

## Implementing the ECN+ Directive in Lithuania: Towards an Over-enforcement of Competition Law?

by

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### *Abstract*

In 2018, the ECN+ Directive was issued with a goal to grant stronger powers to national competition authorities while enforcing competition law. This article analyses how the legal provisions of the ECN+ Directive have already been implemented in the Lithuanian Law on Competition, and considers what further changes may need to be made in order to fully implement the ECN+ Directive in the national law. It elaborates on the legal challenges while implementing the aforementioned Directive and provides a critical view on some of the amendments that have already been made.

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## *Résumé*

En 2018, la directive ECN+ a été adoptée pour conférer des pouvoirs renforcés aux autorités nationales de concurrence dans le cadre de l'application du droit de la concurrence. Cet article analyse comment les dispositions juridiques de la directive ECN+ ont déjà été transposées dans la loi lituanienne sur la concurrence et examine les modifications supplémentaires qui pourraient être nécessaires pour transposer intégralement la directive ECN+ dans le droit national. Il présente en détail les difficultés juridiques rencontrées lors de la mise en œuvre de la directive susmentionnée et donne un avis critique sur certaines des modifications qui ont déjà été apportées.

**Key words:** ECN+ Directive, Lithuanian Law on Competition, commitment decision, structural remedies, association of undertakings, parental liability, leniency, interim measures.

**JEL:** K21

## **I. Introduction**

On 11 December 2018, an EU Directive was issued to empower national competition authorities (hereinafter: NCAs) to be more effective enforcers and to ensure the proper functioning of the internal market (the so-called ECN+ Directive).<sup>1</sup> According to recital 3, the objective of the aforementioned Directive is ‘to ensure that NCAs have the guarantees of independence, resources, and enforcement and fining powers necessary to apply Articles 101 and 102 TFEU effectively’. It is stipulated that, in such a way, the Directive ‘inevitably has an impact on national competition law when it is applied in parallel by NCAs’.

According to Article 34(1) of the ECN+ Directive, this Directive should be implemented in the national laws of the Member States by 4 February 2021. The implementation of the ECN+ Directive may, however, raise legal challenges. Although a full implementation of the ECN+ Directive in Lithuania is still to follow, it may be timely to consider both current and potential legal issues that may arise with regard to the implementation of the legal provisions of the ECN+ Directive. Some of them have been selected for

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<sup>1</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ [2019] L 11/3.

a deeper analysis in this article, namely, commitment decisions, fines for the associations of undertakings, parental liability, leniency and interim measures.

## II. Implementing the ECN+ Directive: legal changes and legal challenges

On 14 March 2019, several amendments to the Law on Competition of the Republic of Lithuania<sup>2</sup> (hereinafter: Law on Competition) were made that entered into force on 1 July 2019.<sup>3</sup> These amendments are mostly relevant for commitment decisions and structural remedies. As regards the latter, it could be noted that the Competition Council, before the amendments, could impose structural remedies only in the case of concentrations (Article 35(1) point 2 of the Law on Competition). After the amendment of Article 35, the competition authority may apply such remedies (for example, ordering to sell (part of) the company or its assets or shares, to reorganize the company etc.) also in the case of a prohibited agreement or an abuse of a dominant position.

The amendments related to commitment decisions may raise several legal issues and thus beg for a deeper analysis, which is provided below.

### 1. Commitment decisions

The right of the European Commission to adopt commitment decisions is enshrined in Article 9 of Regulation 1/2003.<sup>4</sup> The ECN+ Directive provides a legal framework for the Member States to legislate with regard to the commitment decisions that may be adopted by national competition authorities. Article 12(1) of the ECN+ Directive reads:

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<sup>2</sup> Law on Competition of the Republic of Lithuania, 23 March 1999, No. VIII-1099, as lastly amended on 13 June 2019 (No. XIII-2219).

<sup>3</sup> Law of the Republic of Lithuania amending Articles 18, 22, 25, 28, 29, 35, 36, 39, 49, 53 of the Law on Competition No. VIII-1099 and supplementing the Law on Competition with Article 38<sup>1</sup>, 14 March 2019, No. XIII-1989.

<sup>4</sup> 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, OJ [2003] L 1/1. Article 9(1) of Regulation 1/2003 reads: 'Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission'.

‘Member States shall ensure that, in enforcement proceedings initiated with a view to adopting a decision requiring that an infringement of Article 101 or Article 102 TFEU be brought to an end, national competition authorities may, after formally or informally seeking the views of market participants, by decision make commitments offered by undertakings or associations of undertakings binding, where those commitments meet the concerns expressed by the national competition authorities. Such a decision may be adopted for a specified period, and shall conclude that there are no longer grounds for action by the national competition authority concerned’.

Commitment decisions are not a new concept in Lithuanian competition law. Legal provisions on commitment decisions were included into the Law on Competition as of 1 May 2004, when Lithuania entered the European Union. The Law amending and supplementing the Law on Competition,<sup>5</sup> Article 19, stipulated that Article 30(2) of the Law on Competition, which listed the grounds for the Competition Council to terminate the investigation, shall be supplemented, among others, with the legal provision stating that ‘the investigation shall be terminated if the actions did not cause any significant damage to the interests safeguarded by the laws, and the undertaking, suspected to have infringed the law, in good will terminated the actions and submitted to the Competition Council in writing a commitment not to engage in such actions’ (Article 30(2) point 2 of the amended Law on Competition).<sup>6</sup> Accordingly, one of the requirements for adopting a commitment decision was that the actions did not cause any significant damage to the interests safeguarded by the law – to be more precise, the Law on Competition. However, such a requirement is neither found in Article 9 of Regulation 1/2003 nor in Article 12 of the ECN+ Directive. One of the main requirements under the

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<sup>5</sup> Law of the Republic of Lithuania amending and supplementing the Law on Competition, declaring invalid the Law on the control of state aid to undertakings, and amending Article 1 of the Civil Procedure Code, 15 April 2004, No. IX-2126. Article 3(1) of Section 4 of the aforementioned law stipulated that this law, except for Article 4 of Section 4, shall enter into force on the day when the Republic of Lithuania enters the European Union. The law thus entered into force on 1 May 2004.

<sup>6</sup> Further amendments to this legal provision were made in 2009 (Law of the Republic of Lithuania amending and supplementing Articles 1, 3, 4, 10, 13, 14, 19, 20, 23, 24, 26, 28, 29, 30, 31, 40, 41, 42, 43, 44, 49 and the Annex of the Law on Competition, 9 April 2009, No. XI-216) and in the new edit of the Law on Competition issued in 2017 (Law of the Republic of Lithuania amending the Law on Competition No. VIII-1099, 12 January 2017, No. XIII-193). In the latter, Article 28(3) point 2 of the Law on Competition stated that ‘the investigation shall be terminated if the actions did not cause any significant damage to the interests safeguarded by the Law on Competition, and the undertaking, which is suspected to have infringed the law, in good will terminated the actions and submitted to the Competition Council in writing a commitment not to engage in such actions or to perform actions, which annul the suspected infringement or which provide conditions to avoid it in the future’.

mentioned legal provisions is that the commitment meets the concerns expressed by the competition authority. Furthermore, the formulation of the Lithuanian Law on Competition, namely, the fact that the investigation shall be terminated, to some extent limited the discretion of the Competition Council while deciding whether to accept the commitments offered by the undertakings. Following the wording of the legal provision, the Competition Council had to accept commitments as long as the undertakings concerned had submitted the commitments and no significant damage had been caused to the interests safeguarded by the Law on Competition. However, the ECN+ Directive, although it does not say this in Article 12, explains in recital 39 that '[i]t should be at the discretion of NCAs whether to accept commitments'.<sup>7</sup>

The law as of 14 March 2019, amending a number of the legal provisions of the Lithuanian Law on Competition, makes important changes with regard to the notion of commitment decisions, enshrined in Article 28 of the Law on Competition. First of all, it provides discretion to the Competition Council to accept the commitments and to make them binding on the undertakings that submitted them, secondly, it strikes out the requirement of the lack of significant damage from the requirements for a commitment decision. Thirdly, the requirement that the undertakings terminated their actions in good will and commit to perform actions, which provide conditions to avoid the suspected infringement in the future, is deleted.

The amended legal provision (Article 28(4) of the Law on Competition), which entered into force on 1 July 2019, reads as follows:

'The Competition Council, if it plans to set commitments on the undertaking to terminate a prohibited agreement or an abuse of a dominant position, has a right to adopt a decision to terminate the investigation if the undertaking, which is suspected to have infringed the Law on Competition, submits in writing their commitments to annul the suspected infringement and the Competition Council, by its decision, makes them binding on the undertaking. The time framework of such commitments is defined by the decision of the Competition Council.'

Although this legal provision, as explained above, will bring advantages in many regards as compared to the previous legal provision, it also raises a number of legal problems.

