S. E.; Lagathu, E. The Law on Fines Imposed in EU Competition Proceedings: On the Road to

or the sanctions which might have the most deterrent effect (for instance Wouter P.J. Wils[22], Jean Martin Folz[23]), while the third group of scholars by using comparative analyses were examining the possibility to introduce alternative or additional liability measures (for instance Douglas H. Ginsburg & Joshua D. Wright[24], Peter Whelan[25], Kalliopi Kokkinaki[26] et al.). Additionally, as well the scientific works of Lithuanian scholars[27] (Novosad A. & Moisejevas R., Bruneckiene J. & Pekarskiene I.) were assessed. Moreover, the analysis of EU legal acts including TFEU, Regulation 1/2003[28], Guidelines of setting fines and others, as well Lithuania Law on Competition, the Fining Rules and other laws has been conducted. Also case-law of the Commission, the General Court, the Court of Justice of European Union (hereinafter – Court of Justice) and Competition Council of the Republic of Lithuania of (hereinafter – the Competition Council) as well as courts of Lithuania decisions has been analysed.

Aim. The main aim of the Master thesis is to identify the main objectives and the main features of different types of competition law sanctions as well as private enforcement as an additional liability form, in order to assess the present competition law sanctions of Lithuania imposed for the infringements of prohibited agreements and present proposals for improvement.

Research objectives. The objectives of the Master thesis are interconnected with the structure. Moreover, in order to achieve the main aim it is important:

- To identify the main objectives of competition law sanctions;
- To reveal the main features of sanctions of competition law which might be imposed for infringements of prohibited agreements;
- To assess present legal framework and tendencies of sanctions imposed for breaches of prohibited agreements in Lithuania;
- To perform comparative analysis of the Fining Rules and the Guidelines of setting fines in order to disclose practical applicability issues regarding fines imposition for prohibited agreements in Lithuania;

Consistency. *Journal of European Competition Law & Practice* [interactive]. 2014, 5(6): 400-420 [accessed on 31-03-2015], [accessed through <http://www.oxfordjournals.org/en/>].

[22] Wils, W. P. J., Optimal Antitrust Fines: Theory and Practice. *World Competition* [interactive]. 2006, 29(2) [accessed on 31-03-2015]. <http://ssrn.com/abstract=883102>.

[23] Folz, J. M., et al. On assessing penalties for infringements of competition law, *supra* note 8.

[24] Ginsburg, D. H.; Wright, J. D. Antitrust Sanctions. *Competition Policy International* [interactive]. 2010, 6(2): 3-39 [accessed on 31-03-2015]. <http://ssrn.com/abstract=1705701>.

[25] Whelan, P. Contemplating the Future: Personal Criminal Sanctions for Infringements of EC Competition Law. *King's Law Journal* [interactive]. 2008, 19(2) [accessed on 31-03-2015], [accessed through EBSCO Host].

[26] Kokkinaki, K. An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle? *Supra* note 2.

[27] Novosad, A.; Moisejevas, R. Novelties of Method of Setting Fines Imposed for Infringements of the Lithuanian Law on Competition, *supra* note 17; Bruneckiene, J.; Pekarskiene, I. Economic Efficiency of Fines Imposed on Cartels, *supra* note 18.

[28] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. [2003] OJ L 1, 4.1.

- To analyse additional liability form which might be applied for infringements of prohibited agreements in Lithuania.

Defended thesis.

1. Present sanctions imposed for violations of Article 5 of the Law on Competition are not deterrent enough, therefore improvements of the Fining Rules and individual administrative sanctions are essential;
2. Private enforcement of the Law on Competition could play important role as an additional form of liability therefore the adoption of specific legal rules regarding redress are more than welcome.

Methods. The methods of analysis of the Master thesis are the following: the logical-analytical method, the comparative method, the case-analysis method and the empirical method. The logical-analytical method has been used to identify main aspects of objectives and features of competition law sanctions, as well during the analysis of private enforcement as an additional liability measure. While the comparative method and the case-analysis method are mostly used in conducting comparative analysis of the Guidelines of setting fines and the Fining Rules, as well comparing individual sanctions of competition law with similar administrative sanctions. The empirical method has been used to collect, analyse and summarize relevant information of fines imposed on undertakings for infringements of Article 5 of the Law on Competition.

The Structure of the Master thesis. The structure of the Master thesis is divided into two main chapters. In the first chapter the main objectives of competition law sanctions and three main groups of types of sanctions imposed for infringements of competition law are examined. In the second chapter, the assessment of the present sanctions system imposed for infringements of prohibited agreements in Lithuania has been made. Starting with the identification of the background legal rules, principles and practical tendencies of sanctions imposition during the last ten years. While in the subsequent sub-chapters the comparative analysis of the Fining Rules and the Guidelines of setting fines has been performed and the assessment of the other sanctions than fines imposed on undertakings has been made.

The Master thesis is divided into the following chapters:

1. Chapter one - Diversity of Sanctions Imposed for Infringements of Competition law;
2. Chapter two - The Assessment of Liability Forms applied for Breaches of Prohibited Agreements in Lithuania.

2. DIVERSITY OF SANCTIONS IMPOSED FOR INFRINGEMENTS OF COMPETITION LAW

The first chapter of the Master thesis starts with a general overview of competition law sanctions system. It is important to identify the main objectives and existing types of various sanctions in order to understand the place of present situation of competition law of Lithuania sanctions policy in global context. For this reason, in this chapter separate sanctions are examined and significant practical features revealed in order to compare to present competition law of Lithuania sanctions policy regarding breaches of prohibited agreements.

Infringements of competition law as any other illegal activity are sanctioned. There might be a wide range of illegal actions which might distort the fair competition (e.g. abuse of dominant market position, vertical restraints and etc.) but it is commonly agreeable that cartels are the most serious infringements[29]. Therefore, the main attention either in this chapter, either in the next one is focused on sanctions which might be imposed for the breaches of prohibited agreements. Although, sometimes it is hard or there is no necessity to separate sanctions as solely applicable only for violations of prohibited agreements.

Hence, the starting point here is determination of the main objectives of competition law sanctions. It is considered that only with clearly expressed objectives of respective sanction or aims which are known in advance it is possible evaluate if the enforcement of competition law is effective in practice. However, further different types of sanctions which are imposed for infringement of prohibited agreements are analysed.

The prevailing sanction policies among European countries are mostly just the imposition of administrative sanctions. The background of such sanctions consist of fines which in some cases amount even hundreds millions of Euros. Additionally, administrative sanctions comprise fines for procedural infringements, periodic penalty payments and in some countries individual fines or possibility of debarment. These different types of sanctions and their significance for sanction policy will be analysed in detail further.

However, it is considered that fines as the main administrative sanctions are not always sufficient measure, because offenders who were punished before, perform possible gain/loss analysis and are tend to repeat competition law infringements. Therefore it is important indeed to examine criminal sanctions for responsible individuals.

Finally, regarding types of liability it is important to define different forms of competition law liability which might be divided into two groups - the public enforcement and private enforcement. In the first category administrative and criminal penalties fall in also.

[29] Folz, J. M., et al. On assessing penalties for infringements of competition law, *supra* note 8, p. 4.

Meanwhile personal or group civil actions for damages regarding breaches of competition law fall in second category.

2.1. The Main Objectives of Competition Law Sanctions

In the beginning of assessing the main objectives of competition law sanctions it is worth to mentioning *Wouter P.J. Wils* who has distinguished three tasks of competition law enforcement: "*considering the enforcement of antitrust prohibitions such as Articles 81 and 82 EC (auth. note: present Articles 101 and 102 TFEU) could be said to entail three tasks: (1) clarifying the content of the prohibitions; (2) preventing violations of these prohibitions and (3) dealing with the consequences when violations have nevertheless happened"*[30].

(1) Clarifying the content of the prohibitions

The first objective of competition law enforcement is to clarify the competition law prohibitions. Competition law legal rules are mostly formulated in a general way regarding to the prohibition of particular acts. For example, Articles 101 and 102 TFEU or US the Sherman Act[31] Sections 1 and 2 contain general formulations and the main content of these rules is mostly specified through judgments or decisions in individual cases. Additional guidelines issued by competition authorities play an important role as well so that some rules are adopted on the basis of decisions. For instance, in the Guidelines of setting fines there are non-exhaustive list of aggravating and mitigating circumstances therefore the list evolve over the time case-by-case.

(2) Preventing violations of these prohibitions

The second and central objective is the prevention of breaches of competition law prohibitions or in other words - the deterrence. In the analysis of this objective *Wouter P.J. Wils* distinguish three separate conditions under which companies or the individuals made decisions to commit infringement of competition law: "*The first condition is that they need an opportunity to commit a violation. Secondly, they need to be willing to commit a violation. […]. Thirdly, the companies or individual decision-makers need incentives to commit violations, in that the expected benefits to them of the violations exceed the expected costs"* [32]. It is assumed that in order to deter offenders of competition law, sanctions must influence any of these conditions.

Firstly, seeking to reduce the opportunities to commit violations can be done through anticipatory (*ex ante*) intervention. In practice such prevention in advance is hardly feasible regarding all infringements of competition law even though in some cases it is used by European

[30] Wils, P.J. W. Optimal Antitrust Fines: Theory and Practice, *supra* note 22, p. 5.
[31] The Sherman Anti-Trust Act of 1890 (15 U.S.C.A. §§ 1 et seq.).
[32] Wils, P.J. W. Optimal Antitrust Fines: Theory and Practice, *supra* note 22, p. 6.

countries. For example, in case of merger or acquisition the undertakings have a duty to inform and receive prior notification and authorisation of competition authority or EU Commission if established thresholds are exceeded.

Secondly, the issue how to prevent competition law violations by reducing business people's willingness to commit a breach might be solved by strengthening normative commitment to these persons to competition law rules. Indeed, the imposition of sanction is an important measure to punish particular offenders but the most important aspect is public deterrent effect which helps to create a credible threat of punishment not only for those who would be willing to commit violations on the basis of a profit calculation but it also sends a message to those who are voluntarily law-abiding to strengthen their moral commitment to follow the rules[33].

The third condition - altering the balance of expected benefits and costs of violations might be fulfilled by prosecuting and punishing violations, i.e. imposing sufficient weight sanctions which deter persons from committing competition law breaches. Additionally, the other methods could also be used in order to alter the balance of costs and benefits. It might be reached through leniency policies, through making the prohibited agreements or separate clauses legally unenforceable as Article 101 (2) TFEU constitutes or for instance, adding the additional costs which would be difficult to calculate in advance, for instance, in the part of fine calculation regarding evolution of mitigating and aggravating circumstances.

(3) Dealing with the consequences when violations have nevertheless happened

It is considered that in spite of sanctions policy excellence, the total prevention and elimination of all violations hardly possible. The reasons for this phenomenon are dual[34] – psychological and economical. However, therefore it is important to deal effectively with consequences.

The psychological reason is related to understanding that regardless that competition authorities detects many violations and impose huge fines there is still a possibility to remain unnoticed. Meanwhile, the economic reason is that the enforcement measures in order to prevent breaches mostly suffer costs. Such costs include various administrative expenses regarding detection, investigations, prosecution and etc. Different degree of prevention is proportionally related to the costs which are limited therefore at this point the effect of 100 % is as well very doubtful.

[33] Kokkinaki, K. An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle? *Supra* note 2, p. 11.
[34] Wils, P.J. W. Optimal Antitrust Fines: Theory and Practice, *supra* note 22, p. 9.

Dealing with the consequences of violations that have taken place the injunctions might be used as an instrument to limit and mitigate the harm. Moreover, in order to deal with consequences and pursue corrective justice two[35] partly overlapping aspects must be achieved. The first might be achieved by taking any benefit from an offender which might be received from violation of competition law. While the second aspect is related to compensation - making a party which committed the violation compensate other parties who innocently suffered the consequences of the breach of competition law. These aspects are used in order to pursue corrective justice and will be analysed further: the first as administrative or criminal fines and the second as used private enforcement measure.

Nevertheless, *Wouter P.J. Wils* proposed theoretical analysis which support the general opinion that two main objectives of competition law sanctions are distinct: (1) to punish; (2) to deter. Others scholars[36] additionally assign the third (3) compensation for damages.

According to the Court of Justice case law, the object of the penalties is just "*to suppress illegal activities and to prevent any reference*"[37] Moreover, the EU Commission's in case of imposition of fines regarding breaches of Articles 101 and 102 TFEU stress the following: *"The Commission's power to impose fines […] is of the means […] to carry out the task of supervision entrusted to it by the Treaty. […] For this purpose the Commission must ensure that its action has the necessary deterrent effect […] not only in order to sanction the undertaking concerned (auth. additional note: specific deterrence) but also in order to deter other undertakings from engaging in, or continuing behaviour that is contrary to Articles 81 and 82 EC (auth. additional note: general deterrence)."*[38] Hence, it is clear that the deterrent effect of EU sanctions policy is the main aim. At this point, Lithuanian sanction policy according to Article 2 of the Fining Rules, declare similar purposes that fines imposed for infringements of Law on Competition and TFEU must be individualised and with a prevention effect. The declarative objectives are clear depending on whether the present sanctions policy in Lithuania and EU with all the instruments is effective to achieve theses aims in practice.

2.2. Administrative Sanctions

Administrative sanctions are those which are playing the central role in competition law sanctions policy. However, differently than general administrative sanctions in national law, administrative competition sanctions has specific features especially regarding imposition

[35] *Ibid*, p. 10.
[36] Folz, J. M., et al. On assessing penalties for infringements of competition law, *supra* note 8, p. 8.
[37] Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, para 173.
[38] Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003. [2006] OJ C 210/02, paragraph 4.

process and the sizes of fines. Hence, the main types of administrative sanctions of competition law are discussed further.

2.2.1. Fines Imposed for Procedural Infringements

The first group of administrative sanctions might be defined as sanctions for procedural infringements which play an important role in the investigation process as well as to ensure the process of enforcement of adopted decision of competition authorities.

Procedural fines

In order to ensure an effective investigation procedure of competition law breaches competition authorities may impose procedural fines. Such fines are considered as a measure to ensure that all the important information will be collected in time and the possible offenders will be prevented from distortion of investigation. The further general conditions when procedural fines might be imposed are emphasised in case of the Commission investigation.

According to Regulation 1/2003 Article 23(1), the Commission may impose on undertakings by decision as well as associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year. The procedural fines might be imposed on possible offenders when they intentionally or negligently are in the line with particular investigation procedure steps: (a) supply incorrect or misleading information; (b) in response to a request supply incorrect, incomplete or misleading information or do not supply information within the required time-limit; (c) produce the required books or other records related to the business in incomplete form during inspections or refuse to submit to inspections; (d) give an incorrect or misleading answer in response to a question asked, fail to rectify within a time-limit set by the Commission, an incorrect, incomplete or misleading answer given by a member of the staff, or fail or refuse to provide a complete answer on facts relating to the subject-matter and purpose of an inspection ordered; (e) seals affixed by officials or other accompanying persons authorised by the Commission have been broken. Hence, regarding these circumstances the Commission could punish the offenders for a failure to cooperate with, obstructing its investigations, or for supplying incorrect, incomplete or misleading information[39].

Moreover, the practise showed that even the obstruction by negligence may bear harsh consequences. In *EPH case*[40] the General Court upheld fine for having obstructed inspection (i.) by negligently unblocking the e-mail account of one of the key persons targeted by the inspection, and (ii.) by intentionally diverting the incoming e-mails of at least one other key

[39] Jones, A.; Sufrin, B. *EU Competition Law: Text, Cases, and Materials. Fifth edition.* Oxford: Oxford University Press, 2014, p. 995.
[40] Case T-272/12 *EPH v Commission* [2014] ECLI:EU:T:2014:995

person to a server[41]. The General Court confirmed that in the absence of guidelines applicable to the setting of fines for obstruction, the Commission is not required to express in figures, in absolute terms or as a percentage, the basic amount of the fine and any aggravating or mitigating circumstances[42]. Additionally, the General Court stressed that obstruction actions regarding electronic files must have more deterrent effect because *'they are much easier and quicker to manipulate than paper files',* and electronic files may be quickly hided or deleted even in the presence of the inspectors. Lastly, the General Court evaluated that the fine - which represented 0.25 per cent of EPH's turnover - was not excessive[43].

Another worth mentioning case was related to negligence which cost EUR 38 million for undertaking. In E.ON Energie case[44], the fine was imposed on E. ON Energie concerning the breaking of a seal affixed by the Commission officials to secure documents collected in the course of an unannounced inspection. In this case the Court of Justice ruled that it is irrelevant to determine whether or not someone actually entered the room after breaking the seal, as the mere doubt cast on the integrity of the evidence in itself is sufficient to justify imposing a fine[45] which represented 0.14 per cent of E.ON's annual turnover.

Notable, two more aspects are important to add regarding procedural fines. First, the Commission may impose a fine on the undertaking for obstruction or consider such conduct as an aggravating circumstance, but not both at the same time[46]. Secondly, the Commission stressed to bear in mind the substantive fine while setting the amount of procedural fine in order '*to ensure that it does not pay off for companies to take the risk of a procedural fine in order to avoid a potentially high fine for breaches of substantive law*'[47]. Thus, the procedural fines must be high enough and deterrence in order the offenders might not obstruct the investigation with purpose later to avoid higher fines.

Law on Competition Article 36(3) as well establish the legal background for fines imposition regarding procedural infringements. The fine threshold (1 % of gross annual income in the preceding business year) and main conditions (not providing required information or providing incorrect and incomplete information to the Competition Council, hindering the officials of the Competition Council from entering into investigate premises and etc.) for procedural fines imposition in Lithuania are almost identical as according to EU competition law. However, procedural fines in Lithuanian competition law practice are not usual,

[41] Barbier, L. S., B.; Lagathu, E. The Law on Fines Imposed in EU Competition Proceedings: Fifty Shades of Undertakings, *supra* note 21, p. 18.
[42] Case T-272/12 *EPH v Commission* [2014] ECLI:EU:T:2014:995, para 101.
[43] *Ibid*, paras 108, 115.
[44] Case C-89/11 *E.ON Energie v Commission* [2012] ECLI:EU:C:2012:738.
[45] *Ibid*, paras 128-133.
[46] Case T-384/06 *IBP v Commission* [2011] ECR II-01177, para 109.
[47] Case COMP/39.793 *EPH and others* [2012] OJ C 316, para 83.

nevertheless the percentage amount of imposed fines calculated from undertaking annual revenues is much higher than in EU competition law practice and fines are differently calculated.

