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Article

Judicial review of competition law decisions: an empirical study of the Lithuanian context

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ABSTRACT

Commemorating the 20th anniversary since joining the European Union (EU) (together with an obligation to enforce EU competition law), this study evaluates national judgments reviewing the Lithuanian National Competition Council's [known as *Konkurencijos Taryba* (*KT*)] decisions during the 2004–24 period. Building on comprehensive empirical research on judicial review of the KT's decisions, which involved employing both quantitative and qualitative methods, this article aims to capture the main trends and patterns of judicial review in the Lithuanian context, with some comparison to other small European countries. The study covers the KT's decisions in relation to the application of Articles 101 and 102 TFEU (and domestic equivalents), pertaining not only to infringement decisions but also to settlements, commitments, as well as decisions not to launch an investigation or discontinue an investigation. The findings reveal a predominant focus on the national provisions, with only 27 per cent of appealed cases embracing the EU element. As far as the outcomes are concerned, this article notes that the administrative courts mostly confirmed the competition authority's decisions, with any interventions being calibrated in a manner to avoid any encroachment upon the authority's discretion, clearly upholding the concept of judicial deference.

KEYWORDS: Judicial review in Lithuania; competition decisions; empirical research; Konkurencijos Taryba
JEL CLASSIFICATIONS: K21, K23

1. INTRODUCTION

Judicial review plays a crucial role in the enforcement of competition law, forming a fundamental element of due process as well as supporting the credibility and legitimacy of enforcement. Without adequate review, parties may lose trust in the soundness and fairness of competition enforcement. In the context of the European Union (EU), most competition

cases [related to Articles 101 and 102 of the Treaty on Functioning of the European Union (TFEU)] are decided at the national level. Yet, research conducted at the national level is not comprehensive, especially in relation to the rules governing the operation of national judicial review systems, such as small Central and Eastern European countries (CEECs). This article fills this gap by evaluating judicial review of competition decisions in one small CEEC—Lithuania—delving into a thorough analysis built on both quantitative and qualitative research. Some limited comparisons were undertaken with other small CEECs and SEECs (South Eastern European countries). While commemorating the 20th anniversary since joining the EU (together with an obligation to enforce EU competition law), this study covers national judgments reviewing the *Konkurencijos Taryba*'s (KT, the sole authority entrusted with enforcement of competition law in Lithuania) decisions (resolutions) in relation to the application of Articles 101 and 102 TFEU (and domestic equivalents) in Lithuania from 1 May 2004 to 1 May 2024. This article is built on the previous contribution,[1] portraying an expanded version of the empirical study covering 20 years of competition law enforcement while simultaneously identifying tendencies and intricacies of judicial review. In the Lithuanian context, there is no comprehensive research conducted in the field of judicial review of the national competition authority's (NCA) decisions. Previous studies have focused on more general aspects, such as the development of competition law in Lithuania.[2] Those studies, to a limited extent, have also included a general description of the judicial review of administrative decisions. There has also been empirical research undertaken by Grigaravičienė,[3] with the emphasis being placed solely on restrictive agreements in the context of public procurement; *inter alia*, this study also covered judicial review of the KT's decisions in this specific context. In contrast to the previous studies, this article provides comprehensive empirical research on judicial review of the KT's decisions based on Articles 101 and 102 TFEU as well as domestic equivalents, while employing both quantitative and qualitative methods.

Specifically, the article is structured as follows. After this introduction (Section 1), the following two sections set the foundation of the article, with Section 2 providing an overview of competition law enforcement in Lithuania, and Section 3 discusses the appeal process of KT's decisions in Lithuania. The core of the article lies in Sections 4–6, with Section 4 defining the methodology used, followed by Sections 5 and 6 with the emphasis being placed on quantitative and qualitative methods, respectively. The conclusion remarks are then noted in Section 7.

2. OVERVIEW OF COMPETITION LAW ENFORCEMENT

After regaining independence in 1991, Lithuania started major transformations to return to its European roots, and joining the EU was seen as the best solution to achieve this. These transformations, *inter alia*, embraced dealing with outmoded technology; setting up capital markets; creating banking, financial, and monetary systems; overcoming embedded political systems; re-drafting their laws to allow for new forms of economic organizations; and even

[1] A Lithuanian report contributed to the *Study on Judicial Review* of *competition law enforcement in the EU and the UK*, led by B Rodger and others, representing the 27 EU Member States and the UK, with the 2004–21 review period. Available at: Judicial Review of Competition Law Enforcement in the EU: Empirical Mapping 2004–21 | Mapping Judicial Review of National Competition Authorities Competition Law Decisions (mappingcomplawreview.com). This is also a revised version of the chapter, 'Lithuania' (ch 19) in B Rodger and others, *Judicial Review of Competition Law Enforcement in the EU Member States and the UK* (Kluwer Law International 2024).

[2] See, for instance, J Gumbis and others, *Competition Law in Lithuania* (Kluwer 2014); J Gumbis and others *Competition Law in Lithuania* (3rd edn, Kluwer 2019); J Gumbis and others, 'Lithuania' in F Denozza and A Toffoletto (eds), *IEL Competition Law* (Kluwer 2019).

[3] R Grigaravičienė, 'Problems of Qualifying the Agreements Restricting the Competition during the Public Procurement in Lithuanian Law: Theory and Practice' (the Master's thesis, Vilnius 2017) (in Lithuanian).

changing a deep-rooted socialist mentality, as life behind the 'iron curtains' 50 years of occupation left Lithuania far behind western European countries with modern economies.[4]

In preparation for the membership of the EU, Lithuania had to implement modern EU-compliant competition laws and establish attendant institutions as part of the harmonization of their legal framework with the *acquis communautaire*—an essential pre-condition for admittance.[5] Considering that competition itself was non-existent while Lithuania was part of the Soviet Union, competition law presented a new and challenging branch of law, which Lithuania had to face amidst its transition to fully fledged market economies. Among other things, the Lithuanian public administration system also had to change.

In common with other candidate countries at that time, Lithuania had a high degree of flexibility in designing their national competition authorities, yet, ensuring these authorities were independent of government and enjoyed a sufficient level of resources and expertise to deal with competition issues.[6] Lithuania enacted its first Law on Competition (LoC) in 1992.[7] However, the first institutions dealing with competition issues in Lithuania were highly influenced by the government. Pursuant to the 1992 LoC, the Competition Council initially existed within the Agency of Prices and Competition under the Ministry of Economy and was formed on the basis of the former State Price Committee.[8] Following the 1999 LoC, the KT was established, which is an independent body (in terms of decision-making) responsible for the enforcement of competition law in Lithuania. The functions of investigation and decision-making are separate in KT. While investigations are conducted by different divisions (ie anti-competitive agreements investigation group; dominant and public entities investigation group), decisions (final and procedural) are taken by the KT Board. The Board consists of its Chairperson and four Council Members, who are appointed by the President of the Republic of Lithuania upon the proposal of the Prime Minister. The Chairperson and Council Members can serve no more than two consecutive 6-year terms.

In contrast to Estonia, which has enforced national competition law in the form of either criminal offences or misdemeanours,[9] the KT follows administrative enforcement. Lithuania applies the bifurcated judicial model only with regard to the sanctions imposed on individuals.[10] After examination of the case, the KT adopts a resolution that specifies the circumstances of the violation of the LoC, evidence of the fault of the offender, explanations of the offender, the applicant, and other persons submitted to the KT, and their evaluation, reasons for the ruling, and legal basis. Figure 1 details the KT investigation procedure. One must also note that the 2012 amendments to the LoC established the prioritization rules, allowing the KT to set its priorities instead of following on all meritless complaints.[11]

[4] J Malinauskaite, *Merger Control in Post-Communist Countries* (Routledge 2010) ch 4.

[5] For further reading on the intricacies of the joining conditions and their meanings, see H Grabbe, 'European Union Conditionality and the "Acquis Communautaire"' (2002) 23 International Political Science Review 249.

[6] Malinauskaite (n 4).

[7] The Law on Competition, 15 September 1992, No. I-2878. Similarly, Latvia introduced its first competition law in 1991, which entered into force on 1 February 1992. Estonia adopted its first Competition Act on 16 June 1993 which came into force on 1 October 1993. Croatia launched its first modern competition rules in 1995. JP Kaufman, 'On the Development of (Not So) New Competition Systems—Findings from an Empirical Study on Croatia' (2022) 10 Journal of Antitrust Enforcement 326 <https://doi.org/10.1093/jaenfo/jnab018>

[8] Similarly, the first Estonian Competition Board, which was established on 21 October 1993 and was subordinated to the Ministry of Economic Affairs and Communications, also developed from a Price Board.

[9] In light of the ECN+ Directive, there are some current proposals to shift to administrative enforcement. E Parn-Lee, 'Estonia Rapporteur Report' in (n 1).

[10] The Law on Competition of Lithuania has an exception with regard to CEOs where only the Vilnius Regional Administrative Court can impose sanctions (ie disqualification or a financial penalty) on these individuals. See art 41(1) of the Law on Competition 23 March 1999 No VIII-1099 (*No XIII-193, 2017-01-12, announced TAR 2017-01-18, i. k. 2017-01075, as amended*).