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<sup>7</sup> Recital 39 also provides an exception when commitment decisions may be not appropriate ('[i]n principle, such commitment decisions are not appropriate in the case of secret cartels, in respect of which NCAs should impose fines'). The fact that commitment decisions may be not appropriate in the case of cartels is stipulated in the Explanatory Memorandum of the Law amending the Law on Competition as of 14 March 2019 (Explanatory Memorandum to the Project of the Law of the Republic of Lithuania amending Articles 18, 22, 25, 28, 29, 35, 36, 39, 49, 53 of the Law on Competition No. VIII-1099 and supplementing the Law on Competition with Article 38<sup>1</sup>, 4 December 2018, No. XIIP-2991, p. 3).

Firstly, it says that the Competition Council ‘sets’ the commitments. However, a more precise legal language should have been that the Competition Council ‘accepts’ the commitments, since it does not set them on its own initiative, but rather upon the initiative of undertakings.

Secondly, and more importantly, the wording of the new legal provision is confusing, if not unfortunate. On the one hand, it speaks about a ‘suspected’ infringement and the possibility for undertakings, which are suspected to have infringed the Law on Competition, to offer commitments to the Competition Council. On the other hand, however, it says that a commitment set, or, to be more precise, accepted, by the Competition Council will be ‘to terminate a prohibited agreement or an abuse of a dominant position’. Thereby, the word ‘suspected’ is missing. Under EU competition law, commitment decisions – the notion, which was introduced by Regulation 1/2003 – are meant to serve as a tool for a more efficient competition law procedure (Geradin/Mattioli, 2017; Wils, 2015), so that such a procedure may be terminated without a final decision by the competition authority on whether there was an infringement of competition law.<sup>8</sup> This idea is repeated in recital 39 of the ECN+ Directive, which states that ‘[c]ommitment decisions should find that there are no longer grounds for action by the NCAs, *without reaching a conclusion as to whether there has been an infringement of Article 101 or 102 TFEU*’ (emphasis added). Also, Article 12(1) of the ECN+ Directive states that ‘[s]uch a decision [...] shall conclude that there are no longer grounds for action by the national competition authority concerned’. Hence, a commitment decision may be accepted without finding an infringement.<sup>9</sup>

The ambiguity of the formulation of the new legal provision of the Lithuanian Law on Competition related to commitment decisions may render such a legal provision subject to interpretation. On the one hand, it could be interpreted in compliance with EU competition law, saying that the Competition Council may accept commitments from undertakings, which are suspected to have infringed the Law on Competition, without making a final decision on whether

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<sup>8</sup> See: CJEU, *European Commission v. Alrosa Company Ltd*, Case C-441/07 P, 29 June 2010, ECLI:EU:C:2010:377, para. 35: ‘This is a new mechanism introduced by Regulation No 1/2003 which is intended to ensure that the competition rules laid down in the EC Treaty are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the Commission, binding in order to provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement. More particularly, Article 9 of the regulation is based on considerations of procedural economy, and enables undertakings to participate fully in the procedure, by putting forward the solutions which appear to them to be the most appropriate and capable of addressing the Commission’s concerns’.

<sup>9</sup> See also recital 39 of the ECN+ Directive, which stipulates that ‘[w]here, in the course of proceedings which *might lead* to an agreement or a practice being prohibited [...]’. (emphasis added)

there was such an infringement. On the other hand, however, it could be argued in an opposite way saying that, since Article 28(4) of the Law on Competition says that such a commitment would be set with a goal to terminate a prohibited agreement or an abuse of a dominant position, the Competition Council, before accepting a commitment, should perform a full investigation in order to find out whether there was such an infringement in the first place. In such a way, the notion of a commitment decision, as it is known under EU competition law, would be compromised, since it would be possible to accept a commitment only when a full investigation were performed. The 'reasonable' interpretation of this legal provision will be left for the competition authority and the courts. However, from the point of view of legal certainty, it would have been better if such an ambiguity had been avoided.

Thirdly, Article 12(3) of the ECN+ Directive lists a number of cases when the enforcement proceedings could be reopened by the competition authority, that is firstly, any material changes of the facts based on which the commitment decision was adopted, secondly, the undertakings acting contrary to their commitments, and, thirdly, cases where a commitment decision was based on incomplete, incorrect or misleading information provided by the parties. The Lithuanian Law on Competition, instead, foresees one legal ground when the Competition Council may reopen the investigation, namely the appearance of new circumstances (Article 28(6)). On the one hand, it could be argued that such a legal ground is rather broad and may cover cases listed in the ECN+ Directive. On the other hand, however, a narrow interpretation of the aforementioned legal ground may also be possible saying that it covers only new circumstances that appear after the case has ended, thus, not including the situations when the undertakings, for example, provided misleading information or act contrary to the commitments. Such a narrow interpretation of the legal grounds would be supported, for example, by the legal grounds for reopening civil law procedures: pursuant to Article 366 of the Civil Procedure Code of the Republic of Lithuania,<sup>10</sup> the appearance of new circumstances is the legal ground for reopening the procedure that is separate from the legal ground that false information might have been provided by the parties, third persons, experts etc. Also, the Law on Administrative Proceedings<sup>11</sup> foresees them as separate legal grounds (Article 156). The Criminal Procedure Code of the Republic of Lithuania,<sup>12</sup> however, includes the

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<sup>10</sup> Civil Procedure Code of the Republic of Lithuania, 28 February 2002, No. IX-743 (with later amendments).

<sup>11</sup> Law on Administrative Proceedings of the Republic of Lithuania, 14 January 1999, No. VIII-1029 (with later amendments).

<sup>12</sup> Criminal Procedure Code of the Republic of Lithuania, 14 March 2002, No. IX-785 (with later amendments).

provision of false information under the same legal ground of the appearance of new circumstances for reopening the procedures (Article 444). Bearing this in mind, it might be that the appearance of new circumstances may be interpreted as one of the legal grounds, which would be separate from the other grounds, such as the provision of false information and acting contrary to the commitments.

Yet, the importance of the reopening of the procedure in the case of commitments should not be underestimated. Bearing in mind that the enforcement procedure in such cases is ended without a final decision on the infringement, the reopening of such a procedure may be highly relevant. After all, the goal of a commitment is to eliminate competition law concerns that a competition authority may have. Should a commitment fail to fulfill this goal, it might be very important to reinvestigate the case in order to eliminate the aforementioned concern. It is noteworthy in this regard that the fines, including periodic fines, which are foreseen in the ECN+ Directive for cases of non-compliance with a commitment decision (Article 13(2)(f), Article 16(2)(b)),<sup>13</sup> can hardly serve this purpose. On the contrary, such penalty payments may raise a number of legal concerns. First of all, the question arises whether the undertaking could be punished for a non-compliance with a decision, which lacks a final finding of the infringement in the first place. After all, a collision may arise here as regards the presumption of innocence. The reopening of the procedure, with a perspective of a full investigation, might be a more optimal solution in this regard. Secondly, even if the undertaking had to pay a periodic penalty payment for non-compliance with a commitment decision,

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<sup>13</sup> This legal provision of the ECN+ Directive has already been implemented in the Lithuanian Law on Competition. According to the amendments to the Law on Competition that entered into force on 1 July 2019, Article 36(1) states that, for a non-compliance with the commitments set under Article 28(4) of the Law on Competition, a fine shall be imposed of up to 10 percent of the total annual turnover received in the preceding economic year. Besides, a possibility exists, under the amended Article 36, to impose periodic fines for a non-compliance with the commitments: Article 36(4) of the Law on Competition stipulates that, for a non-compliance with the commitments set under Article 28(4) of the Law on Competition, a fine of up to 5 percent of an average daily total turnover in the preceding economic year can be imposed on the undertakings for each day of the implementation (or continuation) of the infringement. It is noteworthy, in this regard, that the Explanatory Memorandum of the Law amending the Law on Competition stresses the importance of having legal provisions on imposing fines for the 'procedural infringements' such as, among others, a non-compliance with commitment decisions. (Explanatory Memorandum to the Project of the Law of the Republic of Lithuania amending Articles 18, 22, 25, 28, 29, 35, 36, 39, 49, 53 of the Law on Competition No. VIII-1099 and supplementing the Law on Competition with Article 38<sup>1</sup>, 4 December 2018, No. XIIIIP-2991, pp. 4–5). However, from a legal perspective, a non-compliance with commitment decisions should not be considered as a merely procedural infringement, since it rather relates to the merits of the case.



this would not necessarily guarantee that such compliance will take place at the end of the day. On the contrary, and thirdly, situations may arise when the undertakings, paying the fine, even if on a daily basis, may conveniently 'buy out' competition rather than engage into it. Such a situation, however, would not solve the competition law problem, which, after all, is one of the main concerns in the case of commitment decisions. Hence, it may be highly important to have a number of clear legal grounds when a competition authority may reopen the enforcement proceedings in the case of commitment decisions.