In practice of Lithuanian competition law regarding procedural fines, there are two cases which are important to mention: *Plunges duona case*[48] and *Litcon case*[49]. In the first case, the fine of approximately EUR 25 000 (0.6 % of annual income in the preceding business year) were imposed for a failure to fulfil mandatory obligations to provide the required information while in the second *Litcon case* record approximately EUR 178 000 (0.6 % of annual income in the preceding business year) fine was imposed for obstructing the inspection and, thus, impeding the investigation. Later these decision were upheld by administrative courts. Notable that in both cases same per cent of annual income in preceding business year was applied despite of the fact that in the first case the breach took almost a year while in the second case the obstruction was one-off. Also, in both cases offenders stated that the obstruction happened due to employees negligence therefore it should be assessed with less gravity. But such arguments were dismissed by the Competition Council on the basis of previously mentioned decision of the Commission where it was held that the assessment of gravity of infringement is irrespective of whether it was committed negligently or intentionally[50].

In comparison with practical aspects of EU and Lithuania procedural fines imposition it is important to note that the Competition Council uses two-steps methodology based on the Fining Rules. As it was mentioned before, the Commission in the process of setting the fines for obstruction is not bound by the Guidelines of setting fines therefore it is not required to express precisely and separately the basic amount of the fine or any aggravating or mitigating circumstances. Moreover, such a position of the Commission is supported, because, in author's own opinion, it is hard to imagine in practice what procedural breaches might have mitigating circumstance because mostly obstruction and other similar procedural breaches are *per se* as an aggravating element. On the other hand, the imposition of procedural fines have to be motivated therefore the evaluation of a gravity level (for instance the obstruction which was mentioned before regarding electronic information considered as a breach of the serious nature) plays the main role in procedural fines imposition.

[48] Resolution No 2S-3 of the Competition Council of the Republic of Lithuania 23/02/2012 regarding the Republic of Lithuania Competition Council demand to during the investigation to *UAB Plunges duona* provide information failure.
[49] Resolution No 2S-3 of the Competition Council of the Republic of Lithuania 17/07/2013 regarding *UAB Litcon* obstruction to conduct investigation.
[50] Case COMP/39.793 *EPH and others* [2012] OJ C 316, para 89.

Periodic penalty payments

Periodic penalty payments - the pecuniary sanction imposed on undertakings which defiance to particular decisions of competition authority. The amount of periodic fines are calculated on a daily rate which is expressed in per cents of average daily turnover in the preceding business year per day.

According to Regulation 1/2003 Article 24 the fine which not exceeding 5 % of the average daily turnover in the preceding business year per day, may be imposed on undertakings or associations of undertakings by the Commission's decision, in cases: (a) to put an end an infringement of Article 101 or Article 102; (b) to comply with a decision ordering interim measures; (c) to comply with a commitment; (d) to supply a complete and correct information which was requested; (e) to submit an inspection which was ordered. However, such type of sanctions are rare in practice.

Microsoft was the first undertaking which was fined under article 24 Regulation 1/2003 for failing to comply with the particular Commission decisions[51]. Microsoft was required to supply complete and accurate interface information which would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers and make that information available on reasonable terms.[52] Thus, Microsoft failed to disclose the required level of information therefore Commission imposed fines. The first fine has been imposed in July 2006 which amounted EUR 280.5 million (EUR 1.5 million per day for the period from 16 December 2005 to 20 June 2006).[53] The second decision was adopted on 27 February 2008 for failing to make information available on fair and reasonable terms. The amount exceeded EUR 899 million (1.02 % of Microsoft's annual turnover), but the General Court later reduced the fine to EUR 860 million.[54] Furthermore, in this decision the General Court highlighted the similarities between fines and periodic penalties, i.e. both measures are related to the past conduct of an undertaking, therefore it must be deterrence for similar behaviour in the future. In the light of these similarities, the imposition of periodic penalty payment does not presuppose that the obligations of the person in question have to be specified more precisely than when the Commission considers imposing a fine[55].

However, these decisions have not been the last in the case of Microsoft. In 2013 the Commission imposed EUR 561 million fine on Microsoft for failing to comply with the

[51] Jones, A.; Sufrin, B. *EU Competition Law: Text, Cases, and Materials. Fifth edition, supra* note 39, p. 996.
[52] Press release No MEMO/06/277 Brussels 12 July 2006. *Competition: Commission Decision of 12 July 2006 to impose penalty payments on Microsoft – frequently asked questions* [interactive], [accessed 19-04-2015]. <http://europa.eu/rapid/press-release_MEMO-06-277_en.htm>.
[53] *Ibid.*
[54] Case T-167/08 *Microsoft v. Commission* [2012] ECLI:EU:T:2012:323
[55] *Ibid*, para. 122.

commitments made legally binding by the decision dated 16 December 2009[56]. This was the first time when the Commission imposed the fine for failure to comply a commitment decision. In calculating the fine, the Commission assessed the gravity, duration, mitigating circumstances and the necessity to ensure deterrent effect thus in doing so Commission appears to have drawn on the principles set out in Guidelines of setting fines despite that they are not applicable to fines imposed pursuant to Article 23(2)(c) of Regulation 1/2003[57]. It is a disadvantage that the Guidelines of setting fines did not express the possibility to apply this fine imposition methodology or at least the main principles in absence of guidelines or rules regarding similar fines imposition. On the contrary, in Lithuania Article 23 of the Fining Rules establishes that regarding the others breaches of Law on Competition the fines are imposed on undertaking by applying rules *mutatis mutandis* used in Sections II, IV and V of the Fining Rules as far as they regulate the calculation of the amount of fine when the basic amount is calculated according to revenues of undertaking in the preceding business year.

2.2.2. Fines Imposed on Undertakings for the Substantive Infringements

Fines for substantive breaches of competition law are the central sanctions competition law sanctions policies of the different countries. Mostly, other sanctions play an additional role and might be imposed depending on the situation. The fines are imposed in all cases if competition authority identify substantive breach of competition law after investigation procedure. Thus, nevertheless that fines are the common sanction, in any other case of administrative breach in so far fines imposed for competition law breaches are incomparably higher. The fines for substantive infringements reach hundreds of million Euros or Dollars and for this reason different methodologies and principles are used in order to reveal all aspects which are important to evaluate during the fine imposition process. Despite of the varieties of competition law sanctions systems the main principles are mostly the similar. Even while comparing US and EU or other European countries methods for calculating fines these are at some extent similar[58]. However, before revealing the main elements of Guidelines of setting fines some criticized aspects are analysed.

In case of imposing fines for substantial breaches of EU competition law the negligent and intentional breaches are distinguished. Article 23(2) of Regulation 1/2003 provides that the Commission may by decision impose fines on undertakings and associations of undertakings either intentionally or negligently. ‘Intentional’ mean an intention to restrict competition, not an

[56] Barbier L. S., E.; Lagathu, E. The Law on Fines Imposed in EU Competition Proceedings: On the Road to Consistency, s*upra* note 21, p. 416.
[57] *Ibid,* p. 416.
[58] Folz, J. M., et al. On assessing penalties for infringements of competition law, *supra* note 8, p. 26.

intention to infringe the rules[59]. Regarding this the General Court held that: *"For an infringement of the competition rules of the Treaty to be regarded as having been committed intentionally, it is necessary for an undertaking to have been aware that it was infringing those rules; it is sufficient that it could not have been unaware that its conduct was aimed at restricting competition"*[60]. Moreover, it is important to note that if the infringement is not identified as intentional it is possible to be held negligent but the EU Courts have never defined negligence because it is considered that experienced commercial entities understand what they are doing[61]. However, this distinction is mostly important in case of intentional breaches because it is evaluated as an aggravating circumstance and element for heavier fine. Hence, negligence does not play an important role in fines imposition.

Another important aspect of fines imposed for substantive infringements is the amount of fines. For instance, under the Sherman Act a corporation shall be imposed maximum fine of $100 million per offence. This means that any single offence (e.g. one phone call) can be punishable by $100 million fine[62]. Furthermore, the statutory maximum can be exceeded under the Alternative Sentencing Act[63], which provides that if any person derives pecuniary gain from the offence (or other experience pecuniary loss), the defendant may be fined up to twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process. The fixed maximum amount of fines expressed in certain currency are met in some Europe countries[64], though fines amounting the particular percentage of undertaking total turnover are more common. In most European countries and according to EU competition law the max amount of fine shall not exceed 10 % of undertaking total turnover in the preceding business year (although it was not specified what turnover has to be taken into account but in Alloys and Chemicals Ltd case[65] the General Court confirmed that the Commission was correct to use the undertaking's last full business year). Moreover, it is important to mention that in some countries the per cent of annual turnover comprise only the offender undertaking annual turnover, while in other countries, according to EU competition law as well, the turnover of whole undertaking group worldwide are taken into account. Such an aspect might be criticised differently.

According to EU Competition law, the term 'undertaking' is considered as an abstract term for entities engaged in economic activity, regardless of their legal status[66]. For this reason

[59] Jones, A.; Sufrin, B. *EU Competition Law: Text, Cases, and Materials. Fifth edition, supra* note 39, p. 998.
[60] Case T-143/89 *Ferrierre Nord v. Commission* [1995] ECR II-917, para 41.
[61] Jones, A.; Sufrin, B. *EU Competition Law: Text, Cases, and Materials. Fifth edition*, *supra* note 39, p. 998.
[62] *Getting the Deal Through: Cartel Regulation 2014*. London: Law Business Research Ltd., 2013, p. 343.
[63] Alternative Sentencing Act of 1991. Government Gazette. [1992] No. 41/1991.
[64] For example, Denmark.
[65] Case T-33/02 *Britannia Alloys and Chemicals Ltd v. Commission* [2005] ECR II-4973, para 50.
[66] Geradin, M. The EU Competition Law Fining System: A Reassessment, *supra* note 4, p. 16.

the concept of undertaking comprise both a subsidiary and its parent company when the latter is found to be able exert "decisive influence" on the subsidiary[67]. Additionally, in case of 100 % owned subsidiary by its parent company there is rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary[68]. There is no doubt that such an aspect has a great impact on the fines calculation, because of 10 % cap fines are calculated in combine of subsidiaries and parent company. Even though, such parental liability doctrine is not contrary to the concept of autonomy of corporate in case of subsidiary. Moreover, other scholars criticises the existence of the presumption of liability (even rebuttable) that parental liability might be contrary to the presumption of innocence and the principle legality established in Articles 6(2) and 7 ECHR[69] respectively[70]. Nevertheless, after such a presumption it is important to justify that the main argument is the deterrence as the ultimate purpose of cartel fines which have to be achieved in order to prevent future breaches of competition law[71].

On the other hand, the parent company is responsible for compliance programmes implementation. Taking into consideration the autonomy of subsidiary, compliance programmes might be implemented directly by parent company or it might be delegated to the subsidiaries. According to this second case, the parent company would not establish centralised compliance system but it could demand subsidiaries to set up their own system under particular guidelines in order the system would be effective. If the compliance programmes would be properly implemented under all guidelines of parent company, the compliance defence might be imposed and no parent company responsibility for antitrust violations at the subsidiary should attach[72]. Such an instrument which decentralised compliance programme might be effective in order to rebut parent liability presumption.

Noted elements are important when the fines for substantive infringements are considered. But as it was mentioned, the main role in describing such fines plays methodology which applied in order to reveal what aspects are taken into consideration in substantial fines imposition process. For instance, in France there are four main principles for calculating fines set out: (i.) the seriousness of the infringement; (ii.) the damage caused to the economy; (iii.) repeat

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[67] Joined case T-71, 74, 87 and 91/03, *Tokai Carbon Co Ltd and others v Commission* [2005] ECR II-10, para 59-60.
[68] Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, para 60.
[69] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953). ETS 5; 213 UNTS 221 (ECHR).
[70] Blanco, O. L., et al. Fine Arts in Brussels: Punishment and Settlement of Cartel Cases under EC Competition Law. *Antitrust between EC Law and National Law* [interactive]. Brussels. 2008, p. 155-197 [accessed on 31-03-2015]. <http://antitrustlair.files.wordpress.com/2011/05/fine-arts-in-brussels-final-comp-41.pdf>, p. 11.
[71] Hofstetter, K.; Ludescher, M. Fines against Parent Companies in EU Antitrust Law - Setting Incentives for 'Best Practice Compliance'. *World Competition: Law and Economics Review* [interactive]. 2010, 33(1) [accessed on 31-03-2015]. <http://ssrn.com/abstract=1502769>, p. 16.
[72] *Ibid*, p. 15.

infringements and (iv.) the offenders' individual situation[73]. These elements are similar to principles used by others competition authorities in European countries. However, the most common methodology used for fines imposition is two-steps methodology which at some extent is used in US well. In case of US methodology, firstly, the base fine according to the volume of commerce affected is calculated and secondly, the base fine is then adjusted by using of aggravating and mitigating circumstances[74]. In comparison, the Commission imposition of fines process as well are based on two main steps: (i.) calculation of the basic amount; and (ii.) adjusting of the basic amount. Whereas this methodology are important background for most EU countries fining rules, the general features important to reveal.

As it was mentioned before the general framework for fines imposition are established in Guidelines of setting fines. Additional aspects related to practical applicability of methodology are disclosed in EU case-law. Certainly, practical aspects are evolving on case-by-case basis.

Hence, the starting point is the determination of basic amount. For the calculation of the basic amount of the fine the following elements are important: (i.) the value of sales good or services to which the infringement directly or indirectly relates; (ii.) the gravity of the infringement; (iii.) number of years of the infringement. According to Guidelines of setting the fines paragraph 19, the basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30 % of the value of sales (paragraph 20 of Guidelines of setting fines).

After the determination of basic amount, an adjustment of basic amount is performed at the second step. In setting the fine, the Commission may take into account mitigating and aggravating circumstance that result in an increase or decrease in the basic amount determined before (paragraph 27 of Guidelines of setting fines). Some mitigating and aggravating circumstances are established in Guidelines of setting fines but the list is non-exhaustive therefore any significant circumstances in particular situation might be evaluated as mitigating or aggravating circumstances.

Furthermore, beside mitigating and aggravating sanctions the Commission shall also evaluate: (i.) legal maximum (the final amount of the fine which shall not, in any event, exceed 10 % of the total turnover in the preceding business year of the undertaking (paragraph 32 of the Guidelines of setting the fines)); (ii.) in case of leniency notice to reduce the amount of the fine for particular per cent; (iii.) upon request the undertaking inability to pay (paragraph 35 of the

[73] Folz, J. M., et al. On assessing penalties for infringements of competition law, *supra* note 8, p. 14.
[74] *Ibid*, p. 26.

Guidelines of setting fines); (iv.) specific situation when it is important to ensure the increase of deterrence (Commission may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates or the amount of gains improperly made as a result of the infringement (paragraph 30 and 31 of the Guidelines of setting fines).

These are the main elements which comprise two-step methodology of EU competition law. It is considered that other EU member states have implemented the similar methodology in order to achieve few purposes. EU members' states competition authorities are entitled to directly apply Articles 101 and 102 TFEU therefore in essence diverse rules of fines imposition regarding the breaches of latter TFEU articles might cause totally different deterrent effect in various EU countries. Moreover, the case-law evolved from the Commission decisions and the General Court or the Court of Justice judgements might be used for more unanimous interpretation of fines imposition rules among competition authorities in different EU member states.

2.2.3. Individual Administrative Sanctions

To continue the further analysis of administrative competition law sanctions the main features of another type - individual sanctions are important to disclose. In this sub-part the main elements of individual penalties and debarment will be investigated.

Individual administrative fines

If in case of the substantive infringements fines in most EU countries are similarly limited (may not exceed 10 % of undertaking annual turnovers) in case of individual fines almost all countries (which apply individual sanctions) have different limits of maximum fines. For instance, in Germany for breaches of section 1 of Act against Restraints of Competition (GWB) the competition authorities may impose fines on individuals amounting up to EUR 1 million or in excess of that, up to 10 per cent of the total turnover generated by the undertaking[75]. In Greece individuals involved in violation of competition law might face two-fold liability: (i.) individuals are jointly liable together with the undertaking for the payment of fine imposed by competition authority, or (ii.) separate fine ranging from EUR 200,000 to EUR 2 million may be imposed against them in case in which they have been involved in preparing, organising or committing the violation[76]. While in Denmark, the minimum indicative level of fines for individuals are established. The amount of fine depend on gravity of breach, for instance less grave (e.g.

[75] *Getting the Deal Through: Cartel Regulation 2014*, *supra* note 62, p. 90.
[76] *The European Antitrust Review 2015: A Global Competition Review Special Report*. London: Law Business Research Ltd, 2014, p. 162.

restrictions of passive sales) minimum 50,000 kroner shall be imposed while in case of very grave (e.g. coordination of prices) minimum 200,000 kroner[77]. These different ways and amounts of individual fines show how competition law of the country sanction policy evaluate the behaviour of individuals in cases of violation of competition law and what deterrent effect or other objective is trying to be achieved.

However, individual fines directly affects the main infringers but in some cases it still may be enough not deterrent enough, for instance the fine might be covered from 'the pocket' of offender's undertaking. Therefore the alternative individual administrative sanction – debarment are analysed further.

Directors' disqualification

Debarment is another alternative sanction which might be imposed on individuals responsible for particular breaches of competition law. Such type of the sanction is not new because directors' disqualification in most EU countries is effectively applied regarding general corporate law breaches[78] (e.g. deliberate insolvency). Unfortunately, debarment is not very common sanction imposed due to competition law breaches. For instance, the EU competition sanctions policy do not contains debarment. While United Kingdom appears to be the pioneer country which was the first one on establishing legal rules regarding the debarment, thus in practice it is not applied very wide[79]. However, the further analysis of sanction "directors disqualification' mostly comprise of United Kingdom model because of its experience and legal regulatory completeness. The main elements of this type of sanction and reasons why in practice it is not applied so common are disclosed.