[11] Resolution No 1S-89 'Concerning Priority of the Activities of the Lithuanian Competition Council' (Resolution of Priority) on 2 July 2012.

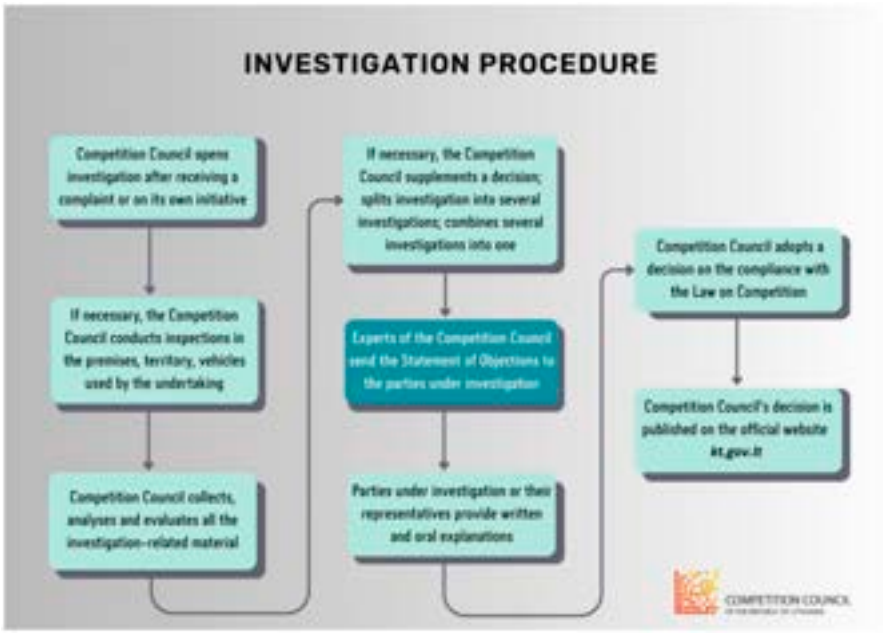

Figure 1. The KT investigation procedure.
Source: The Lithuanian Competition Council (The official website of the Lithuanian Competition Council: kt.gov.lt/en/).

The main objectives of competition policy in the Lithuanian legal system are summarized in the LoC of Lithuania and in the Constitution of Lithuania, which is a supreme law in the Lithuanian Republic.[12] According to Article 46 of the Constitution, 'the law shall prohibit the monopolisation of production and the market, and shall protect freedom of fair competition. The State shall defend the interests of the consumer'. The LoC, on the other hand, imitates the preamble to the TFEU with its overarching reference to 'fair competition', a rather contested notion.[13]

In terms of the anti-competitive provisions, Article 5 of the LoC mirrors Article 101 TFEU (save a 'cross-border trade' element), whereas the national equivalent of Article 102 TFEU is Article 7 (previously, Article 9) LoC.[14] In line with Article 5 of Regulation 1/2003, KT may take the following decisions: (i) require an infringement be brought to an end; (ii) order interim measures; (iii) accept commitments; and (iv) impose fines, periodic penalty payments, or any other penalty provided by the Law on Competition. The first cases in Lithuania were mainly based on unfair competition. In 2000, there were also several infringement cases based on Article 5 as well as Article 9 (now Article 7) LoC. Indeed, the AB

[12] art 7 of the Constitution provides that 'Any law or other act, which is contrary to the Constitution, shall be invalid; 1992, No 33-1014 (30 November 1992). The current Constitution of the Republic of Lithuania was adopted by way of a referendum on 25 October 1992, following the re-establishment of the independence of Lithuania after 50 years of Soviet occupation. For further discussion, see I Jarukaitis and G Švedas, 'The Constitutional Experience of Lithuania in the Context of European and Global Governance Challenges' in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Asser Press, Springer 2019) <https://doi.org/10.1007/978-94-6265-273-6_21> accessed 27 December 2024.

[13] art 1(1) of the Law on Competition, 23 March 1999 No VIII-1099 (*No XIII-193, 2017-01-12, announced TAR 2017-01-18, i. k. 2017-01075, as amended*). For further discussion on fairness, see N Dunne, 'Fairness and the Challenge of Making Markets Work Better' (2021) 84 Modern Law Review 230; K Stylianou and M Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42 Lega Studies 620.

[14] The Law on Competition (n 13).

'Lietuvos Telekomas' (the Lithuanian state-owned Telecom company) was one of the first cases based on abuse of a dominant position to reach both instances of appeal with both courts upholding the KT's infringement decision.[15]

In light of the transposition of the ECN+ directive which intended to empower the competition authorities of Member States to be more effective enforcers and ensure the proper functioning of the internal market,[16] the LoC was amended[17] to incorporate additional safeguards ensuring the KT independence, specifically, that the KT acts independently when enforcing antitrust rules and works in a fully impartial manner, without taking instructions from politicians or other entities, including state institutions and public or private entities. Furthermore, Article 17(4) LoC has been amended by adding an explicit provision that the KT would have sufficient qualified staff, adequate financial, technical, and technological resources to carry out its functions and tasks. It will be interesting to see how this provision will be implemented in practice, as the KT currently has issues in obtaining and retaining qualified personnel. The best university graduates prefer better-paid jobs in the private sector over lower-paid jobs in public bodies.[18]

As part of the amendments, a new provision was incorporated where staff responsible for the adoption of the decisions in KT (ie the Chairperson and Council Members, as well as the administrative staff), after leaving state civil service will have a duty to abstain for 7 years (an average length of court processes in Lithuania) from representing the other party in matters related to infringements or merger control procedures that they participated in the adoption of the decisions.

Furthermore, the amended Law clarifies the rules on immunity from fines or their reduction, where undertakings involved in cartels can be exempted from fines or offered a reduced fine if they cooperate with KT and provide substantial evidence. KT will also be able to impose stricter fines on undertakings for continuous or repeated infringements committed not only in the territory of Lithuania but also in other EU Member States. The amended Law also now explicitly states that the maximum amount of fines will be calculated based on the undertaking's total worldwide turnover in the preceding business year. To improve deterrence, there are also new rules for undertakings forming a single economic unit and on liability succession ensuring that undertakings could not escape fines, through re-structuring.

Finally, the amended Law also incorporated new provisions for cross-border cooperation with other EU authorities, for instance, requests for information about the documents related to the application of Articles 101 and/or 102 TFEU as well as a request on the recovery of fines imposed on KT or accrued interest in other Member States. KT will provide the same assistance to other NCAs.

3. THE APPEAL PROCESS OF KT'S DECISIONS IN LITHUANIA

The court system of Lithuania consists of two main categories: (i) courts of general jurisdiction and (ii) courts of special jurisdiction with administrative courts falling under the latter category. In contrast to Estonia and Latvia, where administrative courts were

[15] Vilnius Regional Administrative Court Judgment No I5-286-2001. The Supreme Administrative Court Judgment No A3-612-01.

[16] 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. http://data.europa.eu/eli/dir/2019/1/oj

[17] On 1 November 2020 amendments to the Law on Competition of Lithuania transposing the ECN+ Directive entered into force.

[18] J Malinauskaite, *Harmonisation of EU Competition Law Enforcement* (Springer 2019); J Malinauskaite, 'Public EU Competition Law Enforcement in SMALL "NEWER" MEMBER States: Addressing the Challenges' (2016) 12 Competition Law Review 19.

functioning in the 1920s, administrative courts in Lithuania were established for the first time only in 1999,[19] in preparation for joining the EU.[20] The intention of this new mechanism was to increase the protection of individual rights by means of the control of the legality of the actions of the administration and to enhance administrative accountability.[21] Two cornerstone acts of this reform were the Law on Public Administration and the Law on Administrative Proceedings, which were adopted in 1999, followed by the establishment of administrative courts in the same year. It is important to note that the basis for the establishment of administrative courts in Lithuania is Article 111 of the Constitution,[22] which governs the right to set up specialized courts to hear administrative, labour, family, and other categories of cases.[23]

Specifically, the Lithuanian Administrative courts comprise the Supreme Administrative Court of Lithuania and the Regional Administrative Court. The Regional Administrative Court hears cases wherein at least one of the parties to the proceedings is the State, a municipality or a State or municipal institution, an agency, a service, or a public servant. Following the reforms in 2001, administrative courts are now fully separated from the system of courts of general jurisdiction. This also led to the establishment of the Supreme Administrative Court of Lithuania, which is the appellate instance for cases heard by the regional administrative courts as courts of the first instance. The order, according to which cases in the disputes arising from the administrative legal relationship are solved, is provided in the Law on Administrative Proceedings of Lithuania.[24] Article 3(1) of the Law on Administrative Proceedings notes that administrative courts settle disputes arising in the domain of public administration. Mostly, administrative courts deal with cases in the following sectors: competition, data protection, financial industry, electronic communications, energy market, waste management, food industry, and alcoholic beverages. Lithuania does not have a specialized court for competition law-related infringements. Pursuant to a general rule, administrative courts carry out a full review of administrative acts and decisions. This means that the judicial review of administrative acts and decisions is based on both, the legality of the decision and also on factual questions and circumstances—findings of fact.