Furthermore, it could also be noted that Article 28(4) of the Law on Competition speaks about the commitments, which would annul the suspected infringement. Compared to the previous legal provision, the amended legal provision does not say that the undertaking should commit not only to end the suspected infringement, but also to perform actions that provide conditions to avoid it in the future. In fact, under the previous legal provision, the annulment of the suspected infringement was only one of the conditions for a commitment to be accepted. On the one hand, it could be argued that a commitment, which obliges the company to perform actions in order to avoid a potential infringement in the future, may be very wide. On the other hand, however, it could be asked whether cases may exist where such a commitment may be needed in order to eliminate the competition law concern. After all, as it was said earlier, one of the main requirements under EU competition law for accepting commitments is that they meet the concerns of the competition authority, hence, they solve the competition law problem. Yet the Lithuanian legal provision merely states that the undertaking submits in writing their commitments to annul the suspected infringement and the Competition Council, by its decision, makes them binding on the undertaking. However, it could be asked whether such a formulation is not too narrow. It could be argued that the focus while accepting commitments should be on the elimination of the competition law concern – the notion that would be broader than the term of ending the suspected infringement. In this regard, the previous legal provision may seem to have been more effective.

The analysis above illustrates that the amendment of the Law on Competition with regard to commitment decisions may create legal problems. Although it improves, in some aspects, the legal provision that existed before, the new legal norm has serious deficits, so it remains to be seen how it will be applied in practice and whether a need may arise to amend this legal provision again in the future.

## 2. Fines

The ECN+ Directive stresses the importance of ‘effective, proportionate and dissuasive fines’ (Article 13, recital 40).<sup>14</sup> The imposition of fines is one of the traditional sanctions for competition law infringements. However, it is important, in general, and from the competition policy point of view in particular, that the focus on the deterrent effect of fines would not compromise the application of sound legal principles and would not lead to over-enforcement.

### a) Fines for the associations of undertakings

Recital 48 stipulates that ‘[e]xperience has shown that associations of undertakings regularly play a role in competition infringements and NCAs should therefore be able to fine such associations effectively’. It is true that the calculation of a fine when an association is involved may be challenging. However, the difficulties in calculating a fine in such cases should not result in an over-enforcement of competition law.

According to the ECN+ Directive, Article 13(1), ‘Member States shall ensure that national administrative authorities may [...] impose [...] effective, proportionate and dissuasive fines on undertakings and associations of undertakings where, intentionally or negligently, they infringe Article 101 or 102 TFEU’. One of the highest risks when imposing fines on associations is double punishment, which may occur when the fines are imposed on both the association and its members. Respecting the principle of *non bis in idem*, recital 48 of the ECN+ Directive stipulates that ‘[w]hen a fine is imposed not only on the association but also on its members, the turnover of the members on which a fine is imposed should not be taken into account when calculating the fine of the association’.

It is nevertheless possible to take into account the turnover of the members when the fine is calculated for the association. The ECN+ Directive stipulates that, while determining the amount of the fine, national competition authorities should have regard both ‘to gravity and to the duration of the infringement’ (Article 14(1) of the ECN+ Directive). Recital 48 of the ECN+ Directive explains that, when assessing the gravity of the infringement, and in the case the fine is to be imposed on an association of undertakings,

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<sup>14</sup> The ability of the NCAs to impose effective fines is also stressed in the Explanatory Memorandum of the ECN+ Directive (Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Brussels, 22 March 2017, COM(2017) 142 final, Explanatory Memorandum, pp. 3, 16–17).

the turnover of the members of the association may be taken into account when ‘the infringement relates to the activities of its members’. It is further stipulated that ‘it should be possible to consider the sum of the sales of goods and services to which the infringement *directly or indirectly* relates by the undertakings that are members of the association’ (recital 48) (emphasis added).<sup>15</sup> This is a rather broad definition. Compared to Regulation 1/2003, it could be noted that Article 23(2) also speaks about the infringement of an association that ‘relates to the activities of its members’, however, it does not say that an infringement might be related directly or indirectly to such activities. The ECN+ Directive, however, includes not only a direct, but also an indirect relation of the infringement to the activities of the members of the association.<sup>16</sup> Thereby, the ECN+ Directive gives a rather wide discretion to national competition authorities to calculate fines for an association taking into account the turnover of its members. Although such an indirect relation of the activities of the members of the association with the infringement may result in higher fines for an association – thus, along the lines of recital 48, which speaks about an effective fining of associations, it raises the risk of beating the purpose in terms of calculating the turnover of the members that would be not so much related to the infringement.

If the fine for an association is calculated taking into account the turnover of its members, Article 14(3) of the ECN+ Directive provides rules for an effective recovery of a fine. It is stipulated that ‘the association is obliged to call for contributions from its members to cover the amount of the fine’ in the case ‘the association is not solvent’ (Article 14(3) of the ECN+ Directive). The goal of such a rule is ‘to ensure effective recovery of fines’ (recital 48 of the ECN+ Directive). However, the ECN+ Directive does not explain what insolvency means. In recital 48 it is merely explained that ‘NCAs should have regard to the relative size of the undertakings that belong to the association and, in particular, to the situation of small and medium-sized enterprises’. Thereby, the focus is on the size of the undertakings rather than on the concept of insolvency. The latter will have to be determined by the respective rules of national law. Such national rules may, however, differ – the circumstance, which will be important in the case when the reach of an association may go beyond the borders of one Member State and the applicable law would be

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<sup>15</sup> It is noteworthy that, according to recital 48, ‘[w]hen a fine is imposed not only on the association but also on its members, the turnover of the members on which a fine is imposed should not be taken into account when calculating the fine of the association’.

<sup>16</sup> This is also repeated in recital 47 of the ECN+ Directive, which says that, when assessing the gravity of an infringement, account may have to be taken of the factors such as ‘the value of the undertaking’s sales of goods and services to which the infringement directly or indirectly relates’.

determined upon the rules of international private law. More importantly though, the ECN+ Directive does not explain whether the notion of insolvency should be interpreted strictly on the basis of the requirements of national legal norms on bankruptcy or whether such a notion should be broader (for example, including the cases of a mere inability to pay). For the purposes of legal certainty, it could be argued that the former should be the case, that is, the notion of 'insolvency' should be interpreted in the framework of national regulations on bankruptcy. Yet, even then, unclarities may remain. For example, the Law on Enterprise Bankruptcy of the Republic of Lithuania<sup>17</sup> stipulates that bankruptcy is a state of enterprise insolvency, declared on the basis of an order set by legal acts, when the end of such a state is strived by satisfying the requirements of the creditors and by ensuring a balance between the interests of the creditors and those of the enterprise (Article 2(1) of the Law on Enterprise Bankruptcy). However, it also defines intentional bankruptcy, namely, causing the bankruptcy by a consciously bad management of an enterprise and (or) concluding agreements when it was known or it had to be known that entering into them infringed the interests of the creditors and (or) lawful interests (Article 2(12) of the Law on Enterprise Bankruptcy). Thereby, the question as regards the implementation of the relevant legal provision of the ECN+ Directive, namely, related to 'insolvency', may be whether such insolvency should cover an intentional bankruptcy. If this were the case, the members of the association would be obliged to ensure the recovery of the fine, which was imposed on the association. It is doubtful, however, that this should be the case. It could thus be helpful to write it down into the legal provisions, implementing the aforementioned legal provision of the ECN+ Directive, that an 'insolvency' of an association, in the case of which, the members of the association may be obliged to pay the fine, should not extend to the cases of an intentional bankruptcy, that is the situation when the insolvency of an association is caused deliberately.

Article 14(4) of the ECN+ Directive specifies how the payment of the fine may be requested from the members of the association if they had to contribute to the payment of the fine due to the insolvency of the association.<sup>18</sup> It is said that, where it is necessary to ensure a full payment

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<sup>17</sup> Law on Enterprise Bankruptcy of the Republic of Lithuania, 20 March 2001, No. IX-216 (with later amendments).