The term "director disqualification" signifies "the conduct of the individual director, who can be prohibited from participating in the management of any company for a specific period, if he/she was involved in anticompetitive activity or failed to take action where he/she knew or ought to have known that it was taking place"[80]. Thus, it is important to distinguish that the subject of sanctions might be only director of the company. The definition of 'director' comprise as well those individuals who acts as directors although they are not validly appointed,

[77] *Ibid*, p. 86.
[78] In the UK, around 2.000 directors are disqualified, for various reasons, each year (Kokkinaki, K. An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle? *Supra* note 2, p. 24 within footnote).
[79] Douglas, G. H.; Wright, J. D. Antitrust Sanctions, *supra* note 25, p. 21.
[80] Khan, A. Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer? *World Competition* [interactive]. 2012, 35(1): 77-102 [accessed on 31-03-2015], [accessed through EBSCO Host], p. 89.

or even if there has been no formal appointment to them at all[81]. Such an aspect that the only director might be liable is criticised. In cases where non-directors are directly involved in competition breach leads to unsatisfactory result of only punishing those indirectly responsible for the misbehaviour of their employees[82].

Another important aspect is related to subjects who may impose debarment. Differently than in case of corporate fines where these are imposed directly by competition authority, the Competition disqualification order (hereinafter - the CDO) might be imposed only by the High Court after submitted application of responsible competition authority. Moreover, two conditions must be satisfied in order to apply the CDO to offender. First, individual must be a director of a company which commits a breach of competition law and second, the court must consider that their conduct as a director makes them unfit to be concerned in the management of a company[83]. Additionally as related to second condition, the court must evaluated the following factors: (i.) whether the director's conduct contributed to the breach of competition law; (ii.) whether, even if his or her conduct did not contribute to the breach, he or she had reasonable grounds to suspect that the conduct of the company constituted a breach of competition law and he or she took steps to prevent it; and (iii.) whether he or she did not know but ought to have known that the company's conduct constituted such a breach. Notable that these conditions are similar to above mentioned criteria related to individual fines. At same time these factors provide that directors who even negligently breached competition law are considered liable as well. It is important to note that definition of breach in the context of directors disqualification comprise only violations of Articles of 101 and 102 TFEU or theirs domestic equivalents in UK[84].

As any other process of sanction imposition, the imposition of the CDO as well consist of in advance known methodology which comprise of five stages assessment process. These factors are established in UK competition authority's (Office of Fair Trading) guidance. In first stage it is evaluated whether the company has committed a breach of competition law and it is proven by a competition authority or the court decision. During the second stage of procedure an assessment of nature of breach is performed. At the third step, it is examined whether the company has made a successful leniency application. During the fourth step, the extent of the director's responsibility for involvement in breach are measured and the justification of the application of the CDO is considered. Finally, at the last fifth stage, the presence of any

[81] Kokkinaki, K. An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle? *Supra* note 2, p. 25 within footnote.
[82] Wils, W. P. J. Is Criminalization of EU Competition Law the Answer? *World Competition: Law and Economics Review* [interactive]. 2005, 28(2) [accessed on 31-03-2015]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=684921>, p. 38.
[83] Company Directors Disqualification Act 1986 (with later modifications) [1986] reg. 4(2).
[84] Stephan, A. Disqualification Orders for Directors Involved in Cartels, *supra* note 13, p. 530.

aggravating or mitigating factors are taken into consideration. In comparing this methodology to two-steps methodology few similarities might be distinguished. The nature of breach, leniency application as well as mitigating and aggravating circumstances are evaluated in both sanctions imposition process. However, the main different CDO might be applied only after the issued decision which prove the breach of competition law. In exceptional circumstances (when it is important to take actions against directors that might sought to avoid responsibility) the latter requirement may not be deemed necessary, but the relevant competition authority would still need to prove before the court that there is a violation of competition law in the case[85].

Nevertheless, scholars' proposals to implement debarment at the EU level are widely discussed, on the other hand the CDO cannot be seen as a silver bullet[86]. For this reason main advantages and disadvantages follow below.

It is assumed that directors' disqualification threat for CDO seems has had strong deterrent effect especially at the adoption moment, because according to *Khan* after informal discussions with solicitors in UK as a part of his research it was observed that increasing number of directors requested from UK solicitors specific advice with purpose to ensure avoidance of possible liability regarding the application of the CDO[87]. Another advantage is the less expensive enforcement proceedings than in those needed in case of criminal sanctions (e.g. imprisonment)[88]. Additionally, in case of imposing the criminal sanction the procedure of different authority (e.g. prosecutor) might be required, while in case of directors' disqualification relevant competition authority in the process of investigation of competition law breach may collect all necessary proofs and submit application to competent court.

Irrespective of important advantages few main critical aspects are revealed. Firstly, the deterrent effect of the CDO might directly depend on how close the company director is to retirement[89]. Sometimes the procedures of breach investigation, court process and appeal might took years therefore for those who will retire in near future such a sanction might not be deter enough. It possible that the company may 'indemnify the individuals through a generous severance package or early retirement'[90]. Moreover, even the director are disqualified, he or she may serve the company's interest from the different position. This phenomenon called "shadow

[85] Kokkinaki, K. An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle? *Supra* note 2, p. 26.
[86] Stephan, A. Disqualification Orders for Directors Involved in Cartels, *supra* note 13, p. 532.
[87] Khan, A. Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer? *Supra* note 80, p. 93.
[88] Kokkinaki, K. An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle? *Supra* note 2, p. 30.
[89] Wils, W. P. J. Is Criminalization of EU Competition Law the Answer? *Supra* note 82, p. 38.
[90] *Ibid*, p. 38.

directors" and there are no obvious solutions to this problem[91]. However there might more theoretical issues but the most important obstacle regarding which the CDO is ineffective in practise – application of leniency notice. In this case most company directors involved in competition law breach (regarding cartel or abuse of dominant position) want to cooperate to uncover the breach because relevant competition authority may not apply the CDO to any current director of company whose company benefited from leniency regarding activities to which the grant of leniency relates[92]. In order to diminish such an obstacle it was proposed in case of leniency apply CDO discount but not immunity. Though the proposal was dismissed.

Taking into consideration all above analysed elements, imposition procedure, main pros and cons of directors' disqualification, it is assumed that this sanction plays important deterrent role in competition law sanction policy. Although it is important to improve some aspects (e.g. find solution in case of leniency application) in order to achieve greater applicability in practise.

2.3. Individual Criminal Sanctions

In this sub-chapter the strictest sanctions for the violations of the competition law are analysed. This analysis begins with the main distinguishing criteria which disclose the general features of criminal law sanctions in comparison to the other types. Moreover, the most common criminal sanctions individual fines and imprisonment sentence are scrutinised.

2.3.1. Six Distinguishing Characteristics of Criminal Law

Criminal - the type of competition law sanctions which are considered as having the highest deterrent effect. Moreover, such a kind of sanctions might be imposed only for most serious violations of competition law, such as price-fixing, bid-raging, sharing of market et al. In order to identify main elements of criminal law sanctions to comparison administrative and civil sanctions *Wouter P. J. Wils* identified six distinguishing characteristics[93]: (i.) criminal law has monopoly regarding imposition of imprisonment sanction, additionally in case of criminal law individuals are more often punished than corporates; (ii.) criminal offence usually requires that the breach of particular rules might committed with criminal intent not by mere negligent; (iii.) the imposition of criminal sanctions has stronger moral condemnation effect and sending the message that criminal breaches are more dishonest than administrative or civil; (iv.) the imposition of criminal sanction are less aware of strict relationship between penalty and harm, because main idea of criminal sanction is not price certain behaviour rather prohibit it (v.) under

[91] Kokkinaki, K. An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle? *Supra* note 2, p. 32.
[92] Stephan, A. Disqualification Orders for Directors Involved in Cartels, *supra* note 13, p. 533.
[93] Wils, W. P. J. Is Criminalization of EU Competition Law the Answer? *Supra* note 82, p. 5-7.

criminal law the enforcement authorities tend to have stronger investigative powers; (vi.) the stronger procedural protection in case of criminal law are tend to be established in order to avoid false convictions. These main distinguishing factors are closely interrelated and theirs practical continent are revealed in further two criminal sanctions analysis.

2.3.2. Criminal Fines

Pecuniary criminal sanctions are another type of fines which might be imposed on undertakings or individuals regarding the most serious breaches of competition law. Notably, that criminal fines are more usually imposed on individuals while corporate fines are rather administrative nature. Such a distinction is mostly related to different process of sanctions imposition. In case of criminal fines higher standard of proof is required – the violations have to be proven beyond reasonable doubt[94]. Furthermore, only the court might impose criminal fines unlike in some cases of administrative sanctions where decision of competition authority is sufficient. However, these are only few differences but what are the main arguments in favour to criminalise fines.

It is considered that the main argument is that criminal fines carry more deterrent effect than administrative fines. As it was mention above moral condemnation aspect might deter possible offenders. In some countries in addition to criminal fine the public publication of breach and the amount of criminal fine imposition might be applied by court as reputational penalty. Under the France competition law any individual who 'fraudulently took a personal and decisive part in conception, organization, or implementation' of the particular serious breaches of competition law may be sanctioned by imprisonment of four years and fine of EUR 75 000, additionally the court by its decision may order to publish in full or in part in newspaper at the expenses of the offender[95]. This additional sanction shows that with publicity stronger deterrent effect is trying to achieve.

Regarding criminal fines imposition process it is noteworthy that similar elements as in case of setting of administrative fines might be taken into account. Such as type of breach, mitigating and aggravating circumstances, the role of offender in breach and others. While the different elements regarding criminal fines might be: (i.) intentional behaviour to violate competition law; (ii.) only very serious breaches (e.g. price-fixing); (iii.) mostly the imposed criminal fines are not directly related with caused harm of breach; (iv.) since criminal fines or imposed only by court, the various guidelines is not always precisely followed and more general principles of criminal law sanctions are taken into consideration during the fines imposition

[94] *Ibid*, p. 13.
[95] *Getting the Deal Through: Cartel Regulation 2014*, *supra* note 62, p. 82.

process; (v.) criminal fines mostly are additional sanctions, while administrative fines imposed on undertakings are considered as a principal. These introduced differences because of variety of criminal and administrative fining systems might be rebutted regarding some countries competition law.

The central role of deterrence in case of criminal fines overrules but does it is sufficient to achieve it at the practical level, i.e. whether in practise criminal fines in essence deter future offenders. It is doubtful and such position rightly illustrates Donald Baker senior corporate executive quote when criminal fines are comparing to other criminal sanctions - imprisonment: "*as long as you are only talking about money, the company can at the end of the day take care of me – but once you began talking about taking away my liberty, there is nothing that the company can do for me*"[96]. Hence, in order to achieve better deterrent effect criminal fines are not sufficient therefore jail sentence should threaten to possible offenders as well.

2.3.3. Imprisonment

Imprisonment is *ultima ratio* measure in the whole competition law sanctions system which might directly affect individuals who organised, commissioned or implemented most serious violations of competition law. US is one of the first country which has more than hundred year experience of jail sentences regarding breaches of competition law. In the original 1890 version of the Sherman Act violations of Section 1 (prohibited agreements) and Section 2 (abuse of dominant position) have been constituted that persons might be punishable under federal law criminal fines and jail sentence which maximum term was 1 year[97]. During these years the Sherman Act was amended regarding sizes of sanctions and after the amendment in 2004 at the moment the maximum jail term is 10 years. Notably that the imprisonment sentences regarding particular breaches of competition law are not just theoretically established but it is widely applied in US. In period from 2003 to 2012 the US courts sentenced 255 people to a total of 176,526 days of imprisonment, while their average imprisonment time per offender was around twelve months[98]. Furthermore, in 1990 the average of 37 % defendants were imposed with jail sentence, whereas in 2009 average was 80 %[99]. In comparing UK where imprisonment sanction regarding competition law breaches where implemented in 2002 till 2010 only three

[96] Wils, W. P. J. Is Criminalization of EU Competition Law the Answer? *Supra* note 82, p. 38 within footnote.
[97] *Ibid*, p. 10.
[98] Kokkinaki, K. An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle? *Supra* note 2, p. 17.
[99] Shaffer, G.; Nesbitt, N. Criminalizing Cartels: A Global Trend? *Legal Studies Research Paper Series* [interactive]. 2011, 11(26) [accessed on 31-03-2015]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865971>, p. 13.

individuals were convicted[100]. Indeed, in UK there is no deep tradition regarding jail sentences imposition for breaches of competition law, on the other hand, there might be other obstacles as in case of directors' disqualification. However, the US example (it is considered that the number of the domestic cartels may decline as a result of the imposition of jail sanctions to individuals) was the main reason for which some EU countries have introduced custodial sanctions in their national laws[101]. Hence, further the main elements of custodial sanctions, advantages and disadvantages will be identified.

Firstly, it is important to stress, as in case of criminal fines, that custodial sentences are imposed only for limited list of breaches of competition law: price-fixing, bid-rigging, in some countries abuse of dominant position, market sharing or customer allocation schemas among horizontal competitors. For instance in Germany only for big-rigging jail sentence might be imposed while in US all above mentioned breaches might punished by custodial sanction.

Second, important aspect is that any person involved in serious competition breach might be defendants although in practise mostly individual directors and executives are imprisonment[102]. The fact that any employee of undertaking might be imprisonment, according to author's position, assessed in two ways. On the one hand only directly responsible individuals might be recognised liable. On the other hand employees mostly perform their duties under directions of their managers therefore there is a threat that liability might be transferred on the executors but not on those who first made a controversial decision.

Thirdly, in case of custodial sentences imposition mostly the general principles of criminal offence calculation are used. Specific guidelines regarding individual criminal sanctions is not common among countries as in case of administrative fines for competition law breaches. Additionally, in some countries clear individual intentional act or similar condition is required. As in case of UK where prove standard of dishonesty was required in order to apply prisoner sentence. House of Lords in *Norris case*[103] held that "*mere charge of price-fixing, without aggravating circumstances, does not show dishonesty*"[104]. Hence, these are the main prevailing

[100] Wagner, von P. F. Criminal Antitrust Law Enforcement in Germany: 'The Whole Point is Lost If You Keep it a Secret! Why Didn't You Tell the World, Eh?' *Criminalising cartels: critical studies of an interdisciplinary regulatory movement* [interactive]. Hart Publishing. 2011 [accessed on 31-03-2015]. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1584887>, p. 2.

[101] Werden, J. G.; Hammond, D. S.; Barnett, A. B. Recidivism Eliminated: Cartel Enforcement in the United States since 1999. *Georgetown Global Antitrust Enforcement Symposium, presented at 22 September 2011* [interactive]. Washington D. C. [accessed on 31-03-2015]. < http://ssrn.com/abstract=1927864>, p. 4.

[102] E. g. "*Alfred Taubman, the billionaire who invented the shopping mall concept, spent nearly a year in a prison as a result of the price-fixing agreement*" (Jones, A.; Sufrin, B. *EU Competition Law: Text, Cases, and Materials. Fifth edition, supra* note 39, p. 1065).

[103] Report of House of Lords session 2007-08 of 12 March 2008 in case No UKHL 16, *Norris v. Government of the United States of America et al.* [2008].

[104] *Ibid*, para 20.

elements identifying custodial sentence imposed for competition law breaches, therefore the positive and negative sides of imprisonment sanction shall be evaluated as well.

Some advantages of imprisonment sanction coincide with above mentioned distinguishing characteristics. First and foremost is the deterrent which considered has stronger effect than others sanctions because the threat of imprisonment is not only deterrent for the purpose of competition law enforcement but also regarding its impact on people's moral commitment to the law in general[105]. Another important positive aspect that custodial sentences is might be the most attractive type of sanction to the media[106]. Because in general the most dangerous criminals are sent to prison thus such new is more attractive to public and no doubt it would reach businessman. Additional noteworthy aspect in comparing administrative fines imposed on undertakings is that directly responsible individuals who initiated, organised or acted under the name of the undertaking are punished. Such element might cause less fines which means less harm to other individuals interests in that undertaking who are not related to the competition law breach.

Regardless strong supportive arguments, it is important to reveal some criticised elements of custodial sentence for competition law breaches. Firstly, seeking to implement the imprisonment sanction it is important to take in mind that the investigation and enforcement of such sanctions will require additional resources (financial, human and time). Secondly, no doubt that the implemented jail sentence sanction would cause the extension of investigation procedure because the standard of proof is higher than in case of administrative penalties[107]. Thirdly, imprisonment is not appropriate to all breaches of competition law. And the last but not least disadvantage, is that the imposition of real (not suspended) imprisonment might have negative impact to developing countries with small economy. Mostly the most dangerous persons who endanger other persons are sentenced while in case of imprisonment of competition law offenders there is threat that well educated executives with wide experience might be put in jail. In author's opinion, it is assumed that it might rise additional loss to countries with smaller economic.

All these disclosed elements shows that if in one countries sanction of imprisonment for breaches of competition law might be effective and decline the numbers of serious violations while in other countries with different criminal law tradition would be ineffective or even some countries might have more harm than additional value.

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[105] Wils, W. P. J. Is Criminalization of EU Competition Law the Answer? *Supra* note 82, p. 35.
[106] Kokkinaki, K. An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle? *Supra* note 2, p. 22.
[107] Wagner-von Papp, F. Criminal Antitrust Law Enforcement in Germany: 'The Whole Point is Lost If You Keep it a Secret! Why Didn't You Tell the World, Eh?' *Supra* note 100, p. 17.

2.4. Private Enforcement as an Additional Liability Form

In the earlier part of the Master thesis the main types of competition law sanctions as a part of public enforcement were analysed. Notably, that there might be more types of sanctions or other measures used in order execute public enforcement of competition law breaches, but since the main attention is concentrated on common and the most dangerous breaches (prohibited agreements) other types of sanctions which are not widely spread are out of the scope of the Master thesis. However, public enforcement measures are not the only one instrument to deter competition law offenders. Private enforcement is additional tool which helps to achieve main competition law sanctions objectives. Nevertheless additional deterrent effect of antitrust damage actions, private enforcement has more important function - compensational[108]. For these reasons additional rules in existing civil damage compensation systems are implemented in order victims of competition law breaches might have a chance effectively apply for compensation for suffered losses.