The Court Reform 2024 introduced further changes in the administrative court system. Until 2024, there were two regional administrative courts: (i) Vilnius Regional Administrative Court and (ii) Regional Administrative Court of Regions, which then contained four chambers—Kaunas, Klaipėda, Šiauliai, and Panevėžys. To optimize the resources and workload of these two courts, the Regional Administrative Court of Regions was joined to the Vilnius Regional Administrative Court with the name being changed to the Regional Administrative Court—*Regionų Administracinis Teismas* (RAT). This newly formed Regional Administrative Court now has five chambers: Vilnius, Kaunas, Klaipėda, Šiauliai, and Panevėžys.[25]

In the context of competition law, there is a two-tier system: initially, the Vilnius Regional Administrative Court (*Vilniaus Apygardos Administracinis Teismas*—VAAT) served as the

[19] Even though up to 15 draft laws on the Administrative Court were prepared in the interwar Lithuania. S Bareikytė and others, 'Administrative Courts in Lithuania: History, Evolution, the Present, and Perspectives' (2023) XXII Miscellanea Historico-Iuridica 11–12. <https://doi.org/10.15290/mhi.2023.22.02.01>.

[20] A Andrijauskaitė, 'Administrative Procedure and Judicial Review in Lithuania' in G della Cananea and M Bussani (eds), Judicial Review of Administration in Europe (OUP 2021) ch 12. <https://doi.org/10.1093/oso/9780198867609.003.0012> accessed 27 December 2024.

[21] B Pranevičienė and E Bilevičiūtė, 'Administrative Justice System In Lithuania: Genesis, Development And Tendencies' (2020) 25 Visuomenės Saugumas Ir Viešoji Tvarka/Public Security And Public Order 305.

[22] The Constitution of the Republic of Lithuania was adopted on 25 October 1992.

[23] D Raižys and D Urbonas, 'Administracinių Bylų Teisenos Infrastruktūrinis Modelis' (2010) Visuomenės Saugumas ir Viešoji Tvarka 59.

[24] Law on Administrative Proceedings of the Republic of Lithuania, 14 January 1999, No VIII-1029 as amended.

[25] Teismų reforma | Regionų administracinis teismas (accessed 1 November 2024). The Reorganisation of the Administrative Courts of the Republic of Lithuania Law, 24 November 2022. No XIV-1574.

first-instance court for appeals against KT's decisions, and the Supreme Administrative Court (*Lietuvos Vyriausias Administracinis Teismas*—LVAT) acted as the final-instance court. After the 2024 Reform, the first-instance court is now called the Regional Administrative Court; yet, one would expect that Vilnius Regional Administrative Court would continue dealing with competition cases[26]; this is also noted in the most recent 'Inreal' case.[27] There are no specific competition law divisions or chambers in these courts devoted to solving competition law cases. Nonetheless, the judges specialize in different fields, for instance, competition, data protection, etc and engage in continuous professional development.[28] Judges' knowledge of competition law can be improved through their repeated exposure to competition cases. Yet, competition cases are rather rare.[29] Specifically, this empirical research conducted in this study reveals that judges seem to specialize more in the LVAT rather than in the VAAT (now the RAT Vilnius). For instance, two LVAT judges were involved in about 33 per cent of the analysed competition cases, in comparison with one VAAT judge who appeared in the 13 per cent of the analysed cases. There were some judges that were involved in the courts of both instances[30] [5–8 cases out of 110 in total (three cases are pending)], demonstrating a career progression.[31]

First-instance appeal—Regional Administrative Court

The KT decisions (resolutions) can be appealed to the RAT in writing within one month (previously, 20 days) after receipt of the resolution (or decision) of the KT, or after the date of publication of the decision, depending on which one is first.[32]

The filing of an appeal against the KT's decision, by which a fine is imposed on an undertaking, does not suspend the enforcement of the KT's decision unless either the KT or the court decides otherwise. For instance, in June 2024, the RAT (Vilnius Chamber) agreed with the KT's decision not to postpone the fine imposed on 'Inreal' until the final court's decision comes into force.[33] The KT's decisions may be appealed on both procedural and substantive grounds. Upon hearing the appeal against the KT resolution, the RAT shall adopt one of the following decisions: (i) to uphold the KT's decision and reject the appeal; (ii) to revoke the KT's decision or its individual sections and refer the case back to the KT for a supplementary investigation; (iii) to revoke the KT's decision or its individual sections; and (iv) to amend the KT's decision on concentration, application of sanctions, or interim measures.[34] Given that until 2024, the VAAT had exclusive jurisdiction to hear the appeals on the KT's decision, the empirical research of this article refers to the VAAT (rather than the RAT).

According to Article 98(1) of the Law on Administrative Proceedings, the judgments of the RAT (or judgments of the other administrative courts of first instance) become final after the term for their appeal has passed.

[26] art 33 LoC (as amended 12 January 2024) refers that any complaints against the KT decisions are appealable to the first instance Administrative Court.

[27] Appeal against the KT's decision No 1S-138 (2022). The case is pending in court.

[28] Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, 'The Judicial review of Regulatory Authorities'. Answers to questionnaire: Lithuania (The Supreme Administrative Court of Lithuania). Paris, 6 December 2021. Lithuania.pdf (aca-europe.eu) (accessed 28 May 2024).

[29] The LVAT hears around 3000 administrative cases per year. ibid (accessed 21 April 2024). The most recent report records even higher number—reaching 5000. The LVAT Annual Report 2023. Available at: metinis_2023-final.pdf (accessed 20 December 2024).

[30] Note: not in the same case.

[31] Speaking of the career progression, one judge (covered under this project) also became a judge of the Court of Justice.

[32] art 33(2) of the Law on Competition (as amended 12 January 2024).

[33] Inreal received the fine of EUR 124,660 together with other 38 undertakings for the infringement of art 101 TFEU and the domestic equivalent—art 5 LoC. KT's decision No 1S-138 (2022). The case is pending in court.

[34] art 34 of the Law on Competition.

Final appeal—the Supreme Administrative Court of Lithuania

The RAT's decisions can be further appealed to LVAT, which was formed and started its activities from January 2001, following the amendment of the Law on the Establishment of Administrative Courts of 2000. The LVAT is the appellate instance for decisions, rulings, and orders passed by the Regional Administrative Court.

Pursuant to Article 134(1) of the Law on Administrative Proceedings, the appeal can be lodged by all the participants of the case. The appellate claims must be lodged within 30 days (previously, 14 days). Cases at the LVAT are heard by a chamber of three justices.[35] An extended chamber of five or seven justices may be formed for hearing complex cases, or such a case may be referred to the plenary session of the court. For instance, in the Lithuanian Basketball League case, the LVAT decided to extend the chamber of five justices due to the case's complexities,[36] involving the specific features of the sports sector combined with the COVID-19 implications.

The LVAT reviews the contested rulings in full and its decisions are final and definitive. In case unlawful conduct attributable to the public authorities is established, the LVAT has the power to revoke administrative acts or to set an injunction to do or not to do something. Lithuanian law recognizes the state's liability for the damages caused by the public institutions (and their officials). The duty to remedy the damage is also a constitutional principle.[37] The LVAT is also responsible for the formation of the uniform practice of administrative courts in applying laws.[38]

Specifically, pursuant to Article 144(1) of the Law on Administrative Proceedings, the LVAT may issue one of the following decisions: (i) leave the decision of the RAT unchanged and reject the appellate claim; (ii) annul the RAT decision and issue a new judgment; (iii) change the RAT decision; (iv) annul—in whole or in part—the RAT decision and send the case back to the RAT; (v) annul the RAT decision and close the case or leave the claim unsolved if there are circumstances listed in Articles 103 and 105 of the Law on Administrative Proceedings.[39]

4. METHODOLOGY OF THE STUDY

As far as the methodology is concerned, empirical research was undertaken, embracing systematically collecting, filing, and then analysing the KT's decisions issued after Lithuania joined the EU that were appealed in administrative courts. The analysis period was chosen from 1 May 2004 to 1 May 2024 marking the 20th anniversary of the entry into force of Regulation 1/2003. While this study involved both quantitative and qualitative research, more emphasis was placed on the quantitative research. First of all, quantitative research aimed to uncover trends and derive overarching insights. Secondly, to complement the quantitative study, qualitative analysis then focused on possible justifications for these trends, adding depth to the study.

[35] Supreme Administrative Court, Annual Report of 2017. <uju5t7qvw2geekc96bmtqccpnswc6867> (lvat.lt) (accessed 15 April 2024).

[36] Judgment of 31 January 2024.

[37] Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (n 28) (accessed 15 September 2023).

[38] ibid.

[39] For instance, art 103 of the Law on Administrative Proceedings specifies 11 scenarios when the court can decide to terminate the claim, including when the case does not fall under administrative courts competence. Art 105 of the Law on Administrative Proceedings defines further 6 circumstances when a claim can be dismissed. Law on Administrative Proceedings (consolidated version from 16 November 2022 to 31 December 2022), No VIII-1029.