<sup>18</sup> Article 14(4) reads: 'Member States shall ensure that, where contributions referred to in paragraph 3 have not been made in full to the association of undertakings within the time limit fixed by national competition authorities, national competition authorities may require the payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies of that association. Where necessary to ensure full payment of the fine, after the national competition authorities have required payment from such undertakings, they may also require the payment of the outstanding amount of the fine by any of the members

of the fine and the competition authority has already requested the payment from the undertakings, the representatives of which were the members of the decision-making bodies of the association, the competition authority 'may also require the payment of the outstanding amount of the fine by any of the members of the association which were active on the market on which the infringement occurred'. Limitations to this rule are set by saying that the payment of the fine will be not 'required from undertakings which show that they did not implement the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the investigation started'. Thereby, the duty of the members to pay the fine of the association is related to their actions in implementing the infringement and their knowledge about the infringement or their effort to distance themselves from such an infringement. On the one hand, such requirements may be important in terms of setting the limits when the undertakings may be obliged to pay the fine of the association. On the other hand, however, the requirements foreseen in Article 14(4) of the ECN+ Directive raise questions. First of all, it is said that the payment of the association's fine, in the case when the latter is insolvent and the full amount of the fine is not paid by its members which were part of the decision-making, may be required from its members which were active on the market on which the infringement occurred. Such a requirement is rather broad – it refers to the undertaking's activity in the market rather than to its relation to the infringement. Bearing in mind that the undertaking may be obliged to pay the fine for the association's infringement of competition law merely due to the fact that it is a member of the association and is active on the market related to the infringement, may raise questions when it comes to the presumption of innocence. Secondly, although an exception to this rule is foreseen in terms of the possibility of the company to avoid such a payment if it can prove that it did not implement the infringement and was not aware of the infringement or it publicly distanced itself from the infringement, the burden of proof in this regard would be on the company. It is also in this regard that the issues related to the presumption of innocence may arise. Thirdly, the notions of awareness and public distancing from the infringement are highly relevant in the case of proving a concerted practice under Article 101 TFEU.<sup>19</sup> However,

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of the association which were active on the market on which the infringement occurred. However, payment under this paragraph shall not be required from undertakings which show that they did not implement the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the investigation started'.

<sup>19</sup> See, for example, the *E-Turas* case (Decision of the Competition Council on the compliance of the actions of the undertakings providing organized sales of trips and other related services with the requirements of Article 5 of the Law on Competition of the Republic

in such a case, these notions have to be analyzed at the stage of proving an infringement of competition law, not merely clarifying the sanctions. In fact, should it be proven that a company was aware of the infringement and did not publicly distance itself from it, not to speak about the fact that it implemented the infringing decision, such a company should possibly be held liable for the infringement. In other words, the question in such a case would be not merely whether the company should pay the fine, but whether the company should be held liable for the competition law infringement in the first place. These two issues are different and should be analyzed separately according to appropriate legal standards.

#### **b) Maximum amount of fines**

The ECN+ Directive elaborates on the maximum amount of the fine (Article 15). According to Article 15(1), the maximum amount of the fine shall be ‘not less than 10% of the total worldwide turnover of the undertaking or association of undertakings in the business year preceding the decision referred to in Article 13(1)’. Article 15(2) elaborates on the maximum amount of the fine for an association of undertakings when an infringement relates to the activities of its members. Several remarks have to be made in this regard.

The purpose of including a legal provision on the maximum amount of the fine, according to the Explanatory Memorandum of the ECN+ Directive, is ‘to ensure NCAs can set deterrent fines on the basis of a common set of core parameters: first, there should be a common legal maximum of no less than 10% of the worldwide turnover and second, when setting the fine, NCAs should have regard to the core factors of gravity and duration of the infringement’.<sup>20</sup> The Explanatory Memorandum notes that:

‘[...] there are differences in the methodologies for calculating fines that can have a significant impact on the level of fines imposed by NCAs. These differences mainly concern: (1) the maximum fine that can be set (the legal maximum) and (2) the parameters for calculating the fine. Such differences partly explain how fines today can vary by up to 25 times depending on which authority acts. Very low fines may be imposed for the same infringement, meaning that the deterrent effect of fines differs widely across Europe which was an issue flagged during the public

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of Lithuania and Article 101 TFEU, 7 June 2012, No. 2S-9; Judgement of the Supreme Administrative Court of the Republic of Lithuania, 2 May 2016, Case No. A-97-858/2016; CJEU, Case C-74/14, “*Eturas*” *UAB and Others v Lietuvos Respublikos konkurencijos taryba*, 21 January 2016, ECLI:EU:C:2016:42).

<sup>20</sup> Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Brussels, 22 March 2017, COM(2017) 142 final, Explanatory Memorandum, p. 17.

consultation. The fines imposed may not reflect the harm caused to competition by the anti-competitive behaviour.<sup>21</sup>

Accordingly, one of the main concerns is that 'very low fines may be imposed for the same infringement' and that such fines may differ among the Member States, partly due to the 'legal maximum' of the fines enshrined in respective laws. However, it could be asked whether it is 'very low fines' that should be one of the main concerns in the case of competition law infringements or whether it should rather be solving the competition law problem. Furthermore, the legal maximum that is enshrined in the national laws and in Regulation 1/2003 applicable to the European Commission serves a (good) purpose in terms of setting the limits for an amount of the fine that may be imposed for competition law infringements. After all, although the fine may have to be deterrent, it should not be such that could result in an expropriation. The Lithuanian Law on Competition foresees the 10% cap for setting the fine (Article 36(1) of the Law on Competition). Similarly, such a cap is enshrined in Article 23 of Regulation 1/2003.

Since the ECN+ Directive enshrines the 'legal minimum' of 10% in the case when a maximum amount of the fine should be imposed for a competition law infringement, it is not entirely clear how such a legal minimum will relate to the legal provisions establishing the legal maximum of 10% when imposing the fine. The ECN+ Directive does not provide criteria when the maximum amount of the fine should be imposed. Although this may be applied to the most severe cases evaluated on the basis of the gravity and the duration of the infringement, the interpretation of these criteria may differ in the Member States, so that also the amount of the fines, which the ECN+ Directive strives to make more uniform, may differ. More importantly though, although the ECN+ Directive does not require the elimination of the legal provisions on the legal maximum, the question is how the rules on the legal minimum in the case of the maximum amount of the fine should be implemented in compliance with national legal provisions, which speak about the cap of the fine in terms of 10%. As it was explained before, it is important that such a maximum cap would not be deleted from the laws, first and foremost, due to the fact that it sets the limits of the fine that may be imposed by the competition authority. However, since it will also be the legal minimum of the fine that may need to be included in the national law when implementing the ECN+ Directive, one of the options could be to write it down into the law that such a 'legal minimum' may be applicable in the case of the most severe competition law infringements, which would deserve the maximum amount of the fine. In such a way, the fine, which would go beyond the 10% of the

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<sup>21</sup> *Ibidem*, p. 17.

worldwide turnover of the companies would – and probably, should – be an exception rather than a rule.

It is noteworthy that recital 49 of the ECN+ Directive explains that the rules on the legal minimum in the case of the maximum amount of the fine ‘should not prevent Member States from maintaining or introducing a higher maximum fine that can be imposed’. Thus, Member States are allowed to go way beyond the 10% minimum in their regulations on setting fines. However, also in this regard, a word of caution should be spoken stressing the fact that the focus on the deterrence of fines should not lead to an over-enforcement of competition law risking to distort the balance between sanctioning the companies for competition law infringements and overstepping the boundaries of such sanctions with a risk of expropriating the companies.

Finally, it should be recalled that the European Competition Network (ECN) consists of the European Commission and national competition authorities. The European Commission is bound by Regulation 1/2003, whereas the ECN+ Directive is meant to strengthen the powers of national competition authorities. Balanced as this goal may seem to be at first sight, it may be that the ECN+ Directive grants stronger powers to national competition authorities than the European Commission has when enforcing competition law. After all, the legal provisions on the maximum amount of fine are missing in Regulation 1/2003, which is applicable in the case of the fines imposed by the European Commission. Article 23(2) of Regulation 1/2003 stipulates that ‘[f]or each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year’. However, national competition authorities may be able to impose fines that are ‘at least’ 10% of the total worldwide turnover if they decide to impose a maximum amount of the fine for a competition law infringement. The discretion of national competition authorities of doing so is not limited in the ECN+ Directive. Thus, whereas the Explanatory Memorandum seeks to align the differences in the amounts of fines imposed by national competition authorities, the result of the ECN+ Directive may be that such differences will exist, not the least when it comes to the enforcement of competition law by the European Commission and by national competition authorities.

### **3. Parental liability**

Article 13(5) of the ECN+ Directive stipulates that ‘Member States shall ensure that for the purpose of imposing fines on parent companies [...], the notion of undertaking applies’. Although this legal provision is relatively short



and is rather abstract, the ECN+ Directive thereby seems to require the Member States to enable the attribution of the liability for competition law infringements to the parent companies when such an infringement is committed by their subsidiaries. The purpose of including such a legal provision in the ECN+ Directive, according to the Explanatory Memorandum, is related to the payment of the fines.<sup>22</sup>

Article 13(5) of the ECN+ Directive does not provide any legal requirements for parental liability. It merely refers to the ‘notion of undertaking’. Recital 46 of the ECN+ Directive explains that:

‘To ensure the effective and uniform application of Articles 101 and 102 TFEU, the notion of ‘undertaking’, as contained in Articles 101 and 102 TFEU, which should be applied in accordance with the case law of the Court of Justice of the European Union, designates an economic unit, even if it consists of several legal or natural persons. Accordingly, NCAs should be able to apply the notion of undertaking to find a parent company liable, and impose fines on it, for the conduct of one of its subsidiaries, where the parent company and its subsidiary form a single economic unit.’