It is admitted that the private enforcement of competition law or even main issues might be subject-matter for separate research. But with purpose to put main liability forms in logical integral system it is important in this context to analyse and disclose general features, existing systems of private enforcement and the main aspects of freshly adopted the Directive on antitrust damages actions[109].

2.4.1. General Features of Private Enforcement of Competition Law

Breaches of competition law causes various negative consequences in general (e.g. distorted particular market), as well additional outcomes touches specific subjects - victims (e.g. consumers or/and competitors). However, it might be evaluated that the caused damage to general economy is compensated throw the imposed fines, while the separate individuals who suffered personal damages may seek compensations by using civil procedures. Notably, losses suffered regarding breaches of competition law require different compensatory mechanism than general compensation of damages. Such exclusivity are caused by several reasons.

It is admitted that damage compensation actions regarding competition law breaches as well play the role of deterrence but only in those cases where victims may effectively recover suffered harm. Therefore favourable mechanism has to be implemented in order to increase additional deterrent effect. Notably, private actions mostly are available to all types of anti-competitive conduct. Moreover, victims are mostly consumers (as well in some cases

[108] Wils, W. P. J. The Relationship between Public Antitrust Enforcement and Private Actions for Damages. *World Competition* [interactive]. 2008, 32(1) [accessed on 31-03-2015]. <http://ssrn.com/abstract=1296458>, 15.
[109] Directive of the European Parliament and of the Council of on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] PE-CONS 80/14.

competitors but too favourable rules to competitors would cause additional harm to effective competition[110]). Thus, consumer is weaker party in disputes who evaluating whether the time, litigation or other cost is worth to seek for loss suffered harm due to competition law breach. With respect that damage compensation would be effective such instruments as class actions, collective actions, representative actions brought by consumer associations, as well the award of triple damages (instead of single), the availability of contingency fees, pre-trial discovery procedure which allows private parties better accesses to relevant evidence, rebuttable presumption that cartelist caused the harm or other similar measures have to be implemented. The success of these instruments depends on different legal system, because what works effectively in one country (e.g. triple damages in US) might be contrary to general law principles in other countries (e.g. it is assumed that triple damages might in contradiction with proportionality principle in EU). However, taking into consideration above mentioned instruments two main prevailing models of private enforcement with common and different features might are distinguished: (i.) US style model and (ii.) European model[111].

2.4.2. Prevailing Systems of Private Antitrust Litigation

In the beginning it is noteworthy that without any doubts US leads in private actions regarding competition law breaches in comparison to EU countries counted together. During 2006-2007 in the US 1165 antitrust cases was brought to court, 1150 were brought by private actors, whilst in the period of 2007-2012 in EU collective antitrust actions have been brought in only six Member States (Austria, France, Germany, Spain and the UK) and in none of these countries were more than five of the actions during these five years[112]. Unfortunately, since 2007 private antitrust litigation in US are facing relatively steady decline in civil complaints because of the US Supreme Court decision in *Bell Atlantic Corp. et al. v. Twombly et al. case*[113] which have made additional difficulties for plaintiffs to maintain antitrust claims[114]. However, what are the main aspects which characterizing these two models.

In US most common way of private enforcement is so called US-style class actions where the group of individuals under the other names who suffered harm regarding particular breach of competition law represented by attorney-at-law brought class action to court. Important

[110] Ginsburg, D. H. Comparing Antitrust Enforcement in the United States and Europe. *Journal of Competition Law and Economics* [interactive]. 2005, 1(3): 427–439 [accessed on 31-03-2015], [accessed through <http://www.oxfordjournals.org/en/>], p. 437.
[111] Bergh, V. D. R. Private Enforcement of European Competition Law and the Persisting Collective Action Problem. *Maastricht Journal of European and Comparative Law* [interactive]. 2013, 1(4): 12-34 [accessed on 31-03-2015]. <http://www.maastrichtjournal.eu/pdf_file/its/mj_20_01_0012.pdf>, p. 13.
[112] Jones, A.; Sufrin, B. *EU Competition Law: Text, Cases, and Materials. Fifth edition, supra* note 39, p. 1085.
[113] Decisions of Supreme Court of United States of 21 May 2007 in case No 05–1126 *Bell Atlantic Corp. et al. v. Twombly et al.* [2010].
[114] *Getting the Deal Through. Private Antitrust Litigation 2015*. London: Law Business Research Ltd., 2014, p. 143.

distinguishing factor is that US-style class actions are opt-out procedure collective actions. In such a type collective actions all persons who suffered possible damages regarding particular breach of competition law are class member as well a part of lawsuit therefore that's why some persons may suffer a preclusive judgment without any knowledge[115]. Surely, these persons during the civil procedure are entitle to leave (opt-out) the scheme of class actions and they are not bound by the outcomes of litigation. Noteworthy, that opt-out scheme are better in terms of deterrence, in case of small damages amounts when victims are given larger cost savings and better risk sharing. On the other hand, this system stimulate numbers of unmeritorious suits. Contrary, opt-out scheme in Europe is hardly imaginable because of incompatibility with general legal principles, for instance due process principle according to which no victim can be made a plaintiff without his or her knowledge[116]. Furthermore, US-style class actions contains additional distinguishing consumer favourable elements in the process of damage compensation. The most important are the following: (i.) the availability of triple damages; (ii.) the statutory right of claimants to use judgments entered against the defendant as *prima facie* evidence against that defendant; (iii.) in case of the successful plaintiff (claimant), contrary to the ordinary rule in the US that each party bears its own cost, to recover costs, including reasonable attorney's fee; (iv.) the possibility of contingency fee and etc.[117].

Private enforcement models in Europe are designed as collective opt-in actions and representative actions which are brought by consumers associations. In case of collective opt-in actions individuals who suffered damages for any breach of competition law have to express approval to join litigation at same time their take responsibility in case of loss to compensate litigation costs. Such model rise some issues, especially in attracting sufficient number of participants in order that even divided costs would not exceed the suffered harm. Moreover, some scholars distinguish the principle-agent problem by which it is considered that under opt-in scheme plaintiffs usually exercise almost no control over the proceedings than in contrast US-style class actions which are consistently controlled by the attorney who acts as an entrepreneur because under contingency fee arrangement he invested and expecting generous fee[118]. Alternatively to collective actions in some countries the representative actions might be brought by consumer associations. *Roger Van den Bergh* distinguish three main types how consumers

[115] Issacharoff, S.; Miller, G. P. Will Aggregate Litigation Come to Europe? NYU Law and Economics Research Paper No. 08-46. *Vanderbilt Law Review* [interactive]. 2009, vol. 62: 179-210 [accessed on 31-03-2015]. <http://ssrn.com/abstract=1296843>, p. 202.

[116] Bergh, V. D. R. Private Enforcement of European Competition Law and the Persisting Collective Action Problem, *supra* note 111, p. 21.

[117] See more. Jones, A.; Sufrin, B. *EU Competition Law: Text, Cases, and Materials. Fifth edition*, *supra* note 39, p. 1085.

[118] Bergh, V. D. R. Private Enforcement of European Competition Law and the Persisting Collective Action Problem, *supra* note 111, p. 26.

associations may represent victims of competition law: *"(i.) approved consumer associations may be given standing to represent their members in future proceedings; (ii.) consumers associations may be established after a competition law infringement occurred and have standing on an ad hoc basis; (iii.) approved consumer associations may be given standing to represent end-consumers at large"*[119]. In theory it was considered that consumers associations would be more active in case of consumers' rights defence, but in practise the lack of interests, risk to suffer finance loss and free-riding problem[120] shows that consumers associations are not the best solution to seek for damage compensation. On the other hand, in some countries (e.g. Germany) where consumers associations do not compete between each other and are funded from government budget, associations represent all consumers' interests, including victims which are not involved in this process, therefore there is no fear to lose funding or that free-riders will use their litigation results without additional contribution.

Nevertheless, that private enforcement in Europe is not that commonly used as in US, in most EU member states it is excessively costly and difficult to bring antitrust damages actions. Thus, with the main purpose to help citizens and companies who are victims of infringements of EU antitrust rules to claim damages in November 2014 the Directive on antirust damages actions was adopted[121]. Till the end of 2016 all EU Member States will have to implement the Directive's rules to their national law. Further the essential novelties are disclosed.

2.4.3. The Main Aspects of the Directive on Antitrust Damages Actions

The main idea of the Directive on antitrust damages actions is to achieve a more effective enforcement of the EU antitrust rules. In the press release of Commission it has been stipulated that: *"only 25 % of antitrust infringements found by the Commission in the last 7 years have been followed by civil actions for damages. Most of these actions were brought by large businesses."*[122] At the present situation, in some countries there are mechanisms to seek redress regarding competition law breaches, however victims due to shortcomings in the legal frameworks face some obstacles. It is difficult to obtain relevant evidences, the unclear time limits within which victims can submit actions or to what extent they can rely on decisions of

[119] *Ibid*, p. 22.
[120] Free riders issue – it is case when victims of competition law breach are not participating in the first court procedures regarding redress and they are waiting for the results in order later to brought action on the same basis to the court or not.
[121] Press release IP/14/1580. Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions [interactive]. [accessed on 25/04/2015] . <http://europa.eu/rapid/press-release_IP-14-1580_en.htm>.
[122] Press release IP/14/455. Antitrust: Commission proposal for Directive to facilitate damages claims by victims of antitrust violations – frequently asked questions [interactive]. [accessed on 25/04/2015]. <http://europa.eu/rapid/press-release_MEMO-14-310_en.htm>.

national competition authorities in order to prove an infringement[123]. Such and similar issues will be solved when adopted Directive on antitrust damages action measures will be transposed to Member States national laws.

Firstly, after the implementation parties will have better access to evidences. Under the request of victims who seek redress national courts may issue orders for offenders or third parties to disclose relevant evidences which lies in their control (Article 5(1) of the Directive). In this case national courts will have to ensure that such disclosure orders would be proportionate in order duly to protect confidential information.

Secondly, highly important fact is that national competition authority's decisions regarding violation of Article 101 and 102 TFEU or equivalents in national law will be automatically constituted as *prima facie* evidence of the infringement.

Thirdly, the Directive clarified the time limits. The general limitation period for bringing actions for damages will be at least five years (Article 10(3) of the Directive). Whilst, in case of the competition authority investigation the limitation period will be suspended and the suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated (Article 10(4) of the Directive).

Fourthly, the Directive established that victims will be entitled to obtain full compensation for actual loss and for loss of profit, plus payment of interest from the time the harm occurred until compensation is paid (Article 3 of the Directive).

Fifth, the Directive provide a rebuttable presumption that cartel infringements cause harm (Article 17(2) of the Directive. Moreover, with the assistance of national competition authority national courts shall estimate the amount of harm, this will help victims in the often difficult task of proving and quantifying the harm they have suffered[124].

These are the main aspects which, according to author's opinion, will have practical significance in order private enforcement become additional effective sanction to fight with the offenders of competition law.

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To summing-up the first chapter, firstly, it is worth mentioning that nevertheless the variety of aims of the competition law sanctions the most important in practise are the following: (i.) to punish; (ii.) to deter (general and specific offenders); (iii.) to compensate. Secondly, in the latter years the main attention of competition law sanctions is concentrated on the achievement of deterrence, therefore tendency of increased fines is noted. However, such trend is widely

[123] *Ibid*.
[124] *Getting the Deal Through. Private Antitrust Litigation 2015*, *supra* note 114, p. 15.

criticised, and one of the main argument that notwithstanding the amount of fines imposed on undertakings without personal liability and additional individuals' sanctions it is impossible to achieve proper deterrence effect. Thirdly, with the purpose to reduce number of the most serious breaches of competition law (e.g. cartels) some countries in Europe has adopted individual administrative sanctions (e.g. individual administrative fines and/or debarment) or/and even criminal sanctions (e.g. fines, imprisonment). However, the formal adoption of these sanctions does not mean wide applicability in practise. Thus, it is considered that by removing some obstacles (for instance in UK directors' disqualification might be applicable only in mere intentional cases, therefore in practise any consent of general manger of undertaking to cooperate means non-applicability of debarment sanction) it is possible to achieve better sanction applicability in practise, as well higher deterrence effect. Fourthly, not only public enforcement measures can be useful, but also private enforcement of competition law would play compensational and additional deterrent role in the favourable legal framework. For this reason EU follow to US example (where private antitrust litigation is very common in practise) but by choosing different model than US and has adopted the Directive on antitrust damages actions, which will harmonise the Members' State national rules of private enforcement of competition law and should encourage private antitrust litigation culture.

3. THE ASSESSMENT OF LIABILITY FORMS APPLIED FOR BREACHES OF PROHIBITED AGREEMENTS IN LITHUNIA

After general overview of competition law sanctions in this chapter main elements of Lithuania competition law sanctions policy are disclosed. As it was mentioned in the beginning the central role is focused on sanctions imposed for violations of prohibited agreements because prohibited agreements are considered, especially cartel agreements, as the most usual and the most serious breaches of competition law. Moreover, whereas Lithuania competition law is mostly based on EU competition law, therefore comparative analysis and references to EU competition law rules, the Commission decisions and EU case-law are inevitable.

In the first part of this chapter, the man national legal rules of the competition law which are background for regulation of breaches of prohibited agreements and sanctions imposition are identified. Additionally, main principles of EU competition law which important to take into account in the process of sanctions imposition are discussed and their significance to Lithuania competition law sanctions policy. Lastly, main trends of Lithuania competition law regarding sanctions imposed for prohibited agreements in the period 2005 - 2015 are distinguished.

The second part of this chapter comprise of the analysis of the most common or from practical perspective it might be said the only applicable sanction – fines and theirs imposition process in Lithuania. Main practical elements of the Fining Rules in comparison to similar the Guidelines of setting of fines are revealed.

In the last part of this chapter the other sanctions types for violation of prohibited agreements in Lithuania are discussed. The evaluation of the main aspects of individual administrative sanctions such as debarment and individual fines and the main criteria of imposition are examined. As well, the necessity of criminal sanctions for the most serious (cartel agreements) is considered. Finally, the present legal framework of private enforcement in Lithuania, practical issues arising from the case-law and future perspectives of this instrument are disclosed.

3.1. Legal Framework and Tendencies

In the beginning, before of assessing the main sanctions imposed for breaches of prohibited agreements in Lithuania it is important to evaluate the legal framework, main principles and practical tendencies of imposition of sanctions for violations of prohibited agreements.

3.1.1. Legal Basis Establishing the Regulation of Prohibited Agreements in Lithuania

Starting from general perspective, foundation of Lithuania completion law is established in the Constitution of the Republic of Lithuania[125]. Article 46(4) provides that: '*the law shall prohibit monopolisation of production and the market and shall protect freedom of fair competition*'. For this reason, in 1999 the Law on Competition was adopted, which are the cornerstone for Lithuania competition law, including regulation of prohibited agreements. Article 5 of Law on Competition establishes that *'all agreements which have the purpose of restricting competition or which restrict or may restrict competition shall be prohibited and shall be void from the moment of conclusion thereof <...>'.*

Additionally, without general definition of prohibited agreements Article 5 as well provides list of possible horizontal and vertical anticompetitive agreements. Noteworthy that the list is non-exhaustive and any form of agreement which restrict competition might be considered as prohibiting. Moreover, in this context it is important to mention, the Article 101 TFEU which as well emphasises prohibited agreements under EU competition law. Since 1 May 2004 after Regulation 1/2003 came into force, *'the competition authorities of the Member States shall have power to apply Article 101 and Article 102 in individual cases'* (Article 5 of Regulation 1/2003). Such a power to apply Article 101 TFEU is either granted to Member States courts. These are only general legal basis which precludes any anticompetitive agreements, whilst the liability of violations of these rules are established in different articles.

Chapter VI (Articles 35-43) of the Law on Competition provides the liability – list of sanctions which can be imposed for breaches of competition law. The arsenal of Lithuania competition law sanctions which might be imposed by the Competition Council for breaches of prohibited agreements comprise the following: i.) to obligate undertakings to discontinue illegal activity and eliminate consequences of the violation; ii.) to impose fines on undertakings (including procedural fines, periodical penalty payments, fine for substantial infringements (e.g. Article 5)); iii.) under the authorisation of Vilnius Regional Administrative Court (hereinafter – the VRAC) to impose on undertaking restrictions on economic activity (temporary suspension of export and import operations, banking operations or an authorisation (license) to engage in respective economic activity). Moreover, the Competition Council may adopt the resolution to refer to the VRAC with an application for the imposition of individual sanctions to the managers of undertakings, i.e. disqualification of manger[126] for the period from three to five years or fine

[125] The Constitution of the Republic of Lithuania. Official Gazette. 1992, No. 220.

[126] The definition 'disqualification of manager (or director)' or 'debarment' are not used in the Law on Competition, but in order to shorter the description of this sanction author will use these notions in the context of Article 40 paragraph 1 of the Law on Competition which provides that for the contribution to the prohibited agreement concluded by the economic entity between competitors or abuse of a dominant position the manager of the

up to EUR 14 481. Finally, in this context, worthy mention, that the Law on Competition as well provides legal background for private enforcement. According to Article 43(1) *'economic entities that violate this Law must compensate for damage caused to other economic entities or natural and legal persons in accordance with the procedure established by the laws'*.

However, seeking for effective and consistent enforcement of the main sanctions, i.e. fines imposition on undertakings, under the Article 37(4) the Government of the Republic of Lithuania enacted the Fining Rules in 2004 which later were improved and new version was adopted in 2012. As it was stated above, the Fining Rules were 'inspired' by Guidelines of setting fines. Thus, during the fines imposition process the similar methodology with few different principles are used in Lithuania competition law. While, in case of individual sanctions the court shall act in compliance with principles of justice, reasonableness and fairness, as well the other factors have to be evaluated, which continent are revealed in the next part of this chapter.