The quantitative research involved gathering public information of the courts' decisions in Lithuania with a few options available. First, the Lithuanian courts publish annual as well as monthly reports of their cases.[40] However, these reports are lengthy without specific categories of cases being identified, preventing to identify all the relevant cases falling within the research scope. Secondly, there is a publicly available database, 'eTeismai' (based on the LITEKO system), where non-confidential decisions of all the courts are available.[41] However, this database is not comprehensive. Any search by some keywords or other defined criteria is completely unworkable and unreliable. It has also been noted that this database does not include all the administrative court decisions.[42] Thirdly, there is a sophisticated database INFOLEX.PRAKTIKA with all Lithuanian laws bylaws and all the courts' decisions. This database is largely used by practitioners and public bodies. However, its subscription is rather expensive. Therefore, there is limited accessibility to this database and the general public cannot easily retrieve the courts' decisions.

Locating the relevant judgments has been challenging due to the limited availability of reliable databases. Therefore, an alternative option was sought to conduct this study exploring the KT database and manually reviewing all the KT's decisions/resolutions. To identify the relevant cases, the following steps were taken: (i) to use a year-by-year mode via a general search tool [Nutarimai | Konkurencijos taryba (kt.gov.lt)], (ii) to identify the decisions that were appealed; and finally, (iii) select only the decisions related to Articles 101 and 102 TFEU and/or domestic equivalents, therefore, excluding any decisions related to unfair competition, concentration, etc.

There were two stages undertaken in this study. First, during the first stage, the period searched embraced all judgments issued and made public from 1 May 2004 to 1 May 2024 relating to NCA decisions rendered in this timeframe. The identified cases were then systematically recorded in an Excel sheet following a defined template, pertaining not only to infringement decisions, but also to settlements, commitments, and decisions not to launch an investigation or discontinue an investigation. Most certainly, decisions related to fines were also incorporated, as this is the most common ground for appeal in Lithuania. Secondly, in relation to the more recent cases, during the May 2021–May 2024, the same database was used to identify the relevant cases, while noting whether they are challenged in courts, facilitating quantitative rather than qualitative analysis.[43] One must emphasize that, on average, litigation in Lithuania lasts about 1–5 years or longer, depending on the complexity of the case.

5. QUANTITATIVE ANALYSIS

Total number of cases

The study identified 113 judgments (both first instance and final instance). The majority of cases are appealed in both instances, with 60 judgments decided by the VAAT (one case is pending) and 49 decided by the LVAT (with three cases pending), or 54 per cent falling under the first instance and 46 per cent—under the 2nd (final) instance. On average, there were approximately three judgments issued by the VAAT and 2.45 judgments by the LVAT per annum. In 2011, there were the highest number of recorded cases—15 under both instances of appeal, followed by 2012, which recorded 12 cases and 2016—eight cases

[40] Naujausia teismo praktika | Lietuvos vyriausiasis administracinis teismas (lvat.lt)

[41] Pagrindinis—eTeismai.

[42] J Batura, 'The Implementation of the Doctrine "Stare Decisis" in administrative rulings in Lithuania: Theoretical And Practical Aspects' (Master's thesis, Vilnius 2010) (in Lithuanian).

[43] These new cases are still pending.

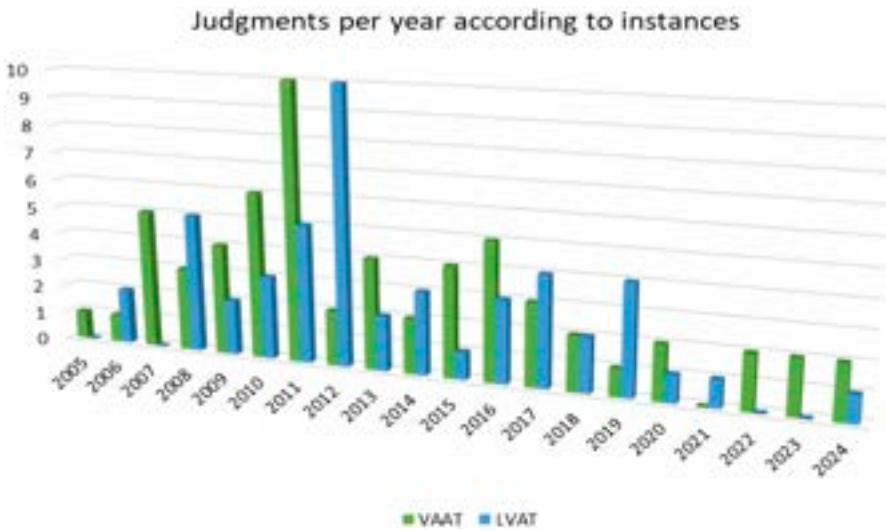

Figure 2. Total judgments per year according to instances.

(Fig. 2). It is difficult to explain this peak. However, there are a few facts that may explain the decline in the number of cases from 2013. First, the new chairman of the KT Keserauskas was appointed in April 2011 followed by some further changes in the Board and its directions. Secondly, the KT launched its prioritization policy in 2012, enabling it to set its own priorities and concentrate its limited resources in specific areas identified as being of greatest importance.[44]

Success rates and outcomes

As previously indicated, if the KT's decisions are challenged in courts, quite often they embrace both instances. For the purpose of this study, if a KT's decision was appealed by various parties in separate proceedings, the outcome of all those judgments was counted as a single case. Figure 3 depicts that the rate of fully successful appeals is relatively low—14 per cent. It seems that the courts in general confirm the KT's decisions. This is in line with general administrative court practice in Lithuania, as only rarely do administrative courts amend and modify the appealed decision themselves.[45] If compared to Latvia, the most active collaborator of Lithuanian KT's cases, the percentage of fully successful appeals against the Latvian Competition Council's decisions during the similar period (namely 2004–21) is very similar—16 per cent.[46] In terms of other small CEE and SEE countries, Bulgaria reported 14 per cent, whereas Croatia—11 per cent.[47] However, one must note that the rate of the appeals against the KT's decisions or VAAT judgments being fully rejected is relatively low—52 per cent in comparison with Latvia—75 per cent, Bulgaria—72 per cent, and finally, Croatia—84 per cent. This is because of the large fraction of the cases—29 per cent falling under 'the partially successful' category (the cases predominantly pertaining to the

[44] Resolution No 1S-89 (n 11).

[45] Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (n 28) (accessed 21 May 2024).

[46] J Jerņeva, 'Latvia' in (n 1).

[47] JP Kaufman, 'Croatia' in (n 1). A Svetlicinii, 'Bulgaria' in (n 1).

Figure 3. Success of appeals.

reduction of fines). In most cases, the fines imposed by the KT were reduced by the courts either in the first or second instance.

As far as different instance courts are concerned, Figs 4 and 5 illustrate in more detail the first instance outcome and the final instance outcome, respectively. Similar to Fig. 4, approximately 59 per cent of all appealable cases were fully rejected by the VAAT and 44 per cent by the LVAT. While fully successful appeals are limited across both instances, there is some variation in terms of partly successful appeals (23 per cent and 37 per cent by the VAAT and LVAT, respectively). In most cases, the changes were made in relation to fines, namely the fines being reduced. There has not been a single case where the court (in either instance) would increase the fine. One must note that there is also one pending case in the VAAT and three cases in the LVAT. By contrast, as noted above, the Latvian system portrays a different scenario. While, initially, similar to Lithuania, the Latvian administrative courts were amending the fines imposed by the Latvian Competition Council, such as in the *Liepājas SEZ*,[48] *EL Plūsma, and ENERGOREMONTS*[49] cases, yet, this changed in 2017 after the Latvian Constitutional Court's decision on the power to decide on the amount of the fines resting exclusive within Competition Council's competence.[50]

Different types of NCA's decisions subject to appeal

This study has also investigated the cases decided by the KT based on the different antitrust provisions for 20 years. Figure 6 indicates that the competition cases in Lithuania have predominantly focused on the national rules (ie 82 out of 113 cases were decided solely on the LoC of Lithuania). The rest of the proceedings involved a combination of both the EU and domestic provisions. It must be noted that Lithuania had an obligation to enforce the EU competition law provisions under Regulation 1/2003 (provided the element of effect on trade between the Member States was met), as the statistical data include the cases decided

[48] Court case No A42569106.

[49] Court case No A42568206.

[50] 22 December 2017 Judgment of the Constitutional Court in case No 2017-08-01. For further reading, J Jerņeva. 'Latvian Rapporteur Report' in (n 1). There are almost no appeals in relation to fines in Croatia with only nine cases reported (ie one partially accepted, two fully accepted, and the remaining six cases rejected). JP Kaufman, 'Croatian Rapporteur Report' in (n 1).

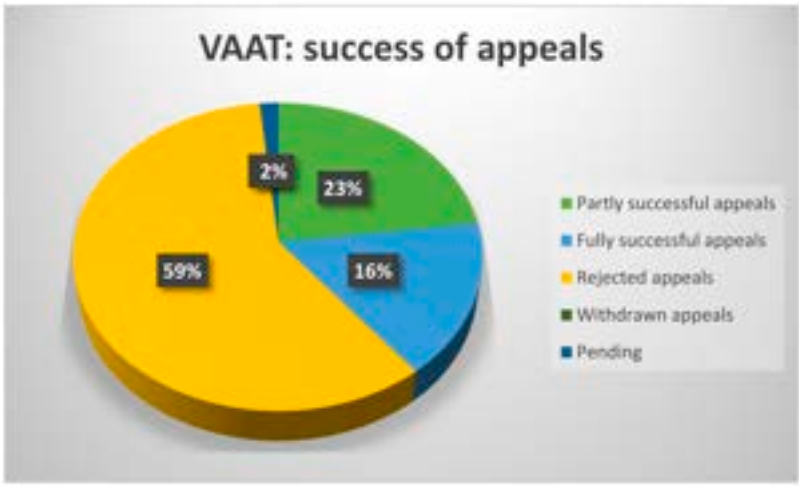

Figure 4. VAAT: success of appeals.