It is interesting to observe that the ECN+ Directive, even if this is done in a recital, refers to the case-law of the Court of Justice of the EU (hereinafter: CJEU) – after all, case-law may be subject to change. So, bearing in mind that the Member States have to implement the ECN+ Directive in their national laws, the question is what exactly may need to be transposed into the national law. As said, the ECN+ Directive, in Article 13(5), provides rather loose criteria for parental liability. One of the options could be to write it down in the national law that parent companies may be held liable for the competition law infringements of their subsidiaries, leaving it for the national

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<sup>22</sup> Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Brussels, 22 March 2017, COM(2017) 142 final, Explanatory Memorandum, pp. 16–17: ‘[...] there are a number of issues that affect the level of enforcement of Articles 101 and 102 TFEU and mean that companies can face very low or no fines at all depending on which authority acts, undermining deterrence and the level-playing field. [...] The third aspect concerns limitations regarding who can be held liable for paying the fine. The concept of ‘undertaking’ in EU competition law is established by the case law of the European Court of Justice. It means that different legal entities belonging to one ‘undertaking’ can be held jointly and severally liable for any fines imposed on such ‘undertaking’. [...] This sends a clear signal to the entire corporate group that the absence of good corporate governance and compliance with competition law will not remain unpunished. It also allows the fine to reflect the overall strength of the corporate group and not only that of the subsidiary, making it more meaningful and deterrent. However, several NCAs cannot today hold parent companies liable for infringements committed by subsidiaries under their control. [...] To address this, the proposal provides that the notion of undertaking is applied for the purpose of imposing fines on parent companies and legal and economic successors of undertakings.’ (footnote omitted).

courts and the competition authority to interpret such a legal provision in practice. The interpretation of such a legal provision, however, would not be without a challenge. One of the most pressing questions would be the issue of fault in the case of parental liability.

According to Article 13(1) of the ECN+ Directive, competition authorities may impose fines where undertakings – intentionally or negligently – infringe Article 101 or 102 TFEU. This is repeated in recital 42, which stresses the fact that, ‘in accordance with the Charter of Fundamental Rights of the European Union, in proceedings before national administrative competition authorities or, as the case may be, in non-criminal judicial proceedings, fines should be imposed where the infringement has been committed intentionally or negligently’. Thereby, establishing fault is required for the imposition of fines for competition law infringements.

One would expect that fault shall be interpreted on the basis of national legal provisions and case-law. However, recital 42 of the ECN+ Directive says that ‘[t]he notions of intent and negligence should be interpreted in line with the case law of the Court of Justice of the European Union on the application of Articles 101 and 102 TFEU and not in line with the notions of intent and negligence in proceedings conducted by criminal authorities relating to criminal matters’. Although it may, in fact, be that the notions of intent and negligence do not need to live up to a strict standard of these notions under criminal law, it could nevertheless be argued that it is important to leave room for the national courts and competition authorities to interpret these notions in line with their national laws.

Having said this, it could be recalled that the CJEU has held that parent companies may be considered liable for the competition law infringements committed by their subsidiaries. In *European Commission v. Siemens*,<sup>23</sup> the CJEU held that when ‘an economic entity infringes the competition rules, it is for that entity, in accordance with the principle of personal responsibility, to answer for that infringement’.<sup>24</sup> Hence, on the one hand, the CJEU speaks about personal liability in the case of competition law infringements. On the other hand, however, the CJEU said that ‘[...] in certain circumstances, a legal person who is not the perpetrator of an infringement of the competition rules may nevertheless be penalised for the unlawful conduct of another legal person, if both those persons form part of the same economic entity and thus constitute the undertaking that infringed Article 81 EC’.<sup>25</sup> Accordingly, the

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<sup>23</sup> CJEU, Cases C-231/11 P to C-233/11 P, *European Commission v. Siemens AG Österreich and others*, 10 April 2014, ECLI:EU:C:2014:256.

<sup>24</sup> *Ibidem*, para. 44 (with further references).

<sup>25</sup> *Ibidem*, para. 45.

liability can be attributed to the parent company under the condition that those companies ‘form part of the same economic entity’.

In the words of the CJEU:

‘[...] the conduct of a subsidiary may be imputed to the parent company in particular where, although having separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. [...] The Commission will thus be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary.’<sup>26</sup>

Thereby, the attribution of liability to the parent company hinges on the fact that a subsidiary ‘does not decide independently’, but rather follows the instructions of the parent company.

Furthermore, the CJEU, in the *AKZO* case, explained that ‘[...] the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement’.<sup>27</sup> Moreover, according to the CJEU, ‘[...] it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market’.<sup>28</sup>

Thus, according to the case-law of the CJEU, the parent company may be held liable for the competition law infringement of its subsidiary if such a parent company exercises a decisive influence on such a subsidiary, so that the latter does not decide on its behavior independently, but rather follows the instructions of the parent company. Personal liability is thereby substituted by the presumption of liability on the basis of exercising decisive influence by the parent company upon the subsidiary.

In Lithuania, the Supreme Administrative Court of Lithuania has confirmed competition law liability on the basis of the ‘single economic entity’

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<sup>26</sup> *Ibidem*, paras 46, 48 (with further references).

<sup>27</sup> CJEU, Case C-97/08 P, *Akzo Nobel NV and others v. Commission of the European Communities*, 10 September 2009, ECLI:EU:C:2009:536, para. 59.

<sup>28</sup> *Ibidem*, para. 61.

doctrine.<sup>29</sup> The Court, in a case on the compliance of the actions of shipping agents with Article 5 of the Lithuanian Competition Law (the national equivalent to Article 101 TFEU), held that one of the main criteria of a single economic entity under competition law is the scope of independence of undertakings when adopting their decisions related to their behavior in the market. In this regard, referring to the 'AKZO presumption' that holding 100% of the shares implies that a parent company makes a decisive influence on its subsidiary,<sup>30</sup> the Court held that it was sufficient to show that a parent company possessed all the capital of a subsidiary in order to make a presumption that such a parent company exercised a decisive influence on a subsidiary. Thus, the company, which had 90% of the shares of its subsidiary and which could unilaterally adopt all the decisions, was held to constitute a single economic unit together with its subsidiary and thus to be jointly liable under competition law.

It is noteworthy, however, that in another case – a case, which was related to advertising laws,<sup>31</sup> the Supreme Administrative Court of Lithuania annulled the Competition Council's decision,<sup>32</sup> which was based on joint liability. The Court thereby referred to the ruling of the Constitutional Court of the Republic of Lithuania,<sup>33</sup> according to which, if the sanctions, which are foreseen in the law, in their severity amount to criminal law sanctions, no matter to which kind of liability they refer (criminal, administrative or other), such sanctions have to be followed by respective procedural guarantees, which derive from the Constitution of the Republic of Lithuania, *inter alia*, Article 31. It was stressed by the Constitutional Court that Article 31 of the Constitution of the Republic

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<sup>29</sup> Judgement of the Supreme Administrative Court of Lithuania of 7 April 2014, Case No. A552-54/2014. In this regard, the Supreme Administrative Court of Lithuania agreed with the findings of the Competition Council, although the decision of the latter was partly changed by the Court mostly with regard to the amount of the imposed fines (Decision of the Competition Council of the Republic of Lithuania on the compliance of the actions of the undertakings providing shipping agency services and other services related to shipping and of their association with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania and Article 101 TFEU, 8 December 2011, No. 2S-25).

<sup>30</sup> CJEU, Case C-97/08 P, *Akzo Nobel NV and others v. Commission of the European Communities*, 10 September 2009, ECLI:EU:C:2009:536, para. 60.

<sup>31</sup> Judgement of the Supreme Administrative Court of Lithuania of 18 June 2015, Case No. A-903-624/2015.

<sup>32</sup> Decision of the Competition Council of the Republic of Lithuania on the compliance of actions of UAB 'Nacionalinis žalos ir skolų išieškojimo centras' and UAB 'Tikroji turto kaina' with the requirements of Article 5 of the Law on Advertising of the Republic of Lithuania and Article 15 of the Law on Competition of the Republic of Lithuania, 19 December 2013, No. 2S-15.