3.1.2. General Principles

As far as the methodology of setting the fines is transferred from EU law it is considered that the Competition Council as well shall take into consideration some general EU principles during the fines imposition process. Indeed, some principles might have the equivalents in comparing the general law principles in Lithuania (for instance principles of legality, non-retrospectively or protection of legitimate expectations). However, it is assumed that the most important principles in case of fines imposition to examine are the following: (i.) principles of equal treatment, (ii.) principle of proportionality, (iii.) *non bis in idem* rule, (iv.) sound admiration[127].

Equal treatment means that comparable situations must be treated in the same way and different situations treated differently, unless there is objective justification[128]. For instance, where number of undertaking are involved in the same infringement – as in cartel – the Commission calculates every fine imposed on undertaking accordingly to reflect different impact of undertaking conduct.

The principle of proportionality, as far as it is related to the maximum amount of fines was revealed by the Court of Justice which held that the upper limit on fine (10 per cent of turnover) was seeking to prevent fines from being disproportionate in relation to the size of the

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economic entity may be restricted of the right to be the manager of a public and/or private legal entity, or a member of the collegial supervisory and/or governing body of a public and/or private legal entity.

[127] The principle of sound administration was breached in Case T-410/03 *Hoechast GmbH v. Commission* [2008] ECR II-881, where the Commission was embroiled in negotiations with two undertakings at same time under Leniency Notice.

[128] Jones, A.; Sufrin, B. *EU Competition Law: Text, Cases, and Materials. Fifth edition, supra* note 39, p. 1017.

undertaking and the Commission in process of fines imposition must be guided by the principle of proportionality[129].

The third important principle is principle of *non bis in idem* (double jeopardy), which are one of criminal law fundamental principles. It means that person cannot be prosecuted, tried and convicted twice for the same behaviour[130]. In the context of EU competition law this principle precludes an undertaking from being found guilty or proceedings being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by previous not appealed decision[131]. In this context, the decisions of national competition authorities have to be evaluated, because on the same undertakings investigations might be parallel performed on EU and national level. In this case national competition authorities could not impose fines on an undertakings in respect the same matter in the same market[132]. Finally, noteworthy that Court of Justice held three conditions when *ne bis in idem* is applied in competition cases if all conditions are fulfilled: (i.) identify of the facts; (ii.) unity of the offenders; and (iii.) unity of the legal interested protected[133].

However, the Competition Council and courts during the sanctions imposition process may not blindly follow mere the Fining Rules as well the general principles of Lithuania law either EU competition law shall be taken into consideration. The same idea is stressed in case of individual sanctions imposition when Law on Competition Article 41 paragraph 5 provides that court the court shall act in compliance with the principles of justice, reasonableness and fairness when imposing the sanctions.

3.1.3. The Main Trends of Sanctions Imposed for Breaches of Prohibited Agreements in Lithuania

There are many researches carry out regarding the competition law sanctions imposed in US, EU or other countries. Most of them stipulates that the amounts of fines imposed for prohibited agreements, including cartels is increasing on high pace[134]. For instance, the total amount of fines imposed on undertakings for cartel agreements in the period 1990 – 2004 was EUR 3 772 594 760, while in the period 2005 – 2015 the total amount was more than four time

[129] Case T-33/02 *Britannia Alloys and Chemicals Ltd v. Commission* [2005] ECR II-4973.
[130] Wils, W. P. J. The Principle of 'Ne Bis in Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis. *World Competition: Law and Economics Review* [interactive]. 2003, 26(2) [accessed on 31-03-2015]. <http://ssrn.com/abstract=1319252>, p. 3.
[131] Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, para 59.
[132] Wils, W. P. J. The Principle of 'Ne Bis in Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis, *supra* note 130, p. 11.
[133] Case C-204/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, para 338.
[134] Ginsburg, D. H.; Wright, J. D. Antitrust Sanctions, *supra* note 24, p. 10.

higher, i.e. EUR 16 644 172 735.5[135]. Additionally, with adoption of Guidelines of setting fines in 2006 central role on deterrence rather than punishing was determined and this resulted the increase of fines. But what are the main tendencies regarding sanctions imposed for prohibited agreements in Lithuania? Does the fine as well increased after adoption of Fining Rules in 2012?

In order to answer to these questions the analysis of the Competition Council resolutions and related decisions of the VRAC and the Supreme Administrative Court of Lithuania (hereinafter – the SACL) regarding the breaches of Article 5 of Law on Competition were exercised. The period of decisions comprise from 2005 to 2015 (1 April). The results are presented in the table of Annex 1.

Thus, in assessing the results, indeed, the tendency of fines amount increase imposed by the Competition Council is noted. If in 2005 the Competition Council imposed fines in total amount of EUR 28 962, in 2014 the total amount was EUR 24 036 628.24. On the other hand, during the last three years (excluding 2013 when no fines were imposed for breaches of Article 5 of Law on Competition) the Competition Council proceed investigation regarding undertakings with very high annual turnovers (e.g. the biggest banks in Lithuania (AB Swedbank, AB SEB bank and AB DNB bank or one of the biggest retailer in Baltic countries – UAB Maxima LT and et al.). Another important trend it is noted, that in last four years the total amount of fines in most cases are reduced by courts more than forty per cents or in some cases, withdrawn at all.

However, more than three years have passed since the Fining Rules came into force and it is admitted that tendencies of growing amount of fines regarding breaches of prohibited agreements are observed as in case when the Guidelines of setting fines were adopted in 2006. Furthermore, nevertheless that individual sanctions were adopted in 2011, since then any resolution by the Competition Council was not adopted and referred to the VRAC in order to apply for individual sanctions, although the fines imposed on undertakings succeeded record amount.

Finally, it is noted that during these last ten years no more than 5 cases were broad to courts regarding the redress of breaches of competition law. Also none of them were submitted by consumer or groups of consumers due to violations of prohibited agreements. All these trends reveal that the present competition law sanctions policy undoubtedly requires improvements.

[135] Official statistic regarding the fines imposed for cartel breaches provided in the Commission website. Note, the amounts are adjusted for Court judgments, except recent years' decisions. [interactive]. [accessed on 31-03-2015] <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

3.2. The Assessment of the Fining Rules

In previous chapter[136] where the fines for substantive infringement were analysed the main principles of fines setting methodology were disclosed. As it was mentioned that either the Guidelines of setting fines either the Fining Rules are based on same two-steps methodology, both steps (determination of basic amount and adjustment of basic amount) including important internal elements are analysed further. The main attention is be concentrated on the Fining Rules practical applicability with additional relevant references to the rules of the Guidelines of setting fines, the related Commission's decisions and EU case-law.

3.2.1. Determination of the Basic Amount

The establishment of the basic amount consist of five one after the other following levels: (i.) the determination of value of sales; (ii.) evaluation of gravity of the infringement; (iii.) setting the duration of the infringement; (iv.) additional 'entry fee'[137], for those undertakings which participated in cartel collusions; (v.) 'intermediary adjustment' of the basic amount (with purposes in particular cases to increase the deterrence of fines and evaluate that the basic amount is not exceeding 10 % of undertaking annual turnovers). In comparison the first step (determination of the basic amount) of the Fining Rules and the Guidelines of setting fines, the Fining Rules has additional sub-step – 'intermediary adjustment' of the basic amount.

The Fining Rules constitute that the basic amount is calculated on the proportion of value of sales (in the scale 0-30 %) which depend on the degree of gravity of the infringement multiplied by the number of the years of infringement. After that in some cases the 'entry fee' (15 % - 25 % value of sales) may be added to the basic amount. Finally, the first step is completed after the 'intermediary adjustment' of basic amount.

Value of Sales

Starting point is the determination of value of sale. The Fining Rules provide that the value of sales is determined taking into account the value of undertaking's sales of goods or services to which the infringement directly or indirectly relates of normally the last one full business year of undertaking participation in the infringement (paragraph 5). Although, the starting point of fines calculation is more related to the infringement rather than in previous

[136] See 2.2.2. Fines Imposed on Undertakings for the Substantive Infringements.

[137] The definition of 'entry fee' was used in Commission press release. Such a rule means additional amount (calculated above a sum equal to 15% to 25% of the yearly relevant value of sales) which might be applied mostly in cartel cases as well in other types of anti-trust infringements in order to achieve better deterrent effect of the most serious breaches of Competition law. (Press release IP/06/857. Competition: Commission revises Guidelines for setting fines in antitrust cases [interactive]. [accessed on 1/04/2015]. <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/857&format=HTML&aged=1&language=EN&guiLanguage=en>).

methodology (when the fines calculation starting point was the whole total turnover of an undertaking within the last business year), this element still is not comprehensively clear and raises some practical issues.

Reference year. The term 'normally' in the context of calculation of duration rises some unclearness. In the comparative analysis of the Guidelines of setting fines, the Commission is normally take the sales made by the undertaking during the last full business year of its participation in the infringement, but it is not systematically bound to do so[138]. The main consideration for the Commission is to rely on turnovers that are as comparable as possible[139]. Such deviation from general rule might be used by the Competition Council as well in cases, when the available data of last business year is not comprehensive enough or in order to achieve better deterrence effect (for instance, in earlier year of infringement the related sales were much higher than in last business year).

Internal sales. Captive sales (within the group of the companies) and the sales to independent third parties must not be separated during the calculation of value of sales. As the Court of Justice held that ignoring internal sales would inevitably give an unjustified advantage to vertically integrated companies because, either those undertakings pass on the price increases in the inputs as a result of the infringement in the price of the processed goods or they do not pass those increases on, which thus effectively grants them a cost advantage in relation to their competitors that obtain those same inputs on the market for the goods that are the subject of the infringement[140].

Relevant sales. The value of sales to which the infringement relates is not limited to sales in respect of which there is direct evidence that they were actually affected by that cartel[141]. According to the Court of Justice, imposition of such limitation would artificially minimise the economic significance of the infringement since the mere fact that a limited amount of direct evidence of sales actually affected by the cartel had been found would lead to the imposition of a fine which bore no actual relation to the scope of application of the cartel in question and this would be a reward for being secretive[142]. Such positions result a presumption that cartels are necessarily broader than what the available evidence proves, which is difficult to reconcile with the presumption of innocence[143]. It is important to note that the Competition Council applied this

[138] Barbier, L. S. E.; Lagathu, E. The Law on Fines Imposed in EU Competition Proceedings: On the Road to Consistency, s*upra* note 21, p. 402.
[139] Case T-566/08 *Total Raffinage Marketing v Commission* [2013] ECLI:EU:T:2013:423, paras 412–414.
[140] Case C-580/12 *Guardian Industries v Commission* [2014] ECLI:EU:C:2014:2363, paras 57–63.
[141] Case C-444/11 *Team Relocations v Commission* [2013] ECLI:EU:C:2013:464, paras 76–78.
[142] *Ibid*, para 77.
[143] Barbier, L. S. E.; Lagathu, E. The Law on Fines Imposed in EU Competition Proceedings: On the Road to Consistency, s*upra* note 21, p. 403.

concept (but in similar context – regarding vertical agreement) in *Bakeries goods case*[144], where during the determination of value of sales not only sales directly related to vertical anticompetitive agreement were included but as well incomes of sales to other retailers in Lithuania. The Competition Council took into account the continent of anticompetitive agreement (the offender undertaking tried to ensure that the other retailers would guide the same basic prices in the determination of final prices) and other important circumstances therefore stated that the relevant sales indirectly related to infringement as well have to be taken into account in determination of value of sales[145].

Absence of defined geographical scope. The Fining Rules does not establish the geographical scope of value of sales which have to be taken into account. For instance, the Guidelines of setting fines provides that the general rule is - the value of the undertaking's sales which relates in the relevant geographical area within EEA (Europe Economic Area) is taken into account. On the other hand, if the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels) the value of sales is calculated on the basis of worldwide turnovers of undertaking. It is considered that such practise is inappropriate and criticised for two main reasons[146]: i.) for the possible extraterritorial effect; or ii.) it may lead to *bis in idem* sanctions. Moreover, it was offered to apply practise of concentration cases when the Competition Council refers exclusively to the undertakings' turnover generated in the territory of Lithuania[147]. But in this context noteworthy the approach of the General Court, which in *Parker case* rejected the applicant argument of a geographical scope based on analogy with the Notice of concentration and held that *'assessing the effects of concentration on the market is not comparable to determining the amount of a fine'*[148]. To summing-up this issue, it is noted that in practise the Competition Council takes into account the scope of Lithuania geographical area. Such a position might be approved by the recent practise of the Competition Council in *Cogeneration power plants case*[149] where it was determined that offenders undertakings performed their activates (including related to the infringement) not only in the Lithuania, but in calculation of the value of sales only incomes from sales in Lithuania were taken into account.

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[144] Resolution No. 2S-14/2014 of the Competition Council of the Republic of Lithuania 04/12/2014 on the conformity of actions of undertakings engaged in the activity of producing and sales of bakery goods with requirements of Article 5 of the Law of Republic of Lithuania on Competition and Article 101 of the Treaty on the Functioning of the European Union.

[145] *Ibid*, para 438.

[146] Novosad, A.; Moisejevas, R. Novelties of Method of Setting Fines Imposed for Infringements of the Lithuanian Law on Competition, *supra* note 17, p. 633.

[147] *Ibid.*

[148] Case T-146/09 *Parker ITR v Commission* [2013] ECLI:EU:T:2013:258, para 213.

[149] Resolution No. 2S-2/2015 of the Competition Council of the Republic of Lithuania 11/02/2015 on the conformity of actions of undertakings engaged in activity of cogeneration power plants distribution and other associated activities with requirements of Article 5 of the Law of Republic of Lithuania on Competition and Article 101 of the Treaty on the Functioning of the European Union.

Others. Lastly, worth mentioning few other important criteria. The value of sales is determined before VAT and excise duties. As the General Court stated - transport costs (and other costs) as well ought to be included in the value of sales[150]. In calculation of value of sales the Competition Council shall have to take into consideration only the best available figures. If the provided and available information is not reliable or incomplete the starting point of the fine determination is the total amount of all undertakings sales in previous business years.

Gravity

Gravity is the second important element in determination of the basic amount. Under the Fining Rules the proportion of value of sales (in the scale of 0 – 30 %) depends on the gravity of the infringement. The Competition Council in assessing the proportion shall take the following factors into account: (i.) nature of the infringement, (ii.) the combined market share of all the undertakings concerned, (iii.) the geographic scope of the infringement and (iv.) other relevant circumstances. Some scholars considered that regarding non-exhaustive list of factors the Competition Council is entitled with wider discretion while establishing the gravity of the infringement unlike the Commission because of exhaustive list of factors established in the Guidelines of setting fines[151]. Indeed, the Competition Council enjoy wide discretion in setting the gravity but not wider than the Commission because the General Court more than once noted that gravity must be assessed in the light of non-executive list of circumstances: the Commission is entitled '*to perform an overall assessment of the infringement, by reference to all the relevant circumstances of the case, including factors that are not expressly mentioned in the Guidelines*'[152].

In practise, since the Fining Rules came into force the Competition Council for the infringements of prohibited agreements mostly apply the proportion from 10 % to 20 % of value of sales. While in the *Construction companies bid-rigging case*[153] the maximum degree of gravity 30 % proportion of value of sales was determined. In this case the Competition Council held that regarding in advance price-fixing in public procurements tenders the procedure of tenders were artificial and imitating the competition therefore such behaviour of investigated undertakings and their perception of the committing the breach of competition law disclose the serious nature of the gravity of prohibited agreements in public procurements[154]. It is assumed,

[150] Case T-406/08 *ICF v Commission* [2013] ECLI:EU:T:2013:322, paras 175–176.
[151] Novosad, A.; Moisejevas, R. Novelties of Method of Setting Fines Imposed for Infringements of the Lithuanian Law on Competition, *supra* note 17, p. 634.
[152] Case T-406/09 *Donau Chemie v Commission* [2014] ECLI:EU:T:2014:254, para 76.
[153] Resolution No. 2S-13/2014 of the Competition Council of the Republic of Lithuania 12/11/2014 on the conformity of actions of undertakings involved in participation and organization in public procurements of construction sector with requirements of Article 5 of the Law of Republic of Lithuania on Competition.
[154] *Ibid*, para 234.

that the cornerstone element in this case was the intentional nature of the infringement. Additionally, in assessing the gravity of the infringement the General Court stated that the effect of the infringement is not decisive factor for setting the fine, especially in cartel cases, intentional factors are more important in this respect[155].

Moreover, after the adoption of the Fining Rules it was recommend for the Competition Council that the consequences of the infringement as criteria for assessing the gravity of the infringement should be taken into consideration[156]. Such an approach is only partly supported by author, because in some cases, when serious infringements are committed this may trigger limited consequences in cartel cases[157]. On the other hand, in hard-core cartels cases (i.e. horizontal price-fixing, market-sharing and output-limitation agreements) the Fining Rules establish the minimum per cent for the gravity (20 % - 30 % of the value of sales), but this limitation are at some extent in a contrary to the Commission practise.

Indeed, the hard-core cartels are very harmful by nature and therefore the Commission shall set proportion of the value of sales at the higher end of the scale, generally but not necessarily between 15 % and 30 %[158]. Regarding the Commission practise, the proportion of the value of sales at 15 % or 17 % in a cartel case is considered as highly favourable for the undertaking concerned and therefore does not call for any specific statement of reasons[159], but if the Commission applies a higher percentage, it would have had to provide more detailed reasons[160]. However, in comparison the EU practise of setting the gravity of the infringement it is agreeable with the position that '*the Fining Rules provide a very high threshold for fines in cartel cases and unreasonably limit the discretion of the Competition Council in defining the percentage of the fine in cartel cases*'[161].