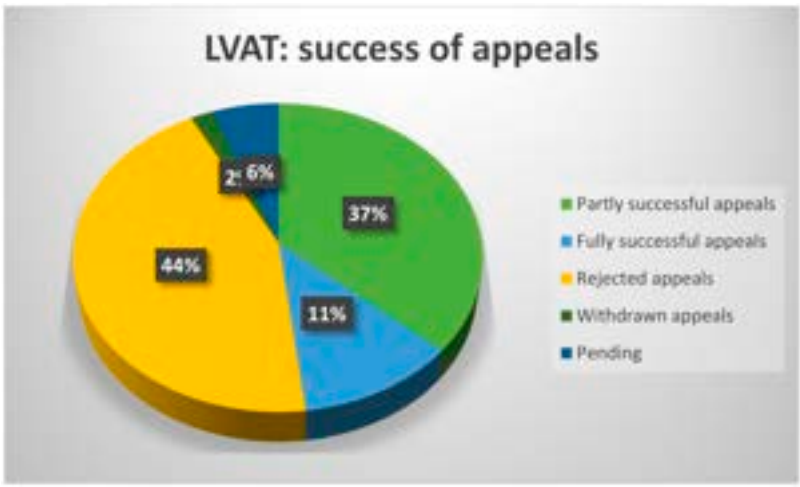

Figure 5. LVAT: success of appeals.

only after May 2004. In the 2004–24[51] period, there were only 31 cases appealed that involved an EU law element. These empirical findings raise concerns in terms of the accurate application of EU law. One may argue that smaller Member States, such as Lithuania, are more exposed to the obligation of enforcement of EU competition provisions, as there are many businesses where economies of scale exceed the demand of a small country. Furthermore, prioritization policies drive the NCAs to focus on severe anti-competitive cases, instead of following up on all meritless complaints. Therefore, provided the element of 'effect on trade between Member States' is properly applied,[52] this aspect should be easily

[51] Until 1 May 2024.

[52] For further reading in the CEEC context, see M Botta, M Bernatt and A Svetlicinii, 'The Assessment of the Effect on Trade by the National Competition Authorities of the "New" Member States: Another Legal Partition of the Internal Market?' (2015) 52 Common Market Law Review 1247.

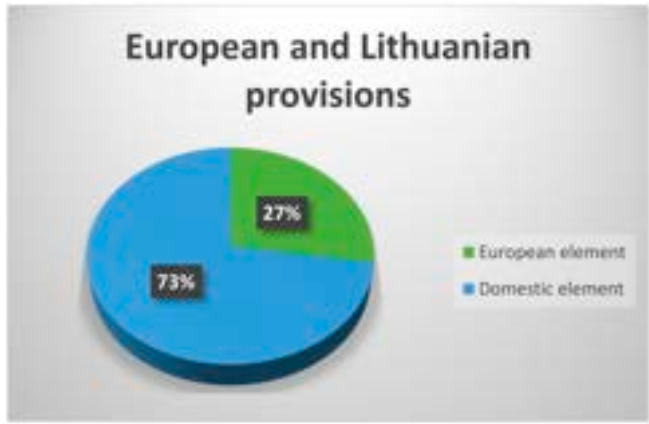

Figure 6. European and Lithuanian provisions.

met in small Member States, such as Lithuania, due to their integrated national markets and the EU competition law provisions should be applied instead (or simultaneously) of national law. Logically, the application of national law should be diminishing.[53] While this was not confirmed by the empirical study, one must note that especially in 2022, there were more cases embracing the EU provisions (Articles 101 and 102 TFEU) in addition to domestic equivalents. The national competition provisions are also preferred in other CEECs and SEECs, such as Bulgaria, Croatia, Estonia, Latvia, and Poland.

Furthermore, the study has revealed that there is a clear domination of the national equivalent of Article 101 TFEU, as 53 per cent of appeals were related to national anti-competitive agreements (in total 74 per cent —based on both Article 101 TFEU/Article 5 LoC and solely, Article 5 LoC) (illustrated in Fig. 7). While there were some (ie 29 cases in total) dealing with abuse of a dominant position based on both national law (21 cases and 1 case is pending) and EU law (seven cases) over the years, there has not been a single infringement decision based on Article 102 TFEU or national equivalent since 2012.[54] Overall, since 2012, there were only four cases (plus one case pending in the VAAT) appealing the KT's decision not to initiate an investigation in relation to Article 102 TFEU (and/or domestic equivalent). There were also some investigations being terminated due to the acceptance of the proposed commitments. For instance,[55] in 2018, the KT closed the investigation into the compliance of *Swedbank* actions with the requirements of the LoC upon *Swedbank* submitting written commitments essential for the elimination of the alleged competition law breach (ie abuse of a dominant position) and creating preconditions to avoid it in the future.[56]

Overall, Fig. 8 clearly demonstrates that the KT places its priority on restrictive agreements rather than abuse of a dominant position.

[53] Malinauskaite (n 18).

[54] The last case related to art 7 LoC infringement decision decided by the SAC is UAB 'Vilniaus energija' A858-1516/2012.

[55] Under art 28 (3)2 of the Law on Competition No VIII-1099 as amended.

[56] During the investigation, the KT examined whether *Swedbank* abused its dominant position by including certain provisions into *Bank Link* service agreements with undertakings providing online payment collection services to e-shops. Such provisions were seen as restricting the aforementioned undertakings' ability to offer new online payment collection services—payment initiation services—to *Swedbank* customers. To assess the suitability and appropriateness of these commitments, the KT published them on its website for public consultations and sent them to the interested parties. After considering the comments and proposals received during the public consultations, *Swedbank* amended the proposed commitments. KT (2018) Newsletter.

Figure 7. Types of restrictions.

The study has also explored the specific restrictions being appealed, such as horizontal and vertical restrictions; exploitative and exclusionary abuse. Figure 7 indicates that even in relation to the prohibition of anti-competitive agreements under national law, appeals have involved only a limited range of issues: approximately 74 per cent (84 cases out of 113) related to restricted agreements, and out of 84 cases 69—involved horizontal agreements. In terms of abuse of a dominant position, 15 out of the 29 KT's decisions related to exclusionary practices or to both exclusionary and exploitative practices (12 cases), with the remaining two cases falling under the exploitative abuse category. A similar trend has also been identified in Latvia, with a significant shift towards the investigation of anti-competitive agreements, which now constitute an absolute majority of cases; notably, during the 2016–21 period, the Latvian Competition Council identified the abuse of a dominant position in merely five decisions.[57] On the contrary, a rather more balanced approach was reported in Croatia,[58] whereas in Bulgaria a national equivalent of Article 102 TFEU clearly prevailed over a national equivalent of Article 101 TFEU.[59]

Limitations continue in relation to the 'by object' and 'by effect' boxes. Figure 9 points out that 95 per cent of those decisions are classified as restrictions 'by object' (with only two cases decided by the KT based on 'by effect' and two cases decided on both 'by effect' and 'by object'). The KT's narrow approach (with its exclusive priority given to the hard-core restrictions) has been challenged in the literature, especially in the context of highly debatable fields, such as the submission of joint bids in public procurement cases, in which the EU clarification is lacking and the NCAs approaches differ. For instance, Paukštė in her article[60] noted that both the KT and the courts unjustifiably found the restriction 'by object' in the *UAB Irdaiva and AB Panevezio statybos trestas v Competition Council* case (known as the *PST/Irdaiva* case), as it eliminated any potential efficiency or other legitimate interests

[57] Jerņeva (n 46).

[58] A very similar number of appeals was reported, related to abuse of a dominant position (50 per cent) and to anti-competitive agreements (40 per cent) during the 2004–21 period. Kaufman (n 47).

[59] Indeed, in Bulgaria, 71 per cent of the appeals concerned the application of the national equivalent of art 102 TFEU during a similar analysed period. A Svetlicinii, 'Bulgaria' (n 1).

[60] R Paukštė, 'Report: Lithuania. Competition Law Enforcement in Public Procurement Markets: Joint Bidding' (2022) 2 European Competition and Regulatory Law Review 144–146.

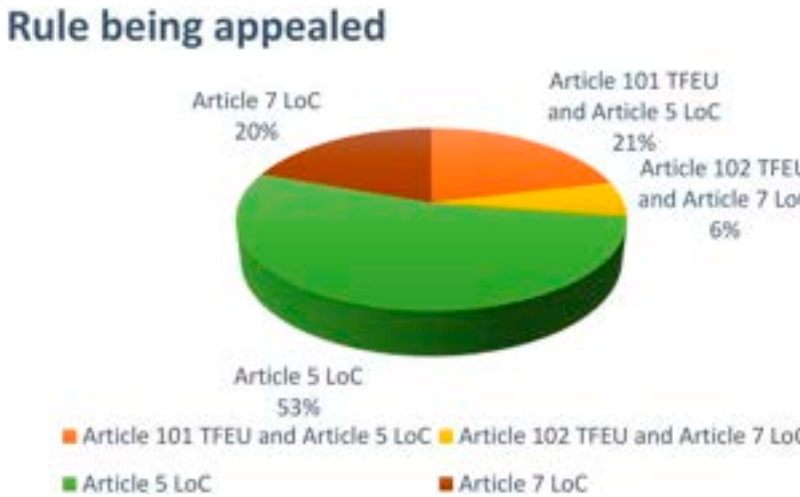

Figure 8. Rule being appealed.