<sup>33</sup> Ruling of the Constitutional Court of the Republic of Lithuania of 3 November 2005, Case No. 02/03-03/03-04/03-05/03-39/03-05/04-16/04-02/05-04/05.

of Lithuania should not be interpreted as applicable only to persons who may be held liable under criminal law. Furthermore, according to the Constitutional Court, the latter imperative has to be taken into account also in the cases when the sanctions, even if they are titled in the law as ‘economic sanctions’, in their severity amount to criminal sanctions. In such a case, it was said, the procedural guarantees – that derive from the Constitution of the Republic of Lithuania – for persons who may be subject to administrative liability have to be foreseen in the respective laws.<sup>34</sup> The Supreme Administrative Court of Lithuania stressed that, according to Article 31(4) of the Constitution of the Republic of Lithuania, a penalty can be imposed only on the basis of the law. In this regard, the Court referred to another ruling of the Constitutional Court of the Republic of Lithuania,<sup>35</sup> according to which, the aforementioned legal norm of the Constitution of the Republic of Lithuania means that a penalty cannot be imposed on the basis of any kind of legal act, but, instead, it can be imposed only on the basis of the law.<sup>36</sup> The Supreme Administrative Court noted that the laws of Lithuania did not foresee joint liability for the infringements of advertising laws. It was stressed that, in contrast to civil liability, joint liability is not possible in the cases of criminal and administrative liability, since the application of a joint liability in such cases would eliminate the possibility to individualize the liability of separate subjects – a fact that contradicts the goals of criminal and administrative liability. Importantly though, with regard to the decision that was judicially reviewed, the Supreme Administrative Court of Lithuania noted that the deficiencies in terms of that the liability was not specified with regard to each undertaking, which, from a legal point of view, were separate, even if they were related, could not be corrected by the Supreme Administrative Court, since this, it was said, could raise the risk of infringing the principle of *non reformatio in peius*. As a result, the Supreme Administrative Court referred the case back to the Competition Council.

Thus, although the Supreme Administrative Court of Lithuania, on the one hand, has affirmed the ‘single economic entity’ doctrine, it, on the other hand, stresses the importance of the individualization of liability in administrative proceedings – a fact, which comes close to the requirement of fault. Furthermore, the individualization of liability would also imply that the decision or the judgement finding an infringement should clearly state which companies are liable for what and to what extent.

In contrast, the CJEU held in the *European Commission v. Siemens* case that the European Commission, while imposing fines on the basis of joint liability

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<sup>34</sup> *Ibidem*, Part II of the legal findings of the judgement, para. 10.4.

<sup>35</sup> Ruling of the Constitutional Court of the Republic of Lithuania of 11 January 2001, Case No. 7/99-17/99.

<sup>36</sup> *Ibidem*, Part III of the legal findings of the judgement.

pursuant to Article 23(2) of Regulation 1/2003, does not have an obligation ‘to determine the shares to be paid by those held jointly and severally liable from the perspective of their internal relationship’.<sup>37</sup> It was said that ‘[o]n the contrary, the objective of joint and several liability resides in the fact that it constitutes an additional legal device available to the Commission to strengthen the effectiveness of the action taken by it for the recovery of fines imposed for infringement of the competition rules, since that mechanism reduces for the Commission, as creditor of the debt represented by such fines, the risk of insolvency, which is part of the objective of deterrence pursued generally by competition law [...]’.<sup>38</sup> The internal allocation of the payment of the fine of those held jointly liable was said to be an issue ‘to be resolved at a later stage’,<sup>39</sup> so that ‘it is for the national courts to determine those shares, in a manner consistent with EU law, by applying the national law applicable to the dispute’.<sup>40</sup>

It could be questioned, however, whether the effective enforcement of competition law in terms of the recovery of fines should undermine the application of sound legal principles, including those on personal liability. Instead, it could be argued that parental liability could be established in exceptional circumstances showing that the parent company exercised a decisive influence on the subsidiary thereby depriving the latter of independent decision-making. In such a way, the attribution of liability would be based, if not on the intent, then at least on negligence, in terms of the deficits in the management of the company, for which a parent company may be held to be liable. In such cases, it should also be possible to individualize liability by saying to what extent companies are held liable for their contributions to the infringement, thus, without leaving the determination of the shares to be paid by those companies for ‘a later stage’ (as suggested by the CJEU in the case cited above).

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<sup>37</sup> CJEU, Cases C-231/11 P to C-233/11 P, *European Commission v. Siemens AG Österreich and others*, 10 April 2014, ECLI:EU:C:2014:256, para. 58 (‘While it follows from Article 23(2) of Regulation No 1/2003 that the Commission is entitled to hold a number of companies jointly and severally liable for payment of a fine, since they formed part of the same undertaking, it is not possible to conclude on the basis of either the wording of that provision or the objective of the joint and several liability mechanism that that power to impose penalties extends, beyond the determination of joint and several liability from an external perspective, to the power to determine the shares to be paid by those held jointly and severally liable from the perspective of their internal relationship.’).

<sup>38</sup> *Ibidem*, para. 59 with further references.

<sup>39</sup> *Ibidem*, para. 60: ‘The determination, in the context of the internal relationship of those held jointly and severally liable for payment of a fine, of the shares each of them is required to pay does not pursue that dual objective. That is a contentious issue, to be resolved at a later stage, and, in principle, the Commission no longer has any interest in the matter, where the fine has been paid in full by one or more of those held liable.’

<sup>40</sup> *Ibidem*, para. 62.

Finally, it should be mentioned that the ECN+ Directive, in recital 42, gives a possibility to the Member States to foresee objective liability for competition law infringements. Recital 42 of the ECN+ Directive stipulates that the requirement of fault is ‘without prejudice to national laws under which the finding of an infringement is based on the criterion of objective liability, provided that it is compatible with the case law of the Court of Justice of the European Union’. In Lithuania, however, such objective liability does not seem to exist. The Supreme Administrative Court of Lithuania held in the case *G4S*<sup>41</sup> that competition law liability is based on fault – the latter may be in a form of an intent or negligence, but, in any case, the applicability of liability without fault was said to be inappropriate.

Thus, the implementation of parental liability pursuant to Article 13(5) of the ECN+ Directive may prove to be challenging. This is not only due to the fact that the notion of parental liability under EU competition law may, by itself, be controversial (a critical analysis on parental liability under EU competition law in: Kalintiri, 2018). In Lithuania, the controversies also exist in the case-law of the Supreme Administrative Court of Lithuania, which, on the one hand, seems to confirm the ‘single economic entity’ doctrine, yet, on the other hand, and in line with the case-law of the Constitutional Court of the Republic of Lithuania, holds that joint liability is not possible in administrative proceedings, which rest on the principle of the individualization of liability. In fact, a word of caution should be expressed about using a too broad interpretation of the ‘single economic unit doctrine’, which may, at the end of the day, result in (parental) liability without fault. It remains to be seen how the ECN+ Directive will be implemented in Lithuania in this regard. One of the options, as stated above, would be to stipulate in the law that parent companies may be liable for the competition law infringements of their subsidiaries leaving it for the practice to interpret and further develop this legal provision.

#### 4. Leniency

The ECN+ Directive elaborates in detail on the leniency programmes<sup>42</sup> for secret cartels (Articles 17–23). Recital 50 explains that such programmes

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<sup>41</sup> Judgement of the Supreme Administrative Court of Lithuania of 8 April 2014, Case No. A502-253/2014, paras 95–105.

<sup>42</sup> Article 2(1) point 16 of the ECN+ Directive defines a leniency programme as ‘a programme concerning the application of Article 101 TFEU or a corresponding provision under national competition law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant’s knowledge of, and

are ‘a key tool for the detection of secret cartels’ and thus contribute to an effective competition law enforcement.

It is, first of all, noteworthy that, although the ECN+ Directive stresses the importance of reducing differences as regards leniency programmes in the EU Member States and thereto related legal certainty,<sup>43</sup> the relevant legal provisions of the ECN+ Directive address secret cartels – a concept that may be subject to interpretation in itself. According to the definition provided by the ECN+ Directive, a secret cartel ‘means a cartel, the existence of which is partially or wholly concealed’ (Article 2(1) point 12). Recital 53 explains that ‘[f]or a cartel to be considered a secret cartel, not all aspects of the conduct need to be secret. In particular, a cartel can be considered a secret cartel when elements of the cartel which make the full extent of the conduct more difficult to detect are not known to the public or the customers or suppliers’. Such an explanation does not provide much clarity, so that the implementation of the relevant legal provisions may be challenging when it is not entirely clear what the subject matter of the relevant rules is in the first place.

In any case, Article 17(1) of the ECN+ Directive stipulates that its legal provisions will be ‘without prejudice to national competition authorities having in place leniency programmes for infringements other than secret cartels or leniency programmes that enable them to grant immunity from fines to natural persons’. In fact, the leniency programme that is available under the Lithuanian Law on Competition is broader than the legal provisions of the ECN+ Directive, which addresses secret cartels, that is agreements between competitors. According to Article 38(1) of the Law on Competition, an undertaking, which is a participant of an agreement between competitors or of an agreement between non-competitors on direct or indirect price fixing, foreseen in Article 5(1) point 1 of the Law on Competition, may apply for leniency. Thus, the Lithuanian leniency programme covers not only agreements between competitors, but also those of non-competitors in the case of price fixing. In fact, when the Lithuanian leniency programme was introduced back in 1999, it covered the participants of an agreement between competitors and dominant undertakings.<sup>44</sup> The applicability of the leniency programme to dominant undertakings was deleted from the law in 2009.<sup>45</sup> In 2012, a new edit

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role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction of, fines for its involvement in the cartel’.