Finally, it is worth to mention the tendency of individualisation regarding setting of gravity percentage in the Commission practise. The individual assessment of gravity of separate undertakings are prevailing in some cases, contrary to the Competition Council practise where the gravity of the infringement is assessed as a whole irrespective of the individual involvement

[155] Case T-406/09 *Donau Chemie v Commission* [2014] ECLI:EU:T:2014:254, para 70.
[156] Novosad, A.; Moisejevas, R. Novelties of Method of Setting Fines Imposed for Infringements of the Lithuanian Law on Competition, *supra* note 17, p. 634.
[157] Barbier, L. S. E.; Winckler, C. A. Landmark Year for the Law on Fines Imposed in EU Competition Proceedings. *Journal of European Competition Law & Practice* [interactive]. 2012, 3(4): 351-370 [accessed on 01-04-2015]. [accessed through <http://www.oxfordjournals.org/en/>], p. 355.
[158] Barbier, L. S. E.; Lagathu, E. The Law on Fines Imposed in EU Competition Proceedings: On the Road to Consistency, *supra* note 21, p. 404.
[159] Case C-444/11 *Team Relocations v Commission* [2013] ECLI:EU:C:2013:464, para 125; Case C-439/11 P *Ziegler v Commission* [2013] ECLI:EU:C:2013:513, paras 119–124.
[160] Case T-204/08 P *Team Relocations v Commission* [2013] ECLI:EU:C:2013:464, para 100.
[161] Novosad, A.; Moisejevas, R. Novelties of Method of Setting Fines Imposed for Infringements of the Lithuanian Law on Competition, *supra* note 17, p. 635.

of each participant. Nonetheless, EU case law remains hesitant[162]. For instance, the Court of Justice held that the Commission is free to decide whether it wishes '*to take into account the relative gravity of the participation of an undertaking in an infringement and the particular circumstances of the case when assessing the gravity of the infringement or when adjusting the basic amount according to the mitigating and/or aggravating circumstances, provided, in the latter case, that it took sufficient account of the relative gravity of the participation in the infringement, and any variation in that gravity over time*'[163]. On the contrary, the General Court held that the Commission with regard to individualization of the gravity of the infringement and the 'entry fee' were determined '*in the light of factors which reflect the characteristics of the infringement as a whole, that is to say, inasmuch as it combines all of the anti-competitive conduct of all of the participants*'[164]. It is assumed that, while one of the main aims of the Fining Rules is to impose on undertakings individualised fines (paragraph 2), as well taking into consideration the fact that the Law on Competition establish exhaustive list of aggravating and mitigating circumstances therefore some circumstances which excluding from those lists might not be properly evaluated, if it is possible the Competition Council should assess individual factors even in the determination of the gravity of the infringement.

Duration

Duration is one of decisive element in the determination of the amount of fines. Under the paragraph 8 of the Fining Rules the basic amount is equal to the proportion of value of sales multiplied by the year of infringement. Additionally, it is provided that the term less than six years should be counted as a half year; longer term than six months, but shorter than one year should be counted as full year (paragraph 12 of the Fining Rules). The same provisions are established in the Guidelines of Setting fines (paragraph 24), but in practise it is regarded as contrary to the principles of equal treatment and proportionality. For this reason the Commission abounded its practise on this point by taking into account the exact number of months[165].

Nevertheless, the Competition Council disregard the Commission practise related to the counting of infringement duration and strictly applies this established rules. For instance, in *Travelling agencies case*[166] the Competition Council applied the same half year term, despite the

[162] Barbier, L S. B.; Lagathu, E. The Law on Fines Imposed in EU Competition Proceedings: Fifty Shades of Undertakings, *supra* note 21, p. 7.
[163] Case C-429/11 P *Gosselin Group v Commission* [2013] ECLI:EU:C:2013:463, paras 91-93.
[164] Case T-91/11 *InnoLux v Commission* [2014] ECLI:EU:T:2014:92, paras 150 - 151.
[165] Barbier, L. S. E.; Lagathu, E. The Law on Fines Imposed in EU Competition Proceedings: Faster, Higher, Harsher, *supra* note 21, p. 330.
[166] Resolution No. 2S-9 of the Competition Council of the Republic of Lithuania 07/06/2012 on the conformity of actions of undertakings engaged in sales of package tours and other associated activities with requirements of

facts that one undertaking participated four months and other just two. It is assumed that such an approach of the Competition Council is contrary to above mentioned principles, therefore for instance in setting the individualised gravity of the infringement the duration of individualised participation in infringement may be evaluated as well.

'Entry fee'

Independently from the duration of infringement the additional amount of between 15 % and 25 % of value of sales might be added to calculated primary basic amount in cases of price-fixing, market-sharing and output limitation cartels (paragraph 13 of the Fining Rules). This extra sum is called 'entry fee' which the main purpose is to deter undertakings from even to entering into most serious breaches of competition law, i.e. preventing them from participating 'to try and see'[167]. Notably, the 'entry fee' is not multiplied by the number of years as the value of sales. Moreover, when determining the 'entry fee' and setting the proportion of value of sales the number of factors have to be evaluated, in particular those which were taken into account during the assessment of the gravity. However, nevertheless that the Fining Rules establish that in cases of price-fixing, market-sharing and output limitation the Competition Council is obliged to apply 'entry fee', in practise only in *Cogeneration power plants case* this additional amount was applied. What are the reasons for such behaviour of the Competition Council, it is hardly to say.

'Intermediary adjustment' of the Basic Amount

Last level of determination of the basic amount is 'intermediary adjustment'. This sub-step comprise two main elements which have to be taken into account. Specific grounds for increase for deterrence and the basic amount assessment in the light of ten percent ceiling of undertaking annual turnovers. Noteworthy, that the Guidelines of setting fines do not constitute this additional sub-step in determination of the basic amount.

The calculated basic amount of the fine might be increased if the value of sales, unrelated to the infringement, exceeds 95 % of the total turnover in the preceding business year of the undertaking concerned (paragraph 14 of the Fining Rules). This rule was applied in *Bakeries goods case*, where the Competition Council determined that the undertaking's (UAB Maxima LT) value of sales unrelated to the infringements exceeds 95 % of the total turnovers, therefore seeking to deter and in accordance with the principles of justice, objectivity and

Article 5 of the Law of Republic of Lithuania on Competition and Article 101 of the Treaty on the Functioning of the European Union.

[167] Geradin, M. The EU Competition Law Fining System: A Reassessment, *supra* note 4, p. 9.

proportionality, the calculated basic amount was increased in 20 %[168]. Moreover, the paragraph 15 of the Fining Rules provides that if it is possible to identify the undertaking profit gained as a result of the infringement, the calculated basic amount of the fine is increased in order to exceed above mentioned profit'. However, in practise, this rule is not applied. According to author's opinion, because the Competition Council can foresee that the fine amount still will exceed 10 % ceiling and therefore do not spend addition time resources for calculations which would not have any practical meaning or in most cases there are no sufficient proves to clearly identify the profit gained as a result of the infringement.

Another element in the last level is the legal maximum for the basic amount of the fine, which only applied in cases when the basic amount is calculated on the basis of total annual turnovers (not on the basis of value of sales). In this case, taking into consideration that the legal maximum still will be applied at the end of the fine imposition procedure, this rule considered as *'objectively unjustifiable, creates the ground for abuses by undertakings and is contrary to the principle of equal treatment'*[169].

To sum-up this last sub-step of the determination of the basic amount, taking the criticised aspects and the practical applicability, the necessity of separate elements at this level is quite doubtful.

3.2.2. Adjustment of the Basic Amount

Second step of setting the fines regarding the Fining Rules consist of two sub-steps: i.) adjustment of the basic amount in the light of aggravating and mitigating circumstances, and ii.) adjustment regarding the role of each undertaking in the infringement, if it is possible to establish. Additionally, after the evaluation of those two sub-steps the Fining Rules provides possibility to reduction of the fine for participants of prohibited agreement (fines reduction by applying specific 'lenience rules'), and at the end the legal maximum (the final fine shall not exceed 10 % of annual turnovers of undertaking) established by Article 36(1) of the Law on Competition shall be taken into consideration. Whereas the issues of the 'leniency' may be separate subject of scientific research therefore it is not analysed by the Master thesis.

Mitigating and Aggravating Circumstances

The Fining Rules provides that the basic amount of the fine might be increased or decreased up to 50 % in accordance to mitigating and/or aggravating circumstances which are established in the Law on Competition. Excluding the cases when the undertaking repeatedly

[168] Resolution No. 2S-14/2014 of the Competition Council of the Republic of Lithuania, *supra* note 144, para 457.
[169] Novosad, A.; Moisejevas, R. Novelties of Method of Setting Fines Imposed for Infringements of the Lithuanian Law on Competition, *supra* note 17, p. 635.

commits a breach for which the sanction established in the Law on Competition has been already imposed, then the basic amount of the fine is increased up to 100 % for the each earlier infringement. This concept is called 'recidivism'.

In comparing this fining methodology elements (mitigating and aggravating circumstances) to the same elements in the Guidelines of setting fines, noteworthy different is that the Fining Rules establish exhaustive lists of mitigating and aggravating circumstances, whilst the Guidelines of setting the fines set non-exhaustive list. According to latter practise it is common that the absence of specific aggravating factors can be considered as mitigating factors and vice versa[170].

The Law on Competition Article 37(2) stipulate the exhaustive list of the mitigating circumstances: (i.) voluntary prevention of the detrimental consequences of the violation after the commitment thereof by the economic entities, (ii.) assistance to the Competition Council in the course of investigation, (iii.) compensation for the losses, (iv.) elimination of the damage caused, (v.) voluntary termination of the violation, (vi.) non-implementation of restrictive practices, (vii.) acknowledgement of the material circumstances established by the Competition Council in the course of investigation, (viii.) also the fact that actions constituting the violation were determined by the actions of the public authorities as well as (ix.) serious financial difficulties of the economic entity.

Although the Law on Competition provides at the first sight quite wide number of mitigating circumstances, thus in practise it is very rare that the Competition Council reduce the basic amount regarding the mitigating circumstances. Since the Fining Rules came into force there was no case where the Competition Council would approve the presence of mitigating circumstances. On the other hand, such an approach is based on strict case law of the SACL. For instance, in case of applying the mitigating circumstance – 'acknowledgement of the material circumstances established by the Competition Council in the course of investigation' – the SACL ruled: *'this mitigating circumstance might be set only when the undertaking not only recognise the factual circumstances revealed during the investigation but as well unconditionally and explicitly agreed that the law infringement was committed. Such the recognition should be clear, unambiguous and unconditional'*[171].

The aggravating circumstances are established in Article 37(3) of the Law on Competition and comprise: (i.) obstruction of the investigation, (ii.) concealment of the committed violation, (iii.) failure to terminate the violation notwithstanding the obligation by the Competition Council to discontinue illegal actions or (iv.) repeated commitment of the violation

[170] Geradin, M. The EU Competition Law Fining System: A Reassessment, *supra* note 4, p. 10.
[171] Judgment of the Supreme Administrative Court of Lithuania of 27 May 2011 in administrative case No A858-294/2011.

within the period of seven years for which the economic entities were already imposed the sanctions provided for in the Law on Competition.

In the evaluation of aggravating circumstances, firstly it is important to mention the 'obstruction of investigation', which as well might be considered as failure to cooperate with the Competition Council. Regarding such behaviour undertaking which is in the investigation or is investigated, the Competition Council may apply procedural fine[172] or such behaviour may be considered as aggravating circumstance. The latter was applied in *Travelling agencies case*, where during the investigation three undertakings failed to provide by the Competition Council requested information, even after the dispatch of repeated writings, consequently the basic amount of the fine was increased in 20 %[173].

Another important aggravating circumstance is repeated commitment of the violation (recidivism). The Fining Rules constitutes that in case of recidivism the basic amount of the fine might be increased up to 100 %, differently than in case of any other aggravating circumstance. Additionally, it is important to mention that the Fining Rules establish so – called 'general recidivism', while the Guidelines of setting fines contains 'specific recidivism' rule[174]. However, the general recidivism rule causes some issues and unclearness, because repeated infringement may be found even in totally different kind of breaches of competition law (e.g. non-notified concentration and prohibited agreement). For this reason from the practical application perspective it is supported the position that specific recidivism should be established and the 'similar infringements' should be considered only as the same type infringements (e.g. prohibited agreement – only for prohibited agreements (with possible further differentiation within the group))[175].

Moreover, the established recidivism rule is criticised because of unclear calculation of the 7 year time limit. In this context, it is assumed that the General Court clarification would be advantageous. In *Ferriere Nord case*, the General Court held that the period that should be taken into account to assess the proportionality of an increase regarding the recidivism begins on the date of the decision concerning the first infringement and ends at the beginning of the second infringement (i.e. not on the date of the decision concerning that infringement)[176]. It is agreeable that the additional tightening of the recidivism was important step for deterrence effect, but the present regulation of recidivism have to be improved.

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[172] See 2.2.1. Sanctions Imposed for Procedural Infringements.
[173] Resolution No. 2S-9 of the Competition Council of the Republic of Lithuania 07/06/2012, *supra* note 166, paras 244-245.
[174] Novosad, A.; Moisejevas, R. Novelties of Method of Setting Fines Imposed for Infringements of the Lithuanian Law on Competition, *supra* note 17, p. 636.
[175] *Ibid*, p. 640.
[176] Case T-90/10 *Ferriere Nord v Commission* [2015] ECLI:EU:T:2015:173, paras 340–344.

The Role of Undertaking

The Fining Rules provides that the basic amount may be increased or decreased regarding the impact of each undertaking on the infringement which was committed (paragraph 18). For those undertakings which have initiated the infringement or have incited the others undertakings to participate in the infringement, the basic amount of the fine is increased. While for those undertakings which have played passive role, the basic amount of the fine is decreased. In comparison this element to the Guidelines of setting fines, it is important to note that the undertaking role of infringement leader or instigator is regarded as aggravating infringement. While the 'passive' role of the undertaking is not considered as mitigating circumstance. Such a distinction of roles into 'active' and 'passive' in the Fining Rules is rather congratulate element. On the other hand, the Competition Council enjoys the wide discretion regarding this distinction, because the Fining Rules do not determine maximum per cent for which the basic amount of fine might be increased or decreased. However, in the Competition Council practise, since the Fining Rules came into force the basic amount of the fine was increased twice for the infringement initiators for 20 % and 50 %, respectively.

Ten per cent ceiling

As it was mentioned before, the amount of fine imposed by the Competition Council may not exceed ten per cent of the gross annual income of the undertaking in the preceding business year. This rule as most of the others is transferred from EU competition law, which there is applied for 50 years. However, ten per cent ceiling was set for ensuring that the fine imposed not exceed the undertakings capacity to pay the fine at the time when it is identified as responsible for the infringement[177]. An undertaking's capacity to pay the fine is assessed against its total turnover, as it is deemed to constitute the best indication of the size and economic power of the undertaking.[178]

Moreover, the SACL held that the gross annual turnovers is not the element linked to the investigated infringement or the other circumstances related to undertaking, thus with ten per cent ceiling it is seeking to avoid that the fines would be disproportional for particular undertaking, rather than calculate respective fine which is determined in each case after assessment of the infringement[179]. Finally, regarding the Competition Council practise it is worth

[177] Barbier, L. S. B.; Lagathu, E. The Law on Fines Imposed in EU Competition Proceedings: Fifty Shades of Undertakings, *supra* note 21, p. 10.
[178] Joined Cases T-56/09 and T-73/09 Saint-Gobain Glass France v Commission [2014] ECLI:EU:T:2014:160, paras 450-451.
[179] Judgment of the Supreme Administrative Court of Lithuania of 28 May 2011 in administrative case No A525-2577/2011, *Lietuvos komunikacijos agenturu asociacija (KOMAA) and other v Competition Council*.

mentioning that the undertakings annual incomes includes sales to internal companies or turnovers from financial, investment and others activities[180].

3.2.3. Excluded Criteria

Regardless that most of the criteria of fining methodology have been transposed from the Guidelines of setting fines to the Fining Rules, some factors which would be taken into consideration during the adjustment of the basic amount were excluded. Indeed, as it was mentioned above, such an element as 'specific increase for deterrence' was implemented in different level of setting the fine. While criteria as 'inability to pay' and 'departure from the fining methodology' were not included into the Fining Rules text at all. But whether it was proper decision made. In essence, the enforcement of competition law at EU and Lithuania national level differs maybe therefore some elements were excluded. On the other hand, it is import to evaluate the practise, on what basis these two above mentioned criteria are applied and whether the application basis would be appropriate to Lithuania national law system.

'Inability to pay'

The Commission, only in exceptional cases and upon request of the undertaking, may take account of the undertaking's inability to pay in a specific social and economic contexts (paragraph 35 of the Guidelines of setting the fines). Regarding this, the Court of Justice held that '*it is not possible to assess whether a fine entails a disproportionate burden for the person upon whom it is imposed solely on the basis of its nominal amount, this is also dependent, in particular, on the person's ability to pay*'[181]. In this context, firstly it is important to mention the fact that imposed fine may give rise the bankruptcy of the undertaking concerned is not sufficient to apply the paragraph 35 of the Guidelines of setting fines[182]. In order to apply the rule of 'inability to pay' two cumulative conditions must be fulfilled: (i.) an insuperable difficulty in paying the fine, and (ii.) that this takes place in a special economic and social context, which could lead to an increase in unemployment or to a deterioration of the economic sectors upstream or downstream[183]. Hence, as shows the case-law, inability to pay the fine is more related to the general economic and particular industry sector situation, within the undertaking perform their activities. Thus not only the mere undertaking's situation but rather the undertaking's situation in the wider whole context shall be assessed. Although, the plea of inability to pay was very

[180] Resolution No. 2S-14/2014 of the Competition Council of the Republic of Lithuania, *supra* note 144, paras 464-466.
[181] Case C-501/11 P *Schindler v Commission* [2013] ECLI:EU:C:2013:522, para 168.
[182] Barbier, L. S. E.; Lagathu, E. The Law on Fines Imposed in EU Competition Proceedings: Faster, Higher, Harsher, *supra* note 21, p. 336.
[183] Case C-439/11 P *Ziegler v Commission* [2013] ECLI:EU:C:2013:513, para 171.

frequent in the prevailing financial and economic crisis[184], but only since 2010 the Commission has started to apply it in practise and in the same year the Commission granted eight reductions of the fines on this basis, ranging from 25 % to 75 %[185]. As well, in 2010 the Commission has adopted internal guidelines by which it is allowed to grant reduction of the fine even after decision adoption[186].