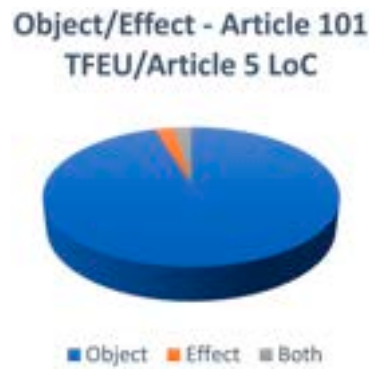

Figure 9. 'By object' or 'by effect' (Article 101 TFEU/Article 5 LoC).

of the consortium members in their joint tender. One must also note that the majority of businesses in Lithuania are small or medium enterprises.

A predominant focus on hard-core cartels may also raise concerns in terms of the effectiveness of Lithuanian competition law enforcement. One may question whether this approach is employed due to the limited resources of KT, as restrictions 'by effect' or proving an abuse requires 'more in-depth investigations' and potentially, more resources. Similarly, the Latvian Competition Council also 'favours' a 'by object' classification with 93 per cent of the analysed cases, falling under this category.[61]

The majority of KT decisions (81 per cent) that were subject to appeal pertained to findings of infringements with the imposition of fines. As discussed above, the fine was reduced in approximately 29 per cent of the cases (ie specially, 23 per cent of the cases decided by the VAAT and 37 per cent by the LVAT). Indeed, to illustrate some examples, in the Eturas

[61] Jerņeva (n 46).

case[62] the fine was significantly reduced (approximately by 87 per cent) by both courts, the VAAT and LVAT[63]; in AB 'SEB BANKO', AB 'SWEDBANK', AB 'DNB BANKO', UAB 'FIRST DATA LIETUVA', UAB 'G4S LIETUVA', the fine was, firstly, decreased by the VAAT with a further reduction by the LVAT—accounting to 83 per cent reduction of the original fine.[64] Given that most cases were in relation to the national equivalent of Article 101 TFEU, the parties were most successful in their appeal proceedings in this type of restriction, especially in relation to the fine.

Other aspects

Leniency policy

There is a clear focus of KT on tackling restrictive agreements. There are different tools to prevent these agreements or collusions, including possible fine reductions for colluding undertakings that cooperate with competition authorities by applying for leniency or settling their case.[65] Even though already the 1999 Law on Competition contained a provision related to leniency, the explanatory guidance on leniency policy in Lithuania was launched almost a decade later in 2008.[66] Despite these explicit rules on immunity/reduction from fines, the programme was largely ineffective. One may speculate that this was mainly due to the wide discretion being placed on the KT when imposing sanctions, and potential mistrust placed on state authorities, which did not provide enough legal certainty for undertakings.[67]

This study identified only seven NCA infringement decisions involving leniency that went through different stages of appeal (seven VAAT judgments and seven LVAT judgments, as depicted in Fig. 10).[68] In almost all cases (five cases), the leniency applicant was successful with full immunity granted, save one case where there was no infringement found in relation to the leniency applicant.[69] While full immunity was not granted in the 'Kosmetikos Prekių Platinimo Veikla Užsiimantiems Ūkio Subjektams' case,[70] due to the fact that the entities submitted their requests for leniency after the investigation had started; nonetheless, the undertakings benefited from the reduction of fine ranging from 15 per cent to 75 per cent. These undertakings also disclosed other bid rigging activities (over 100) unknown to the KT; therefore, these anti-competitive activities were not included in the calculation of fines imposed on these undertakings.

Preliminary reference procedure

National courts may need assistance when interpreting EU law, such as competition law, ensuring a uniform application of EU law across the Union. Yet, Jarukaitis and Švedas observed that applicants in Lithuania are still rather reluctant to rely on EU law;[71] therefore, courts in Lithuania do not have enough opportunities to utilize the preliminary reference procedure.

However, in terms of administrative courts, once this opportunity comes, the LVAT in Lithuania does not shy away from referring preliminary questions to the Court of Justice of

[62] 'Dėl Ūkio Subjektų, Užsiimančių Organizuotų Kelionių Pardavimo ir kita su tuo susijusia veikla' known as the Eturas case, I. 121–135/2013 (first instance); and A-97-858/2016.

[63] LTL (Litas) was the former currency. Lithuania joined the Euro on 1 January 2015.

[64] I. 134–186/2013; A502-253/2014.

[65] P Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (OUP 2014).

[66] Rules on immunity from fines and reduction of fines for the parties to prohibited agreements, Council Resolution No 1S-27. 28 February 2008, Vilnius.

[67] Malinauskaite (n 18).

[68] In comparison with other small CEE countries, this number is not too low. For instance, neither Croatia nor Bulgaria reported a single case related to leniency. See, Kaufman (n 47). A Svetlicinii, 'Bulgaria' (n 1).

[69] KT decision No 2S-2; on appeal, I-2092-580/2011.

[70] KT decision No 1S-115 (2023)

[71] Jarukaitis and Švedas (n 12)

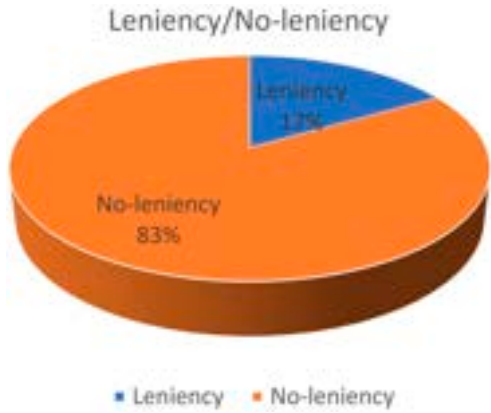

Figure 10. Leniency/no-leniency.

the European Union (CJEU) in the field of activities of regulatory authorities (including KT) comprising around one-fourth of all preliminary references (though the number of administrative cases related to the activities of regulatory authorities is not high).[72] While there have not been many preliminary questions submitted by the LVAT in the competition law field, they are significant in their importance surging debates at the European level. The LVAT noted that the preliminary ruling procedure gives not only impetus for the development of the Lithuanian case law but also raises legal issues relevant to Europe. In the Eturas case,[73] the LVAT sent the following questions to the CJEU: (i) whether based on the actions performed by the platform administrator can be presumed that the platform users were aware of the anti-competitive measure or ought to be aware of it, and thus, by failing to oppose the application of such a discount restriction, tacitly engaged in a concerted practice?; (ii) provided the answer to the first question is negative, what factors should be considered to establish whether the users of the platform were engaged in concerted practices within the meaning of Article 101(1) TFEU?[74] The Eturas case marks a historical moment as one of the first cases demonstrating how online platforms can facilitate unlawful cooperation amongst platform users, therefore, distorting markets in the digital space. This case has also influenced the judgments of other national courts, including the recent case decided by the Federal Supreme Court of Switzerland.[75]

Most recently, in February 2021, the LVAT sent another request for a preliminary ruling to the CJEU in the highly debatable Notaries case.[76] In this case, the KT found that the Lithuanian Chamber of Notaries and eight members of its Presidium concluded an anti-competitive agreement by setting the amount of notary fees and agreeing upon the calculation procedure, thereby restricting the ability of the notaries to apply lower notary fees and offer more favourable fees to consumers. As a result, the KT imposed a fine of EUR

[72] Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (n 28) (accessed 15 April 2024)

[73] In this case, the KT (in its decision No 2S-9) found that the applicants—information system's Eturas sole rights holder and administrator as well as travel agencies which have used this system—engaged in concerted practices and therefore, infringed art 5 of the Law on Competition and art 101(1) TFEU. The SAC No A-97-858/2016.

[74] Case C-74/14 Eturas, ECLI:EU:C:2016:42.

[75] Judgment 2C_149/2018 of 4 February 2021. For further discussion, see Damiano Canapa, 'Non-Binding "Recommended Price" as Concerted Practices—The Federal Supreme Court of Switzerland Rules on Recommended Prices That Are Communicated Electronically to Retailers' (2022) 13 Journal of European Competition Law & Practice lpac024 <https://doi.org/10.1093/jeclap/lpac024>.