<sup>43</sup> See recitals 50–51 of the ECN+ Directive.

<sup>44</sup> See the Law on Competition of the Republic of Lithuania of 23 March 1999, No. VIII-1099, Article 43.

<sup>45</sup> Law of the Republic of Lithuania amending and supplementing Articles 1, 3, 4, 10, 13, 14, 19, 20, 23, 24, 26, 28, 29, 30, 31, 40, 41, 42, 43, 44, 49 and the Annex of the Law on Competition, 9 April 2009, No. XI-216, Article 19.



of the Law on Competition was issued,<sup>46</sup> where the legal provisions related to the leniency programme were also amended. Notably, they were broadened to include also the agreements between non-competitors on a direct or indirect price fixing (Article 38(1) of the amended Law on Competition).

Generally, the conditions for leniency are set in Article 38(1) of the Law on Competition, which stipulates that an undertaking, which is a participant of a prohibited agreement between competitors or a participant of a prohibited agreement between non-competitors on a direct or indirect price fixing, as foreseen in Article 5(1) point 1 of the Law on Competition, may be exempted from the fine, which is foreseen for such an infringement, if the undertaking, in the request for immunity, provided all the information about such an agreement to the Competition Council and if all of the following conditions are fulfilled:

- 1) the undertaking in the request for an exemption provided the information before the opening of the investigation on the agreement;
- 2) the undertaking is the first one of the participants of the prohibited agreement to provide such information in the aforementioned request;
- 3) the undertaking in the request submits all the information known to it about the prohibited agreement and together with it submits the evidence confirming the circumstances described therein;
- 4) the undertaking co-operates with the Competition Council during the investigation;
- 5) the undertaking was not the initiator of the prohibited agreement and did not induce other undertakings to participate in such an agreement.

More detailed criteria and the procedures for immunity from fines and for their reduction are provided in the Rules on Immunity from fines and reduction of fines for the parties to prohibited agreements (hereinafter: Leniency Rules), which were adopted by the Competition Council in 2008.<sup>47</sup> Leniency Rules elaborate on both the immunity from fines as well as fine reductions. However, Leniency Rules, since they were adopted in 2008 (thus, before a legal amendment of the Law on Competition broadening the scope of leniency in terms of non-horizontal agreements), apply to horizontal agreements only (point 2 of the Leniency Rules).

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<sup>46</sup> Law of the Republic of Lithuania amending the Law on Competition, 22 March 2012, No. XI-1937. The law entered into force on 1 May 2012.

<sup>47</sup> Resolution No. 1S-27 of the Competition Council of the Republic of Lithuania, Rules on immunity from fines and reduction of fines for the parties to prohibited agreements, 28 February 2008 (available in English at: <http://kt.gov.lt/en/rules-on-immunity-from-fines-and-reduction-of-fines-for-the-parties-to-prohibited-agreements>).

As it may be seen from Article 38(1) of the Law on Competition, a big portion of the requirements for leniency will reflect those enshrined in the ECN+ Directive. However, there may be some important differences.

As regards the requirements for leniency, it could, first of all, be noted that the ECN+ Directive does not expressly say that the information by a leniency applicant has to be provided before the competition authority starts the investigation. Instead, it is said that the leniency applicant has to be the first one to submit evidence, which enables the competition authority to carry out a targeted inspection (Article 17(2) of the ECN+ Directive). Although these requirements are related, some amendments in the national law may be needed. Amendments may also be needed when it comes to the form of leniency statements. Leniency Rules, point 14, foresee that a leniency applicant has to submit the leniency application in writing. The ECN+ Directive, however, stipulates that such a request may also be submitted orally as well as in any official language of the EU where that is bilaterally agreed upon by the competition authority and the leniency applicant (Article 20 of the ECN+ Directive).

Importantly though, Article 17(3) of the ECN+ Directive stipulates that immunity from fines should not be granted to those undertakings, which coerced other undertakings ‘to join a secret cartel or to remain in it’. The Lithuanian Law on Competition (Article 38) speaks about an initiator of a prohibited agreement. According to Article 38(1) of the Law on Competition, such initiators of the prohibited agreement or those, which induced other undertakings to participate in the prohibited agreement, cannot benefit from the exemption of a fine. However, neither the Law on Competition nor the Leniency Rules explain what the terms ‘initiator’ or ‘the undertaking, which induced others to participate’ mean. The ECN+ Directive uses the term ‘to coerce’. Apart from the differences in wording, this may also have important legal consequences, since the terms ‘an initiator’, ‘an inducer’ and ‘a coercer’ are not identical. The latter is a stronger one and may provide more legal certainty when applying leniency rules. After all, a clarification about who may not benefit from immunity from fines may help potential leniency applicants to better evaluate their position before submitting an immunity request. It is also noteworthy that, although the initiators of a prohibited agreement cannot benefit from immunity from fines, they may, nevertheless, apply for a reduction of a fine, as it is foreseen in the Leniency Rules (point 9) and as this does not seem to contradict the relevant legal provisions of the ECN+ Directive (Article 18, Article 17(3) of the ECN+ Directive).

Furthermore, the ECN+ Directive makes a difference between the immunity from fines and their reduction. Whereas in the case of the former, it is required that the applicant should be the first one to inform the competition authority

about the competition law infringement and to provide evidence (Article 17(2) letter c) of the ECN+ Directive), such a requirement is not found among those for a reduction of the fine (Article 18 of the ECN+ Directive). The Lithuanian Leniency Rules, however, contain this requirement in both cases, namely, the application for the immunity from fines (point 3) as well as the request for a reduction of fines (point 8). Thereby, the Lithuanian rules set stricter requirements than the ECN+ Directive and will thus probably have to be amended.

When it comes to cases when the applicant for immunity or a reduction of the fine submits the application, but asks to be granted a place in the queue for leniency in order to gather the necessary information and evidence (the so-called marker for applications for immunity from fines (Article 21 of the ECN+ Directive)), the ECN+ Directive elaborates on the markers for such applications only in the cases of immunity requests. The Lithuanian Leniency Rules, however, foresee the possibility of such markers in the case of both applications for immunity and for a reduction of fines (point 17). This, however, does not seem to contradict the ECN+ Directive, which, in Article 21(5) and recital 58, explains that Member States may allow undertakings to request a place in the queue for leniency also in the cases of the application for a reduction of fines.

Finally, the ECN+ Directive requires Member States to ensure that 'current and former directors, managers and other members of staff of applicants for immunity from fines to competition authorities are fully protected from sanctions imposed [...] for violations of national laws that pursue predominantly the same objectives to those pursued by Article 101 TFEU [...]' (Article 23(1) of the ECN+ Directive). The Lithuanian Law on Competition foresees sanctions for managers of undertakings if they contributed to the prohibited agreement between competitors or an abuse of a dominant position (Article 40). The latter legal norm was included in the Law on Competition in 2011.<sup>48</sup>

According to Article 40(3) of the Law on Competition, a sanction may be not imposed on a manager of an undertaking who has been exempted from the fine under Article 38 of the Law on Competition or on a manager of an undertaking who submitted the information to the Competition Council as required by Article 38(1) of the Law on Competition about the infringements committed by the undertaking, with which the employment relationship was terminated at the time when the information was submitted to the competition authority. The ECN+ Directive stresses the importance of the timing when

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<sup>48</sup> Law of the Republic of Lithuania amending and supplementing Articles 3, 40, 42 of the Law on Competition and supplementing the Law on Competition with Articles 44<sup>1</sup> and 44<sup>2</sup>, 21 April 2011, No. XI-1347.

the applications for immunity should be submitted by managers. Namely, Article 23(1) letter c) of the ECN+ Directive stipulates that the application for immunity from fines of the undertaking should predate ‘the time when those current or former directors, managers and other members of staff concerned were made aware by the competent authorities of the Member States of the proceedings leading to the imposition of sanctions referred to in this paragraph’.<sup>49</sup> However, the ECN+ Directive, as it was said, does not impose the requirement on the leniency applicant to provide information before the competition authority starts the investigation. Should this requirement, which is currently enshrined in the Lithuanian Law on Competition, be deleted while implementing the provisions of the ECN+ Directive, a legal norm elaborating on the timing of the submission of leniency applications by managers may need to be included in the national legal norms.

Currently, the Lithuanian Law on Competition does not foresee a possibility to mitigate sanctions imposed on the managers; instead, the relevant legal provisions enable the competition authority not to apply sanctions. The ECN+ Directive, however, in recital 66, stipulates that ‘Member States are not precluded from also protecting the current or former directors, managers and other members of staff of the applicants for reduction of fines from sanctions, or from mitigating such sanctions’. Thus, it may be considered to include in the national laws the possibility to mitigate sanctions to managers in the case of leniency.