To summing-up, it is assumed that the criteria 'inability to pay' was not included in the Fining Rules because of short period of practical application and non-evolved EU case-law of this rule. On the other hand, this rule might be useful if the imposed disproportionate fine would have negative impact not only on particular company but to the whole economy, in particular such a small economy as in Lithuania case. Furthermore, it would be useful if the undertakings on this ground could apply for fine reduction even after the imposition of the fine by the Competition Council, as in case of EU competition law.

'Departure from the fining methodology'

Another element, 'departure from the fining methodology', which are established in paragraph 37 of the Guidelines of setting fines, provides really wide discretion to the Commission. This even raises the question, what for the guidelines are established, if the Commission may depart from it any time. In this case, in the light of the principle of legality the General Court held, whereas the Guidelines of setting fines is soft law instrument, it cannot deprive the Commission from the margin of discretion that has been conferred on it by statue: lack of flexibility could on the contrary result in disproportionate fines[187].

Hence, from practical perspective it is considered that this rule is used as a criteria which justify the reduction or increase of the fine if in the particular situation any other rules would be out of the applying scope. For instance, in few cases the Commission reduced the fine under this basis, when the undertaking was small independent company that did not belong to large group of companies, as well it traded high value materials with low margin and had relatively focused product portfolio[188].

Additionally notable, that the ground of 'departure from the fining methodology' as well applied in cases when the value of sales represents high proportion of total undertaking

[184] Jones, A.; Sufrin, B. *EU Competition Law: Text, Cases, and Materials. Fifth edition, supra* note 39, p. 1016.
[185] Barbier, L. S. E.; Winckler, C. A. Legal Issues Regarding Fines Imposed in EU Competition Proceedings. *Journal of European Competition Law & Practice* [interactive]. 2011, 2(4): 356–370 [accessed on 31-03-2015], [accessed through <http://www.oxfordjournals.org/en/>], p. 357.
[186] Barbier, de La Serre E.; Winckler, C. A. Landmark Year for the Law on Fines Imposed in EU Competition Proceedings, *supra* note 157, p. 364.
[187] Case T-400/09 Ecka v Commission [2012] ECLI:EU:T:2012:675, para 45.
[188] Case T-352/09 *Novacke chemicke zavody v Commission* [2012] ECLI:EU:T:2012:673, paras 133–134, or Case AT.39965 *Mushrooms* [2014] OJ C 453, para 73.

turnover and/or there are differences between the setting parties with regard to their individual participation in the infringement.[189] The latter factor is similar to the above mentioned role of the undertaking. It is considered that in this context the passive role of the undertaking in the infringement would be the sufficient basis to apply the paragraph 37 of the Guidelines of setting the fines and reduce the fine.

However, nevertheless that this rule is in accordance to the principle of legality, because of the specific nature of the Guidelines of setting fines (i.e. soft law instrument), it is doubtful that such rule would be in conformity with general principles of Lithuania law if it would be established in the Fining Rules. By nature the Fining Rules are by-law adopted by the Government of the Republic of Lithuania which implement the Law on Competition and therefore the Competition Council shall act within the boundaries of the Fining Rules. Moreover, the possible issues regarding individual participation in the infringement was solved by the rule of determination of the undertaking's role.

3.3. Additional Liability

In the final sub-chapter possible additional liability for Article 5 of Law on Competition is analysed. It is important to note that in the first paragraph individual administrative sanctions which are established in the Law on Competition and the issues of their applicability are discussed. While in the second sub-chapter it is theoretically considered the possibility to adopt individual criminal sanctions in Lithuania. Finally, the present situation of private antitrust litigation in Lithuania are evaluated and what issues regarding to private enforcement will be solved in the near future are discussed.

3.3.1. Individual Administrative Sanctions in Lithuania

In 2011 the amendments of the Law on Competition have been adopted, by which regarding the infringements of prohibited agreements or abuse of dominant position, in addition to fines imposed on undertakings, individual sanctions for mangers of economic entity might be imposed. Individual sanctions may include the director disqualification for particular period and additional individual fine up to EUR 14 480. Nevertheless, these new types of sanction during these four years (since now) have never been applied in practise. What are the main reasons for this trend and what obstacles prevent the Competition Council to refer to the VRAC in order to apply individual sanctions.

Law on Competition Article 40(1) provides that for the contribution to the prohibited agreement concluded by the economic entity between competitors or abuse of a dominant

[189] Case AT.39792 *Steel Abrasives* [2014] OJ C 362, paras 104-105.

position the manager of the economic entity (i.) may be restricted of the right to be the manager of a public and/or private legal entity, or a member of the collegial supervisory and/or governing body of a public and/or private legal entity for a period from three to five years of and/or additionally (ii.) the fines of up to LTL 50 000 (EUR 14 480) may be imposed on manager of economic entity. According to Article 40(2) of the Law on Competition the head of economic entity shall be considered as contributed for committing the infringement where he or she: (i.) has been directly involved in the commission of the infringement; (ii.) has not been directly involved in the commission of the infringement, however, he or she had grounds for suspecting that the undertaking he or she was in charge of committed the infringement and did not take any actions to prevent the infringement; or (iii.) was not aware of the fact although he or she had to be aware of the fact that undertaking had committed or was in the process of committing the infringement. Taking into consideration, these alternative conditions, it is noteworthy that either intentional, either negligent act or omission of the manager of the company might trigger individual liability.

Additionally, according to Article 41(5) of the Law on Competition if the court decides to impose individual sanctions on the director of economic entity, the court should act in compliance with principles of justice, reasonableness and fairness in making the decision and take into consideration the following non-exhaustive list of factors: (i.) the gravity of the infringement committed by the economic entity; (ii.) the duration of the infringement committed by the economic entity; (iii.) the nature of involvement of the manager of the economic entity in the infringement committed by the economic entity; (iv.) the behaviour of the manager of the economic entity in the course of investigation carried out by the Competition Council in relation to the infringement committed by the economic entity; (v.) other relevant circumstances. In comparison these factors to those established in the Fining Rules some similarities are noted. For example, the gravity and the duration of the infringement are the main criteria in determining the basic amount of the fine, while the nature of involvement of the manager might be similar to undertaking role in cartel or the absence of cooperation in a course of investigation might be considered as obstruction to investigation and determined as aggravating circumstance.

Moreover, worth mentioning, that the Law on Competition explicitly provides conditions under which the head of the company may not be subject to individual sanctions: (i.) the manager of the economic entity which applied for 'leniency' and were exempted from the payment of the fine; (ii.) economic entity manager who submitted relevant information about infringement to the Competition Council before the economic entity ceased employment relations with him/her; (iii.) the economic entity has terminated employment relations with the manager due to his involvement in the commitment of a violation and has applied for exemption

from the fine; (iv.) statute of limitations which are applied on undertakings sanctions has expired. The Law on Competition provides criteria which have to be evaluated when considering the necessity of imposition of individual sanctions, as well the factors which may have substantial significance on the sanction size or exemption basis, but it is considered that missing piece of this type of sanction is the absence of the rule which would determine starting point for sanctions calculation.

Moreover, according to author's opinion, it is assumed that to comprise and regulate the both sanctions under the same articles as well under same criteria it was rather unreasonable decision. It is considered that such regulation is one of the obstacle to achieve the main objectives of these sanctions. Therefore, further individual sanctions will be analysed separately.

Indeed, such an instrument as director's disqualification is not new in Lithuania administrative law. For instance, the same sanction is established in the Enterprise Bankruptcy Law of the Republic of Lithuania[190] (hereinafter - Enterprise Bankruptcy Law) which Article 10(14) constitutes that the court may restrict a person's right to hold the position of the head of a public and/or private legal person or be a member of a collegial government body for a period from three to five years if, being required by law, that person failed to perform particular actions (exhaustive list is provided in same 10(14) Article) related to the company bankruptcy procedures. Notably, that this sanctions is not just theoretical legal rule, contrary it is applied in practise[191]. In these cases the court applied 'disqualification' for those managers of companies which acted intentionally, obstructed to bankruptcy administrator or seriously failed to perform the main duties in the insolvency procedure. Nevertheless, that in practise of the Competition Council it is quite rare that managers of the company obstruct to investigations therefore individual sanction debarment in competition law should have to have different main aim – to deter. In such case, it would be applicable as well for substantive infringements and not only in mere intentional cases.

On the other hand the individual administrative fines which may be imposed on managers of the undertakings as well are not the novelty in Lithuania administrative law. Although, the maximum limit in essence is less in comparison to individual fines which may be imposed for competition law breaches. For instance, Code of Administrative Violations of the Republic of Lithuania[192] (hereinafter – the Code of Administrative Violations) Article 51^2 provides that the company's managers might be liable and subjects to fines from EUR 400 to

[190] Enterprise Bankruptcy Law of the Republic of Lithuania. Official Gazette. 2001, No. IX-216.
[191] Ruling of the Supreme Court of Lithuania of 4 April 2012 in civil case No 3K-3-148/2012, *R. R. v UAB "Nemokių įmonių konsultavimas ir administravimas"*; Ruling of the Court of Appeal of Lithuania of 26 February 2015 in civil case No 2-505-186/2015, *A. R. v bankruptcy administrator of BUAB "PRO FUTURO"*; Ruling of the Court of Appeal of Lithuania of 17 February 2015 in civil case No 2-421-943/2015, *A. P. v UAB "Ignika"*.
[192] Code of Administrative Violations of the Republic of Lithuania. Government news. 1985. No. 1-1.

EUR 860 for breaches of the commercial or other activity facilities construction and use contraventions of environmental protection requirements. This example is one of dozens of other administrative violations where undertaking's managers might be subjects to fines.

Furthermore it is important to note that the Code of Administrative Violations as well constitutes employees liability for some administrative breaches. Regarding this, maybe the individual sanctions for infringements of competition law could be improved and in cases for the most serious breaches (including prohibited agreements) the fines on employees would be imposed. Supposed that the amount of fines should be less than those imposed on the managers of the company, but if the employees would know that they as well may be potential subjects to fines, maybe this would help to prevent and reveal more prohibited agreements between undertakings. On the contrary, employees mostly act under the directions of their managers, therefore if the managers would decide to avoid liability for competition law breaches, there might be potential threat that employees would be chosen as scapegoat.

To summing-up, few main aspects regarding the individual sanctions important to note. Firstly, it is considered that the present combination of the both individual sanctions under the same sanctions imposition basis causes ineffectiveness of these sanctions individually. Also, it is doubtful that such a combination helps to achieve these sanctions objectives. Second, as it is apparent from practise of application of debarment regarding Enterprise Bankruptcy Law, the main objective of debarment sanction is concentrated only on intentional offenders. But, in order to induce practical applicability of debarment regarding competition law breaches such sanction should be applicable not only in mere intentional cases. Thirdly, taking into consideration the examples of other administrative fines imposed on managers of the company's or even on company's employees, it is assumed that the circle of subjects of the competition law fines, surely with less amount of fines, should be wider. Moreover, the procedure of imposition of individual fines should be less strict than the current.

3.3.2. The Necessity to Adopt Individual Criminal Sanctions in Lithuania

Criminal individual sanctions with possibility to imprison the persons who are responsible for the most serious breaches are the strictest tool in the whole competition law sanctions arsenal. It is interesting to mention that Canada was the first country which has adopted such sanction after that the US followed and only after almost hundred year it became common practise among some Europe countries[193]. However, Lithuania does not belongs to club of these countries. But whether is there any necessity to adopt criminal sanctions as additional sanctions for the most serious violations, such as horizontal price-fixing, bid-rigging or similar.

[193] Shaffer, G.; Nesbitt, N. Criminalizing Cartels: A Global Trend? *Supra* note 99, p. 26.

Indeed, the criminal sanctions would have higher deterrent effect. With such position agrees the present chairman of the Competition Council[194] but whether adopted criminal sanctions would be effective and in practise really applicable punishment? It is reminded that the individual administrative sanctions which causes less strict consequences have not been applied even once. Moreover, it is important to take in mind that the criminal law breaches requires different investigation procedure which might extend the whole investigation process. It should be added that according to Criminal Code of the Republic of Lithuania[195], natural as well in some cases legal persons might be subjects to criminal sanctions, but there is no such distinction that particular sanctions are imposed only on the managers of the company. While in most European countries, where the criminal sanctions for competition law breaches are established, imprisonment is applied only on the heads of the company.

However, in order to decide is there any necessity to implement additional sanctions, it is assumed that the statistic of latter years should be taken into account. In this case it is worth once more to refer to Annex 1, which shows the statistic of prohibited agreements in latter 10 years. The statistic shows that the highest numbers of finished investigations regarding prohibited agreements for which the fines were imposed reached the peak in 2010 and 2011. After then the tendency of decrease it is noted. On the other hand, the highest fines were imposed in latter three years but in this case noteworthy the highest reductions by courts (for example in *Banks case* the highest fines imposed on commercial banks were withdrawn at all) as well occurred.

Finally, it is important to mention, that one of the main basis to adopt criminal sanctions in some countries was the repetitive illegal actions of the same undertakings. However, nevertheless the prevailing tendency of recidivism at international cartels level[196], in Lithuania such tendency is hardly observed.

To summarise and taking into consideration the fact that the present individual administrative sanctions are not commonly applied, the additional obstacles which might arise in the criminal investigation process, as well the relevant statistic of sanctions imposed for prohibited agreements, it is concluded that the necessity of criminal sanctions for the breaches of prohibited agreements is questionable at the moment.

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[194] "Milijonines baudos ne visuomet atgraso konkurentus tartis del kainu" [interactive], [accessed on 31-03-2015]. <http://www.lrytas.lt/verslas/izvalgos-ir-nuomones/s-keserauskas-milijonines-baudos-ne-visuomet-atgraso-konkurentus-tartis-del-kainu.htm?p=2>.

[195] Criminal Code of the Republic of Lithuania. Official Gazette. 2000, No. VIII-1968.

[196] For instance, in the period from 1990 to 2009 BASF was punished in 26 cartel cases worldwide. See more statistic related to recidivists - Ginsburg, D. H.; Wright, J. D. Antitrust Sanctions, *supra* note 24, p. 15.

3.3.3. Private Antitrust Litigation in Lithuania

Private antitrust litigation as the additional sanction for the infringements of competition law, as it was mentioned above, is not widespread in practise. What are the main obstacles in present national law system or other reasons for such tendencies? Whether the future changes regarding transposition of rules of Directive on antitrust damage actions may change the situation?

Hence, the main legal basis for redress due to competition law violations are established in the Law on Competition. Article 43(1) provides that undertakings which breached the Law on Competition must compensate damages to natural or legal persons. Furthermore, Article 47(1) of the Law on Competition specifies that person whose legitimate interests have been violated by actions performed in contravention of Articles 101 or 102 of the TFEU or other restrictive actions prohibited by the Law on Competition shall be entitled to bring an action before Vilnius Regional Court seeking: (i.) termination of the illegal actions; (ii.) compensation for the damage incurred. Such wording of this legal norm entitles any person to submit action for any breach of the Law on Competition, surely, with stress on most serious violations. However, it seems that this is the only specific rule regarding antitrust damage actions at the moment which establish special jurisdiction of Vilnius Regional Court while the other procedural questions are regulated under the legal rules of the Code of Civil Procedure of the Republic of Lithuania[197] and Civil Code of the Republic of Lithuania[198].

Taking into consideration the specific nature of competition law breaches and legal framework of damages compensation the following reasons for the absence of antitrust actions might be identified: (i.) the absence of experts which might properly calculate damages[199]; (ii.) it is harder to prove delict than breach of contract; (iii.) the shortened 3 years statute of limitations regarding damage compensation actions; (iv.) the absence of successful case-law which would encourage the others to claim for damages.

Moreover, after the examination of not abundant case law practise[200] R. Moisejevas made some conclusions[201] regarding the prevailing tendencies and obstacles in private

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[197] Code of Civil Procedure of the Republic of Lithuania. Official Gazette. 2000, No. IX-743.
[198] Civil Code of the Republic of Lithuania. Official Gazette. 2000, No VIII-1864.
[199] Norkus, I. Ieškiniai dėl žalos, padarytos konkurencijos pažeidimais, atlyginimo: advokato perspektyva. *Conference „Konkurencijos pažeidimais daroma žala ir jos atlyginimas“,* presented at 4 December 2011 [interactive] Vilnius, [accessed on 31-03-2015]. <http://www.tm.lt/dok/Renginiai/14%20diena_Zalos%20atlyginimas_Konkurencijos%20t_Norkus_RLN.pdf>.
[200] Ruling of the Court of Appeal of Lithuania 26 May 2006 in civil court case No 2A-41/2006, *UAB "Siauliu tara" v UAB "Stumbras"*; Ruling of the Court of Appeal of Lithuania 31 December 2008 in civil court No 2-949/2008, *AB "flyLAL-Lithuanian Airlines" v "Air Baltic Corporation" A/S and airport "Riga"*; Ruling of the Supreme Court of Lithuania 17 May 2010 in civil court No 3K-3-207/2010, *LUAB "Klevo lapas" prieš AB "Orlen Lietuva"*; Ruling of the Court of Appeal of Lithuania of 22 December 2011 in civil court case No 2-2655/2011, *UAB "Naftos grupė" v AB "Klaipėdos nafta"*.

enforcement procedure. The main tendencies might be the following: (i.) mostly the actions regarding redress are brought after the adoption of resolution of the Competition Council which states the infringement was committed; (ii.) the majority of actions are submitted by legal persons and regarding the abuse of dominant position. Additionally, the main obstacles which occurs during the litigation: (i.) difficulties in proving the fact of competition law violation; (iii.) difficulties in proving the causation between the infringement of the Law on Competition and the damages; (iii.) complicated calculation of damage. However, it is considered that these three groups of elements (causes, tendencies, practical procedural issues) the best reveal present situation regarding the antitrust litigation in Lithuania. But which of these elements would be changed after the adoption of the Directive on antitrust damage actions?

The answer to the later question might be rather theoretical but how the practise will evolve it is hardly to guess at the present moment. Nevertheless, the statute of limitations will be extended, the other novelties regarding the process of proof (e.g. orders to issue evidences; resolutions of the Competition Council as *prima face* evidence; or rebuttable presumption regarding cartel cases") and clearly established principles of damage calculation will definitely have positive impact on practical evolvement of the antitrust litigation culture in Lithuania.

