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The trend for increased use of economic analysis in merger cases continues. However, the coronavirus crisis has had a negative effect on the number of merger filings. But most lawyers expect this decrease to be temporary.

This article is based on interviews with prominent competition law practitioners from the law firms Cobalt, Ellex, Sorainen and TGS Baltic, as well as with the legal and the economist team of the Competition Council of the Republic of Lithuania (LCC).

Economic analysis continues to play an important role in merger investigations

In 2019, the LCC investigated in total 23 merger applications and four of them entered Phase II investigations. First, the LCC approved an acquisition by Reitan Convenience of Caffeine coffee shops without remedies, despite objections from the market. The LCC has applied, inter alia, a closeness of competition analysis based on before and after scenarios. Second, the LCC approved an acquisition by Avitela of Elektromarkt, after a complex local geographic market investigation. The focal point of discussion in this case was to what extent online sales create competitive pressure on offline sales of electronic goods. And notably, in this case, the LCC took into account online channels when evaluating possible effects of this merger. Third, the LCC issued objections to CGates' acquisition of Splius (both companies providing retail pay-TV and retail internet access services) after which the parties abandoned their plans to implement the transaction. Lastly, after the Phase II investigation, the LCC approved a merger in metal recycling market between L3S and Polimeta.

According to the LCC, since the start of the covid-19 pandemic, there has been a drop in the number of transactions notified to the LCC. The majority of interviewees noted that lockdown did not affect the speed of merger investigations by the LCC. The LCC explained that none of the transactions required opening Phase II investigations and subsequently extensive collection of information, which lends itself well to remote work, which was introduced during the pandemic.

One recent example where economists were engaged early in the process is a network sharing between two mobile operators, Bite and Tele2, mainly in connection with the rollout of 5G network infrastructure in Lithuania and Latvia. Our interviewees expect economic analysis to play a major role in this assessment process, which is still in its early stage.

Abuse of dominance cases and follow-on damage claims are very rare

Since January 2019, the LCC has not started any new abuse of dominance cases. In addition, the LCC has terminated its investigation in the postal sector following Lithuanian Post's commitments to inform other postal service providers about any pricing changes in advance, apply transitional period for its competitors and proportionally adjust its pricing in public tenders. One of the economic tools used in the Lithuanian Post's alleged abuse of dominance case was an as-efficient competitor test.

In addition, there were no new follow-on damage cases. Some lawyers mentioned that lack of robust infringement decisions adopted by the LCC is one of the main reasons for the low number of damages claims. However, it may be argued that claimants have not been active enough in launching stand-alone cases. For example, follow-on damages claims are not being brought in bid-rigging cases due to lack of incentives on the part of contracting authorities (bid-rigging constitutes considerable portion of all the LCC's cartel decisions). Furthermore, underdevelopment of class actions could also be one of the reasons (for example, the LCC's decision regarding driving schools' cartel did not lead to any follow-on damages actions despite clearly established price increase).

The covid-19 pandemic has not troubled LCC's operations (yet)

The LCC was ready for the isolation because its employees were used to remote working and because at the point when mandatory self-isolation was introduced, a big part of the LCC's investigations was at the final stages. The LCC has noted, however, that the initial stages of investigation (eg, in cartel cases) would be problematic under the lockdown because there could be difficulties in collecting evidence. The LCC has the possibility to use dawn raids in private houses, but it has not yet exercised this measure, and a lockdown would make such raids more difficult to carry out.

On the positive note, our interviewees noted that the pandemic has made it possible to have important meetings with the LCC digitally. This allows foreign experts to participate in meetings online and, in turn, this

reduces the cost of hiring foreign experts for parties. They hope that such practice will be maintained by the LCC in the future. However, some lawyers noted that virtual meetings with the LCC have been slightly less effective than the physical ones, since people tend to share less thoughts virtually than physically.

LCC supported granting authorities on covid-19 state aid measures

In 2020, the LCC has supported the granting authorities in developing state aid measures in line with the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak (COVID-19 Communication), which introduced new rules and unusual notification practices. The LCC took a hands-on approach in notifying these state aid measures to the European Commission and ensuring their swift approval. During this period the European Commission approved 10 Lithuanian state aid measures under the COVID-19 Communication, amounting to more than €1 billion. At the end of July 2020, none of the 10 Lithuanian state aid measures had been contested by other member states or competitors of the beneficiaries.

The ECN+ Directive has been implemented into Lithuanian law and took effect on 1 October 2020

Our interviewed lawyers highlighted that some of the key changes include: (i) an increased legal maximum amount of the fine for article 101 and 102 TFEU infringements up to 10 per cent of the total worldwide turnover in the business year preceding the NCA's decision; (ii) the right to extend the LCC's merger investigation up to one month (in addition to a possibility to "stop the clock"), which will provide the LCC and the parties with more room for manoeuvre in complicated cases of market concentration; and (iii) a possibility for leniency applicants to apply for Type B immunity (ie, total immunity from fines even after the LCC has opened an investigation).

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Mindaugas Cerpickis acts as an economic consultant at Copenhagen Economics specialising in helping clients in competition and dispute resolution cases. Cerpickis has worked on a number of disputes, merger and abuse of dominance cases, including cases where sector regulation and competition economics intersect, for example, in postal, energy and telecom sectors. Before joining Copenhagen Economics, he worked as a management consultant.



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