## 5. Interim measures

Article 11 of the ECN+ Directive elaborates on the application of interim measures by the competition authorities.<sup>50</sup> Pursuant to the Lithuanian Law on Competition, the national competition authority has the possibility to apply

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<sup>49</sup> See also recital 64 of the ECN+ Directive, which says: ‘One of these conditions is that the application for immunity should predate the time when those individuals were made aware by the competent national authorities of the proceedings that could lead to the imposition of sanctions. Such proceedings include the moment those individuals become suspected of violating such national laws.’

<sup>50</sup> Article 11(1) of the ECN+ Directive reads: ‘Member States shall ensure that national competition authorities are empowered to act on their own initiative to order by decision the imposition of interim measures on undertakings and associations of undertakings, at least in cases where there is urgency due to the risk of serious and irreparable harm to competition, on the basis of a prima facie finding of an infringement of Article 101 or Article 102 TFEU. Such a decision shall be proportionate and shall apply either for a specified time period, which may be renewed in so far that is necessary and appropriate, or until the final decision is taken. The national competition authorities shall inform the European Competition Network of the imposition of those interim measures.’

such measures. Importantly though, Article 26(1) of the Law on Competition stipulates that interim measures will apply until the final decision of the Competition Council in a particular case is adopted.<sup>51</sup> The ECN+ Directive, however, says that interim measures shall apply either ‘for a specified time period’ or ‘until the final decision is taken’ (Article 11(1) of the ECN+ Directive). Moreover, such a specified time period may be renewed, however, upon the condition that it is ‘necessary and appropriate’. This may be important bearing in mind the effect that interim measures may have on the companies, which are the addressees of such measures. Following the legal provisions of the ECN+ Directive, the application of interim measures until the final decision of the competition authority is taken is but one of the options. In other cases, the application of such measures would have to be limited in time and, although the possibility exists for a renewal of such a specified time, the competition authority would be able to do this only upon showing that such a renewal is necessary and appropriate.

The fact that interim measures may be applied for a specific period of time, rather than until the final decision of the competition authority is taken, may be important in fast-moving markets. The ECN+ Directive stresses the role of the effective application of interim measures in fast-moving markets.<sup>52</sup> However, in fast-moving markets in particular, the application of a broad scope of interim measures may have to be considered with caution and weighed against the principle of proportionality. Bearing in mind the rapid developments of the markets, the application of such measures for the whole duration of the investigation (that is, until the final decision of the competition authority) may, under some circumstances, cause negative effects not only on the companies, but on the whole market as well. Hence, the beauty of the ECN+ Directive, when it comes to interim measures, might be that it foresees two types of such measures, namely, broad measures (applicable until the final decision of the competition authority) and narrow measures (applicable for a specific period of time).

It could also be noted that the ECN+ Directive requires that national competition authorities have the power to impose interim measures by their decision (Article 11(1) of the ECN+ Directive). According to Article 26(2)

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<sup>51</sup> According to Article 26(1) of the Lithuanian Law on Competition, the Competition Council may, in urgent cases, when there is sufficient information about the infringement of the Law on Competition and in order to avoid significant damage or irreparable consequences for the interests of undertakings or the society, adopt the decision to apply interim measures, which are necessary for the enforcement of the Competition Council’s final decision.

<sup>52</sup> Recital 38 of the ECN+ Directive explains that ‘[t]here is a particular need to enable all competition authorities to deal with developments in fast-moving markets and therefore to reflect within the European Competition Network on the use of interim measures and to take this experience into account in any relevant soft measure or future review of this Directive’.

of the Law on Competition, the Competition Council may apply two types of interim measures: firstly, it may oblige the undertakings to terminate an illegal activity, and, secondly, it may, yet only upon receiving an authorization from the Vilnius Regional Administrative Court, oblige the undertakings to perform certain actions if a failure to perform them may result in a serious damage to the interests of other undertakings or of the society, or may cause irreparable consequences.<sup>53</sup> The decision of the Competition Council on the application of interim measures (both types) may be appealed to the Vilnius Regional Administrative Court within one month from the adoption of such a decision; however, filing of a complaint does not suspend the application of interim measures (Article 24(4) of the Law on Competition). Bearing in mind that Article 11(2) of the ECN+ Directive stresses the importance of the ‘expedited appeal procedures’, it might be that some amendments of the aforementioned legal provision may be needed.

### III. Conclusions

In Lithuania, some of the legal provisions of the ECN+ Directive have already been implemented in the national law. Yet, the amendments to the Law on Competition related to commitment decisions may create legal issues. Although the lack of significant damage caused to the interests safeguarded by the Law on Competition is deleted from the requirements for accepting commitments, thereby widening the discretion of the Competition Council to accept them, the ambiguity of the wording of the new legal provision on commitment decisions (that is, whether the competition authority may accept the commitments without conducting a full investigation and making a final decision on whether a competition law infringement occurred) may render this legal provision subject to interpretation and may thus have a negative effect not only as regards legal certainty, but also when it comes to an effective application of this important legal instrument, which was created under EU competition law with the purpose of making competition law procedures

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<sup>53</sup> In the case when the Competition Council has to get an authorisation from the Vilnius Regional Administrative Court to apply interim measures, Article 27(4) of the Law on Competition foresees that the aforementioned court has to analyse such a request within 72 hours. If the request is rejected, the Competition Council may lodge a complaint with the Supreme Administrative Court of Lithuania within 7 days (Article 27(5) of the Law on Competition). The latter has to analyse the complaint within 7 days (Article 27(6) of the Law on Competition). The decision of the Supreme Administrative Court of Lithuania is final (Article 27(7) of the Law on Competition).

more efficient. Further, the Lithuanian Law on Competition lists one legal ground for the Competition Council to reopen the procedures, namely, the appearance of new circumstances. Should this legal ground be interpreted narrowly, the investigation could not be reopened in cases such as, for example, when the companies act contrary to the commitments. Such a situation would be unfortunate, since it would leave the competition law problem identified by the competition authority unsolved – a circumstance, which is of utmost importance while accepting the commitments in the first place.

Further amendments will have to be made in the national law in order to fully implement the ECN+ Directive. In this regard, a careful implementation of the legal provisions related to fines may be needed. While difficulties may arise when calculating fines for the associations of undertakings, it is important that the rules on calculating such fines, as well as the rules on an effective recovery of a fine, do not unjustifiably extend to cover the turnover of the members of the association. Furthermore, since the ECN+ Directive elaborates on the maximum amount of the fine and enshrines the ‘legal minimum’ in the case of such a fine, unclarities remain as regards the application of such a ‘legal minimum’ in relation to the legal provisions establishing the ‘legal maximum’ when imposing the fine. Also, since such rules are missing from Regulation 1/2003, applicable to the European Commission while enforcing EU competition law, it might be that national competition authorities will have stronger powers than the European Commission while imposing fines. In any case, it is important that the implementation of the legal provisions on the ‘legal minimum’ in the case of the maximum amount of the fine, the goal of which is to impose deterrent fines on undertakings, does not lead to the over-enforcement of competition law, raising the risk of expropriating the companies.

Among the legal provisions of the ECN+ Directive that will have to be implemented, the legal provisions on parental liability may turn out to be the most challenging. Apart from the fact that the ECN+ Directive provides rather loose criteria in this regard, the attribution of the liability of the subsidiaries to their parent companies on the basis of the notion of undertakings in terms of a single economic unit, first and foremost, raises the question of fault. The latter is an important aspect of personal liability. Although the Supreme Administrative Court of Lithuania, following the case-law of the CJEU, has confirmed joint liability of the companies forming a single economic unit, in another case (related to advertising laws), the same court held that joint liability was not possible in administrative proceedings due to the fact that such liability eliminates the possibility to individualize the liability of separate subjects. In light of this, and bearing in mind that the effective enforcement of competition law, particularly in terms of the recovery of fines, should

not undermine the application of sound legal principles, including those on personal liability, a cautious approach may be needed when implementing and further enforcing the legal norms on parental liability.

Whereas the implementation of the legal provisions on parental liability may be the most challenging, leniency may require a higher amount of legal provisions devoted to the implementation of the ECN+ Directive. Among others, important changes in the national law may have to be made with regard to the notion of ‘coercer’ as well as fine-tuning the differences between the legal requirements for granting immunity from fines and merely reducing them, including, but not limited to the cases when the leniency applications were submitted by managers of companies.

Finally, changes in the national law may also have to be made as regards the application by the Competition Council of interim measures. The rules limiting the duration of the application of such measures may be highly important for fast-moving markets and may thus have a positive effect.

For the most part, the ECN+ Directive still has to be implemented in Lithuania. However, the implementation of some of the legal provisions of the ECN+ Directive, such as those related to fines or parental liability, raise the risk of over-enforcement of competition law. Thus, a cautious approach may be needed while implementing these legal provisions in order not to beat their purpose and to provide a legal framework for a more efficient enforcement of competition law, yet not its over-enforcement.

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