[76] Case No eA-25-629/2021

88,400 on the Lithuanian Chamber of Notaries and other fines ranging from EUR 100 to EUR 20,800 on eight members of the Presidium for the infringements of Article 5 LoC and Article 101(1) TFEU.[77] In addition, the KT sent a recommendation to the Government to initiate amendments to the Law on Notaries and eliminate the obligation on the Ministry of Justice to negotiate notary fees with the Lithuanian Chamber of Notaries (which is a self-government institution that unites all notaries).[78] The VAAT repealed the KT's decision. The case is now pending in the LVAT.[79] The proceedings were suspended, as the question was referred to the CJEU. Under the preliminary reference procedure, the CJEU responded to the questions that notaries can be considered undertakings and therefore, competition law should apply to them.[80] However, the CJEU also noted that under the principle of personal liability, Article 101 TFEU must be interpreted as precluding an NCA from imposing individual fines on undertakings which are members of the governing body of that association, provided those undertakings were not joint perpetrators of that infringement.[81]

6. QUALITATIVE ANALYSIS

Effective judicial review is indispensable for any competition law mechanism, especially from a fundamental rights perspective, as established in the *Menarini* judgment.[82] Yet, corroborating whether judicial review is effective is a difficult task; and the rate of annulment of administrative decisions is not a reliable proxy to establish the effectiveness of judicial review.[83] While this article does not specifically assess the effectiveness of judicial review of competition cases in Lithuania and, predominantly, focuses on quantitative research, some qualitative analysis has been conducted drawing upon observations noted during the inquiry.

The Constitution and the Law on Courts regulate that the administration of justice courts in Lithuania is independent of other government institutions, officials, political parties, organizations, and other persons. The LVAT has further stressed that the principle of good administration is enshrined in the main national acts[84] and the Charter of Fundamental Rights of the EU.[85] As noted in Section 3, unlike the court system of general jurisdiction, Lithuanian administrative cases do not have the cassation instance. Nevertheless, administrative courts (ie the VAAT (now the RAT) and LVAT) aim for effective judicial review of public authorities' (including, KT's) decisions. In addition, the LVAT is also responsible for the formation of the uniform practice of administrative courts in applying laws similar to the Supreme Court of Lithuania (under the general jurisdiction system). Therefore, arguably, there is no need for the cassation instance.[86] However, a recent case (which fell beyond the

[77] KT decision, No 2S-2(2018).

[78] On 21 November 2018, the amendments to the Law on the Notary Office and the Law on Bailiffs entered into force, where the Minister of Justice shall set the amount of fees for the services of notaries and bailiffs upon the approval by the Minister of Finance only.

[79] Case No eA-25-629/2021

[80] Case C-128/21 Lietuvos notarų rūmai and Others v Lietuvos Respublikos konkurencijos taryba, ECLI:EU:C:2024:49.

[81] This case is currently pending in LVAT.

[82] *A Menarini Diagnostics S.r.l. v. Italy* - 43509/08; Judgment 27.9.2011 [Section II].

[83] P Colomo, 'Law, Policy, Expertise: Hallmarks of Effective Judicial Review in EU Competition Law' (2022) 24 Cambridge Yearbook of European Legal Studies 143.

[84] For instance, *Law on Public Administration or Law on Administrative Proceedings*. 14 January 1999 No VIII—1029, Vilnius.

[85] Case law of the Supreme Administrative Court of Lithuania applying the provisions of the Law on Public Administration of the Republic of Lithuania. Approved by the justices of the Supreme Administrative Court of Lithuania in 1 June 2016, 464–465. For further discussion, see I Deviatnikovaitė, 'Constitutional Principles in Public Administrator's Decision-Making under the Case Law of the Supreme Administrative Court of Lithuania' (2018) 2(1) Bratislava Law Review 109–115.

[86] D Joksas and E Katisevskaja, *Why Administrative Procedure Does (not) Need the Cassation Instance*? (Vilnius University Press 2021) (in Lithuanian) <https://doi.org/10.15388/TMP.2021.11> accessed 15 April 2024.

scope of this study) may raise some concerns in relation to the effectiveness of judicial review of the VAAT and LVAT, notably, in terms of accessibility to justice. In 2018, the KT opened an investigation against five undertakings engaged in the production and retailing of construction materials and household goods suspecting that several major producers and retailers, including the applicant, UAB 'Kesko Senukai', had agreed to fix the prices of certain goods sold in their stores, thereby potentially, breaching Article 5 LoC as well as Article 101 TFEU.[87] Upon obtaining the authorization from VAAT, the KT carried out dawn raids in the businesses under investigation, including UAB 'Kesko Senukai'. Even though KT terminated this investigation, UAB 'Kesko Senukai', nevertheless, lodged a complaint with KT itself and then with courts about the manner in which the inspection was carried out, including that the large amount of information was seized and copied in 'an indiscriminate manner, without even attempting to assess whether certain documents were related to the investigation in question' during the inspection. The KT and the courts refused to examine the claim, with the LVAT arguing that the KT's decision 'had constituted a procedural document of an interim nature that had not given rise to any material legal consequences for the applicant company'.[88] The European Court of Human Rights reached a decision in April 2023 finding a violation of Article 8 of the ECHR, as the absence of an *ex post facto* judicial review of the manner in which the KT's officials carried out the inspection of the applicant's business premise meant that there were no adequate and effective safeguards against abuse and arbitrariness and consequently, the interference with its right to respect for its home and correspondence could not be considered proportionate to the aim pursued or necessary in a democratic society, as required by Article 8 of the Convention.[89]

Furthermore, it should be noted that judicial deference embraces the principle that judges recognize the decision-making authority of other actors.[90] As Allan stated, even though courts must respect the sphere of decision-making autonomy enjoyed by a public body, a general doctrine of deference is unlikely to provide a useful means of defining the limits of the court's jurisdiction. Therefore, the appropriate degree of judicial deference is dependent on all the circumstances, such as the correct balance between constitutional rights and the general public interest (defined in the context in which a specific legal issue arises).[91] In the competition law context, Bernatt specifies four conditions to define the permissibility of judicial deference, where the first three conditions are related to the proceedings before the NCA,[92] whereas the final condition explains the character of judicial review itself.[93] This latter condition should ensure that effective judicial review is offered by the court reviewing the NCA's decision. In Lithuania, the judicial review of administrative acts/decisions is based on both the legality of the decision and also on factual questions and circumstances. In addition, the administrative courts can also review how certain discretion attributed to regulators (including the KT) is exercised. The Lithuanian Law on Public Administration[94]

[87] DĖL ŪKIO SUBJEKTŲ, UŽSIIMANČIŲ STATYBOS, REMONTO IR BUITIES PREKIŲ GAMYBOS IR PARDAVIMO VEIKLA, No 1S-40 (2020), 24 March 2020.

[88] Case of UAB Kesko Senukai Lithuania v Lithuania. *Application no 19162/19*, at para 45. Available at: UAB KESKO SENUKAI LITHUANIA v. LITHUANIA (coe.int)

[89] At paras 126–127. Case of UAB Kesko Senukai Lithuania v Lithuania. *Application no 19162/19*. Available at: UAB KESKO SENUKAI LITHUANIA v. LITHUANIA (coe.int)

[90] E Shirlow, *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication* (Cambridge University Press 2021) 16.

[91] TRS Allan, 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' (2010) 60 The University of Toronto Law Journal 41.

[92] M Bernatt, 'Transatlantic Perspective on Judicial Deference in Administrative Law' (2016) 22 Columbia Journal of European Law 275, 324–325 <http://ssrn.com/abstract=2648232> accessed 1 December 2024.

[93] M Bernatt, 'Effectiveness of Judicial Review in the Polish Competition Law System and the Place for Judicial Deference' (2016) 9 Yearbook of Antitrust and Regulatory Studies 97, 100, 106–107 <https://ssrn.com/abstract=2896823>

[94] Law on Administrative Proceedings of the Republic of Lithuania, 14 January 1999, No VIII-1029 as amended.

sets out a principle of separation of functions. For instance, in terms of judicial review of any technical or economic assessments, the courts should not replace such assessments carried out by the regulatory authority with its own assessment due to the principle of separation of powers.[95] In competition law, reliance on economic analysis cannot be circumvented. In contrast to the regulatory authorities, generalist courts (like in Lithuania) in assessing the different manifestations of economic evidence face various obstacles due to their lack of economic expertise, limited access to information, and lack of requisite institutional legitimacy, especially in terms of connoting broad policy considerations, and they are also susceptible to 'minoritarian' bias, as the regulator is more exposed to the heterogeneous interests through negotiations, consultations,[96] or market inquiries. Building on this logic, judicial review in Lithuania is limited to an assessment as to whether the regulator has exceeded its discretion, or has made a manifest error or has misused its powers as well as whether the regulatory authority has followed procedural rules and has duly assessed all relevant factual circumstances.[97] For instance, in the UAB 'Vilniaus Energija' case,[98] the LVAT stated that it could only to a limited extent review the legality and soundness of the economic analysis conducted by the KT. Nevertheless, it was able to evaluate whether the KT had complied with the procedure, based its findings on sound arguments, had not made a mistake in its assessment or had not misused its powers. In this case, the KT's infringement decision of Article 7 (now Article 9) LoC against UAB 'Vilniaus Energija' was annulled both by the VAAT[99] and subsequently by the LVAT.[100] The LVAT noted that the KT failed to assess all the circumstances which were relevant to the establishment of abuse of a dominant position.[101]

Based on the findings from the quantitative research, one must note that the concept of judicial deference is generally upheld in the context of KT infringement decisions. It is worth noting that the KT in its annual reports regularly indicates that administrative courts uphold approximately 90 per cent of its decisions and requests.[102] This is in line with the general trend whereby the LVAT upholds, approximately 70 per cent of public authorities' decisions[103] without any changes made.[104] Evidently, there is a clear deference in terms of the KT's enforcement priorities, where the courts seem to acknowledge that the KT is the best authority to decide on how its limited resources should be used. For instance, the VAAT (the RAT after the reform) dismissed Kamineros krovinių terminalas claim against KT for its failure to initiate proceedings against AB Klaipėdos valstybinio jūrų uosto direkcija for its alleged abuse of a dominant position (as well as a violation of Article 4 on the duty of entities of public administration to ensure freedom of fair competition). The court noted that the KT did not overstep the boundaries of its discretion; there was no major negative impact proven on competition as well as consumers in Lithuania. Therefore, based on a cost–benefit

[95] Association of the Councils of State and Supreme Administrative 'Jurisdictions of the European Union (n 28) (accessed 21 December 2022).