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In conclusion of this chapter, the main aspects it is important to stress. Firstly, the analysis of latter 10 years practise regarding the sanctions imposed for breaches of prohibited agreements revealed and confirmed prediction of increasing fines imposed on undertakings by the Competition Council. Additionally, it is considered, as in case of trends of increasing fines after the adoption of the Guidelines of setting fines in 2006, that the adoption of the Fining Rules in 2012 as well had an impact for such tendency in Lithuania. Secondly, the assessment of the Fining Rules has disclosed some elements which are not sufficiently or clearly emphasised therefore in practise the issues of applicability arise. For instance, the Fining Rules nor clearly provides guidance of the value of sales which shall be taken into account for calculation of the basic amount of the fine. Additionally, taking into account the practise of the Commission and the EU case-law practise, it is considered that the Competition Council which declares and seeks as much as possible individualised sanctions should individually assess the circumstances of every undertaking at the level of determination of the gravity or the 'entry fee', if applicable. Thirdly, taking into consideration the practise of sanction 'directors disqualification' application for particular breaches laid down in the Enterprise Bankruptcy Law, it is considered that main

[201] Moisejevas, R. Žalos atlyginimas už konkurencijos teisės pažeidimus. *Conference "Konkurencijos laisvės ribos ir priežiūra 2014: viešasis ir privatus konkurencijos teisės normų įgyvendinimas"*, presented at 17 April 2014, Vilnius.

obstacle to apply ‘director’s disqualification’ for the most serious breaches is the criteria of mere intentional act of manager of the undertaking. Fourthly, nevertheless the growing tendency among European countries to adopt criminal sanctions for the most serious breaches of competition law, it is assumed that at the moment there is no necessity to adopt criminal sanctions in Lithuania. Fifthly, the present legal framework with the absence of specific legal rules regarding damages compensation suffered due to competition law breaches is not effective seeking to redress, however, the adoption of the Directive on antitrust damage actions shows positive signs for future perspective of the antitrust litigation culture in Lithuania.

4. CONCLUSIONS

1. Among the main objectives of the competition law sanctions in EU and Lithuania the attention is concentrated on the deterrence in recent years. Therefore, in order to achieve greater deterrence European Commission Guidelines of setting fines in 2006 and the Fining Rules in 2012 in Lithuania have been adopted. The adopted legal acts which based on the same two-step methodology caused the tendency of increased level of fines imposed for the most serious breaches.

2. Seeking for greater deterrent effect of competition law sanctions and to punish directly liable persons the tendency of adoption of the new national law rules regarding the additional individual administrative and/or criminal sanctions among European countries is noted in the last fifteen years. However, nevertheless legal assumptions, an individual sanctions have not become widely applicable in practise. It is considered that the main reasons for this are the absence of the deep competition law tradition and the individual sanctions applicability only in cases of mere intentionally.

3. Private enforcement of competition law would be an additional liability measure to pursue the objectives of compensation and deterrence in the favourable legal framework. However, at the moment only US could be considered as an example of successful private antitrust litigation country. On the other hand, certain rules which created this success (e.g. triple compensation or actions on the name of all victims without all expressed consent) would be hardly applicable regarding the European legal tradition. Moreover, the EU has chosen its own legal framework regarding private enforcement which will be implemented through transposition of rules of the Directive on antitrust damages.

4. The analysis of sanctions imposed for infringements breaches of prohibited agreements in the period of 2005 - 2015 in Lithuania disclosed the following main tendencies: (i.) growing fines imposed on undertakings by the Competition Council; (ii.) non-applicability of individual sanctions; (iii.) only a few cases when victims who suffered loss due to prohibited agreements have brought claims regarding damages compensation to Vilnius District Court but none of them were submitted by consumer or group of consumers.

5. The assessment of the Fining Rules in the comparative context with the Guidelines of setting fines has disclosed the elements for improvement. Firstly, it should be expressed clearer that value of sales comprise the sales in geographical territory of Lithuania as well as internal and relevant sales. Secondly, in case of determination of gravity the Competition Council enjoys wide discretion to decide on factors which are important in the determination of gravity. Regarding this and taking into consideration the EU case-law, it is recommended to evaluate gravity and 'entry fee' (when it is applicable) on individual basis of all undertakings. Thirdly, the established rules regarding calculation of duration of infringement are contrary to the principles of equal treatment and proportionality, therefore it is recommended to count separate months if the duration does not comprise a clear half of a year or full year. Fourthly, the recidivism in the Fining Rules is separated from other aggravating circumstance with possible higher increase of the basic amount in order to achieve better deterrence for repetitive infringements. However, it is recommended to improve the Fining Rules by adoption of the specific (not general) recidivism and more clearer rule of counting of the seven years' time period which should start being counted on the date of the decision concerning the first infringement and should ends at the beginning of the second infringement.

6. The Law on Competition establishes individual administrative sanctions which might be imposed only to managers of undertakings but regarding that both sanctions are comprised under the same legal rules this causes non-applicability in practise. Therefore, it is recommended to separate these sanctions and to amend the Law on Competition with possibility to apply individual fines on offenders' undertakings employees which are directly responsible for the conclusion of prohibited agreements.

7. After the evaluation of sanctions imposition tendencies, the numbers of revealed violations regarding prohibited agreements in recent years, non-applicability of individual administrative sanctions in practise, it must be concluded that the necessity of adoption of individual criminal sanctions in Lithuania even for the most serious breaches of competition law, including prohibited agreements, is doubtful at the moment.

8. The present legal framework regarding private enforcement of competition law in Lithuania is not favourable for victims of competition law at all. However, it is assumed that after the transposition of the rules established in the Directive on antitrust damage actions the situation shall change or at least give positive assumptions.

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3. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953). ETS 5; 213 UNTS 221 (ECHR);
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6. ANNOTATION IN ENGLISH AND LITHUANIAN LANGUAGES

Juozapaitis L. Liability for Violations of Article 5 (Prohibited Agreements) of the Law of the Republic of Lithuania on Competition. Supervisor: Assoc. Profess. Raimundas Moisejevas – Vilnius: Mykolas Romeris University, Faculty of Law, 2015. – 78 p.

ANNOTATION

The Master thesis are dedicated to reveal the main objectives and features of competition law sanctions in order to assess, whether the present liability measures applied for violations of Article 5 (Prohibited agreements) of the Law of the Republic of Lithuania on Competition is enough deterrence to stop potential offenders.

Hence, the performed research has disclosed that nevertheless the tendency of growing fines, mere such a type of sanctions are not deterrent enough therefore additional penalties or other liability measures has to be implemented. Meanwhile in Lithuania, the improvements related to the Fining Rules and adoption of individual administrative sanctions in the latter years have been made in order to achieve better deterrent effect. Nevertheless, it is concluded that the present liability measures of competition law are still not enough deterrent therefore it has to be improved so as to ensure the effective application in practice.

Keywords: *sanctions, prohibited agreements, fines, individual sanctions, private enforcement*

Juozapaitis L. Atsakomybė už Lietuvos Respublikos konkurencijos įstatymo 5 straipsnio (draudžiami susitarimai) pažeidimus. Magistrinio darbo vadovas: doc. dr. Raimundas Moisejevas – Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, 2015. – 78 p.

ANOTACIJA

Šis magistro baigiamasis darbas skiriamas atskleisti konkurencijos teisės sankcijų pagrindinius tikslus ir bruožus siekiant įvertinti, ar dabartinės atsakomybės priemonės taikytinos už Lietuvos Respublikos konkurencijos įstatymo 5 str. (draudžiami susitarimai) pažeidimus yra pakankamai atgrasančios sustabdyti potencialius pažeidėjus.

Taigi, atliktas tyrimas atskleidė, kad nepaisant augančių baudų tendencijų, vien tik tokio rūšies sankcijų taikymas nėra pakankamai atgrasantis, todėl papildomos sankcijos ar kitos atsakomybės priemonės turi būti taikomos. Tuo tarpu Lietuvoje, pastaraisiais metais buvo įgyvendinti patobulinimai susiję su Baudų skyrimo taisyklėmis ir priimtos individualios sankcijos. Nepaisant to darytina išvada, jog dabartinės konkurencijos teisės atsakomybės priemonės vis dar yra nepakankamai atgrasančios, todėl turi būti patobulintos taip, kad būtų realiai taikomos ir praktikoje.

Reikšminiai žodžiai: *sankcijos, draudžiami susitarimai, baudos, individualios sankcijos, privatus įgyvendinimas*

Juozapaitis L. Liability for Violations of Article 5 (Prohibited Agreements) of the Law of the Republic of Lithuania on Competition. Supervisor: Assoc. Prof. Raimundas Moisejevas – Vilnius: Mykolas Romeris University, Faculty of Law, 2015. – 78 p.

7. SUMMARY

During the latter years the tendencies of increased level of fines imposed on undertakings for the most serious infringements of competition law is noted in Europe. By imposing record fines European Commission seeks to deter the offender undertaking for the future repetitive violations and sends the message to others what might happen if undertakings will breach competition law rules. Nevertheless, such tendencies of huge level fines are sharply criticised. For this purpose additional sanctions or other liability forms have been proposed and already implemented in some European countries.

Meanwhile in Lithuania, as well some improvements regarding competition law sanctions also have been conducted during the latter years. Therefore, the Master thesis analyse whether the present liability applied for violations of Article 5 (Prohibited agreements) of the Law of the Republic of Lithuania on Competition (hereinafter – the Law on Competition) is enough deterrent to stop potential offenders. In order to find the answer, firstly the general analysis of objectives and the main types of sanctions as well as private enforcement forms of competition law have been conducted. Taking into consideration, the further assessment is carried out of liability for violations the Law on Competition, particularly for breaches of anti-competitive agreements.

The research results disclosed that nevertheless the Law on Competition provides at first sight comprehensive liability for violations of prohibited agreements, thus only fines for undertakings are only imposed in practice. Noteworthy, that the Competition Council should more take into account the EU case-law and improve fines application practice. Moreover, according to author's opinion, in order to effectively apply individual administrative sanctions, the 'directors' disqualification' and the rule allowing to impose fines on directly responsible individuals should be adopted. Finally, the analysis revealed the main causes and obstacles of stagnation of private enforcement of the Law on Competition, however it is considered that the transposition of Directive on antitrust damage actions into national law should change the present situation.

Juozapaitis L. Atsakomybė už Lietuvos Respublikos konkurencijos įstatymo 5 straipsnio (draudžiami susitarimai) pažeidimus. Magistrinio darbo vadovas: doc. dr. Raimundas Moisejevas – Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, 2015. – 78 p.

8. SANTRAUKA

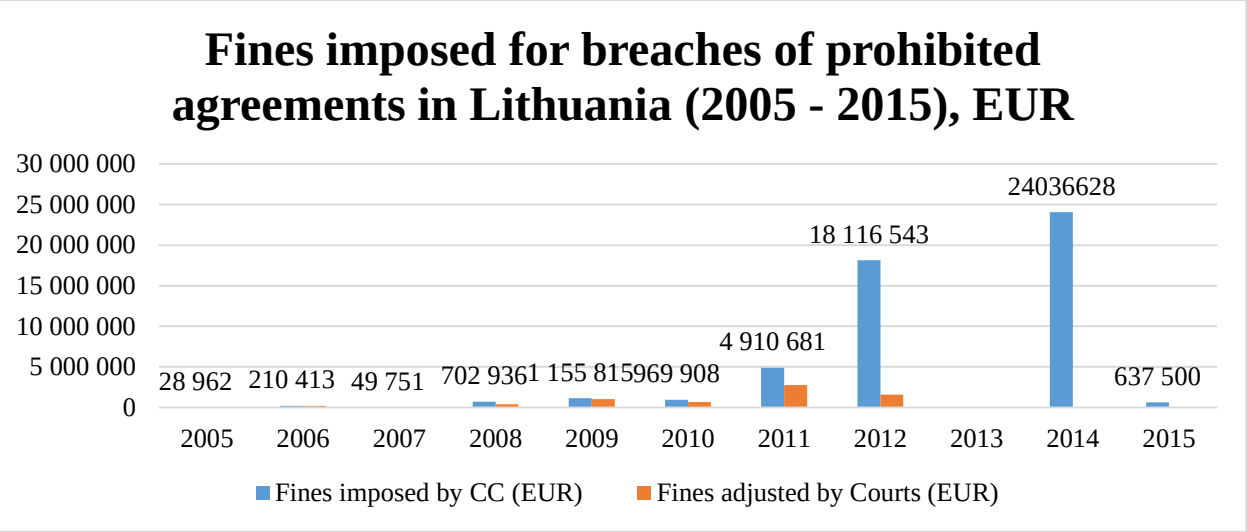
Pastaraisiais metais Europoje pastebėtina baudų skiriamų ūkio subjektams už sunkiausius konkurencijos teisės pažeidimus augimo tendencija. Europos Komisija skirdama rekordiškas baudas siekia atgrasinti pažeidėjus nuo pakartotinių pažeidimų ateityje ir siunčia žinutę kitiems, kas gali nutikti, jei ūkio subjektai pažeis konkurencijos teises taisykles. Nepaisant to, tokios skiriamų milžiniškų baudų tendencijos aštriai kritikuojamos. Šiuo tikslu pasiūlytos ir kai kuriose Europos šalyse jau įgyvendintos papildomos sankcijos ar kitos atsakomybės priemonės.

Tuo tarpu Lietuvoje taip pat buvo atlikta keletas patobulinimų susijusių su konkurencijos teisės sankcijomis pastaraisiais metais. Dėl to, šis Magistrinis darbas analizuoja, ar dabartinės atsakomybė taikytina už Lietuvos Respublikos konkurencijos įstatymo (toliau – Konkurencijos įstatymo) 5 straipsnio (draudžiami susitarimai) pažeidimus yra pakankamai atgrasanti, kad sustabdyti galimus pažeidėjus. Siekiant surasti atsakymą į šį klausimą, pirmiausia buvo atliktas bendro pobūdžio tyrimas susijęs su konkurencijos teisės sankcijų tikslų, pagrindinių sankcijų ir privataus įgyvendinimo analize. Atsižvelgiant į tai, toliau atliktas Konkurencijos įstatyme nustatytų atsakomybės formų, kurios galėtų būti taikomos už draudžiamų susitarimų pažeidimus, vertinimas.

Tyrimo rezultatai atskleidė, jog nepaisant to, kad Konkurencijos įstatyme iš pirmo žvilgsnio numatyta įvairialypė atsakomybė už draudžiamų susitarimų pažeidimus, tačiau praktikoje skiriamos tik baudos ūkio subjektams. Svarbu paminėti ir tai, kad Konkurencijos taryba turėtų labiau atsižvelgti į ES teismų praktiką ir patobulinti baudų skyrimo praktiką. Taip pat, autoriaus nuomone, siekiant efektyviai taikyti individualias administracines sankcijas, „direktorių diskvalifikavimas“ ir individualios baudos turi būti atskirtos ir turėtų būti priimta nuostata leidžianti paskirti baudas tiesiogiai atsakingiems asmenims. Galiausiai tyrimas atskleidė privataus Konkurencijos įstatymo įgyvendinimo stagnacijos pagrindines priežastis ir įgyvendinimo kliūtis, tačiau manytina, kad Direktyvos dėl žalos padarytos konkurenciją ribojančiais veiksmais perkėlimas į nacionalinę teisę turėtų pakeisti šiandieninę situaciją.

9. ANNEX 1 – The Statistics of Fines Imposed for Infringements of Prohibited Agreements in Lithuania in the Period of 2005 – 2015.

Year	Number of Competition Council decisions regarding prohibited agreements	Fines imposed by Competition Council	Fines after Court adjustment[202]	Competition Council fines reduction by courts expressed in per cents
2005	1	LTL 100 000 / EUR 28 962	LTL 49 500 / EUR 14 336.19	50.5 %
2006	2	LTL 726 514 / EUR 210 413	LTL 646 278 / EUR 187 175.05	11.04 %
2007	2	LTL 171 781 / EUR 49 751.22	LTL 166 781 / EUR 48 303.12	3 %
2008	3	LTL 2 427 100 / EUR 702 936.75	LTL 1 345 800 / EUR 389 770.62	44.55 %
2009	3	LTL 3 990 800 / EUR 1 155 815.57	LTL 3 543 100 / EUR 1 026 152.69	11.21 %
2010	6	LTL 3 348 900 / EUR 969 908.48	LTL 2 408 981 / EUR 697 689.12	28.07 %
2011	5	LTL 16 955 600 / EUR 4 910 681.19	LTL 9 587 281 / EUR 2 776 668.5	43.46 %
2012	2	LTL 62 552 800 / EUR 18 116 543.1	LTL 5 433 000 / EUR 1 573 505.56[203]	91,31 %
2013	-	-	-	-
2014	4	LTL 82 993 670 / EUR 24 036 628.24	-	-
2015	1[204]	EUR 637 500	-	-



[202] Some Competition Council resolutions are appealed to Vilnius Regional Administrative Court or in Supreme Administrative Court of Lithuania therefore not all information are included.
[203] There is no final decision according to *Travel agencies case* therefore in this paragraph the same amount of fines imposed by Competition Council is indicated.
[204] Only decisions till 1 April 2015 are included.

10. CONFIRMATION OF INDEPENDENCE OF WRITTEN WORK

22 May, 2015

Vilnius

I, Mykolas Romeris University (hereinafter referred as the University), Law faculty, European and International Business Law study programme student, Laurynas Juozapaitis, herby confirm that these Master's final thesis "Liability for Violations of Article 5 (Prohibited Agreements) of the Law of the Republic of Lithuania on Competition":

1. Has been accomplished independently by me and in a good faith;
2. Has never been submitted and defended in any other educational institution in Lithuania or abroad;
3. Is written in accordance with principles of academic writing and being familiar with methodological guidelines for academic papers.

I am aware of the fact that in case of breaching the principle of fair competition – plagiarism – a student can be expelled from the University for the gross breach of academic discipline.

Laurynas Juozapaitis