[96] D Mantzari, 'Economic Evidence in Regulatory Disputes: Revisiting the Court–Regulatory Agency Relationship in the US and the UK' (2016) 36 Oxford Journal of Legal Studies 565 <https://doi.org/10.1093/ojls/gqv035> accessed 15 December 2024.

[97] Confirmed in the administrative case No A-502-72/2009.

[98] Decision of the KT on the compliance of actions of UAB 'Vilniaus Energija' with the requirements of art 9(1) (now art 7) of the Law on Competition, 13 September 2007, No 2S-18.

[99] Initially, the VAAT upheld the KT's decision. However, the LVAT sent the case back for additional investigation. The KT did not change its original infringement decision after further investigation. On appeal, both courts agreed to annual the KT's decision. Judgment of VAAT, 24 October 2011, Case No I-3681-562/2011.

[100] Judgment of LVAT, 13 August 2012, Case No A858-1516/2012.

[101] OECD (2019), The standard of review by courts in competition cases. Contribution from Lithuania. Available at: pdf (oecd.org) (accessed 30 April 2024).

[102] See, for instance, KT Annual Reports of 2015, 2018, 2019.

[103] As noted previously, the LVAT hears around 3000–5000 administrative cases per year. The LVAT Annual Report 2023. Available at: metinis_2023-final.pdf (accessed on 20 December 2024).

[104] Joksas and Katisevskaja (n 86).

analysis, the KT's decision was justified.[105] It seems that the courts yield substantial deference, rather than just 'minimal' deference to the KT, owed to the regulator for constitutional reasons.[106]

Pursuant to Article 104(1) of the Law on Administrative Proceedings, the court which analyses the case under the appeal procedure reviews the soundness and the legitimacy of the judgment of the court of first instance without overstepping the boundaries of the appellant's case. In the competition law appeals context, one must note disagreements between the administrative courts and indication of the lack of experience and knowledge of handling competition cases, for instance, with the VAAT's initial persistence of the need to prove a 'fault' element. For instance, in the Advertising and Media cartel case, the KT found that the Lithuanian association of the communication agencies and several undertakings providing advertising and media planning services violated Article 5(1) LoC 'by object', as they agreed to set a fixed fee to be paid by the competition organizers to these undertakings for their participation in the competitions on the purchase of advertising services. This decision was annulled by the VAAT,[107] which, among other things, noted that the KT unjustifiably failed to analyse the effects the agreement might have had on competition. Upon further appeal, the LVAT annulled the VAAT's decision, noting two types of restrictions 'by object' and 'by effect' under Article 5 LoC,[108] consequently deciding that the KT was correct in its findings that once the fixing of prices was found, it could be classified as a restriction 'by object' without a need to analyse the effects of such an agreement on competition. In the more recent Lithuanian Basketball League case, once again the VAAT challenged the KT's 'by object' findings. The KT found that the Lithuanian Basketball League and ten basketball clubs entered into an anti-competitive agreement when they decided to stop paying basketball players salaries or other financial remuneration for the rest of the season after the termination of the basketball championship 2019–20 due to the COVID-19, therefore infringing both Article 5(1) LoC as well as Article 101 TFEU. The fines imposed were rather nominal, ranging from EUR 1,070 to EUR 16,510. Keserauskas, the former chairman of the KT, noted that competitors could not use the COVID-19 pandemic to justify cartels, which sought to collectively mitigate the consequences of the crisis at the expense of employed persons or consumers. However, the VAAT ruled that the KT failed to prove that a restrictive agreement had been reached and had not fully assessed the relevant context—that being the unprecedented circumstances during the COVID-19 pandemic as well as the specific features of this sports sector. In its landmark *Meca Medina* case,[109] the CJEU concluded that sports activities are subject to competition law in so far as they constitute an economic activity; this was also confirmed in the more recent cases of the European Superleague[110] and Royal Antwerp Football Club.[111] In the latter case, the court left it up to the national court to decide whether there was restriction 'by object', also noting that the specific characteristics of sport should be considered. The Basketball League case is now pending at the LVAT, where the court decided to renew the case with the extended chamber of five justices due to its complexities.[112] This case also illustrates that labour markets are not excluded from the KT's radar. Some employment practices, such as wage-fixing agreements, non-competing, and/or

[105] UAB Kamineros krovinių terminalas v Konkurencijos Taryba, the RAT judgment on 10 January 2024.

[106] A Kavanagh, 'Deference or Defiance' in G Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2011) 191–192; Mantzari (n 97).

[107] Vilnius Regional Administrative Court, 21 January 2010, Case No I-515-602/2010.

[108] LVAT judgment of 28 March 2011, Case No A525-2577/2011.

[109] Case C-519/04 P, ECLI:EU:C:2006:492.

[110] Case C-333/21, ECLI:EU:C:2023:1011.

[111] Case C-680/21, ECLI:EU:C:2023:1010.

[112] Judgment of 31 January 2024.

non-poaching agreements can have significant anti-competitive impacts in diverse industries. Therefore, these practices are one of the KT's key enforcement priorities. For instance, in 2022, the KT imposed a fine of EUR 1 million on the Lithuanian Association of Real Estate Agencies and its 39 members for the infringement of both Article 101 TFEU and Article 5 LoC based on a restrictive agreement; these undertakings agreed not to solicit each other's clients and brokers, and as a result, restricted competition.[113] The KT noted that due to these anti-competitive practices, workers lose opportunities to negotiate higher salaries and/or other benefits.[114] A request for a preliminary reference procedure was rejected by the court. Other jurisdictions share similar concerns. For instance, the Hungarian NCA (GVH) has also imposed a one million HUF fine on the Association of Hungarian HR Consulting Agencies for various anti-competitive behaviours, such as fixing minimum fees and other conditions related to labour-hire, the use of no-poaching clauses that prevented free movement of employees, market sharing (prohibiting recruiting members from employees who had previously worked with another member) and limiting members' ability to submit tenders using data and CVs of employees working for another company in the context of public procurement procedures concerning labour-hire arrangements.[115]

However, 'judicial deference' appears to be more limited in relation to fines imposed by the KT. While imposing fines, the KT regularly cites the previous caselaw[116] indicating low fines will not have any dissuasive effect. Yet, this empirical research indicates that the courts regularly reduce the fines imposed by the KT on undertakings. A similar conclusion was reached by another study, which focused predominantly on public procurement cases involving cartels (based on both—the domestic provision Article 5 LoC; and the EU provision—Article 101 TFEU), where the author noted that the LVAT either upheld the VAAT's decision to reduce the KT's imposed fine(s) or reduced the fine(s) itself in over 60 per cent of all the analysed cases.[117] This may be due to the fact that KT seems to impose fines closer to a higher end rather than a lower end of the annual worldwide turnover 10 per cent range.[118] Potentially, this can be rectified by the recent development. Indeed, the KT launched a more detailed resolution of the methodology for setting fines (effective from 1 May 2023) providing more clarity on the application of the competition law provisions related to setting sanctions.[119] The KT expects that this new resolution will decrease the number of disputes concerning the calculation of fines imposed by the KT, simultaneously, saving the resources of businesses, the KT, and courts.[120]

7. CONCLUDING REMARKS

Administrative justice in the Lithuanian legal system was introduced at the dawn of the preparation for joining the EU and the standard of judicial review has been evolving ever since.

[113] KT's decision No 1S-138 (2022).

[114] One must note the extended sphere of competition law, as traditionally, agreements between employers and workers were not subject to competition rules. For instance, to address permissibility of collective bargaining, the EU Commission published the '*Guidelines on Collective Agreements by solo self-employed people' in 2022.*

[115] Case No VJ/61/2017. Decision of 18 December 2020.

[116] eg A552-2016/2012 UAB 'Eksortus', UAB 'Specialus montazas-NTP'; A520-634/2013 Corporation of European Pharmaceutical Distributors; A-899-858/2017 UAB 'AMIC Lietuva' etc

[117] Grigaraviciene (n 3).

[118] Likewise, under art 23 of Regulation 1/2003, undertakings in Lithuania can be fined a maximum of 10 per cent of the total annual worldwide turnover.

[119] Nutarimas dėl baudų, skiriamų už Lietuvos Respublikos Konkurencijos iôstatymo pažeidimus, dydžio nustatymo tvarkos aprašo patvirtinimo, No 64. *No 1102, 2022-11-09, announced TAR 2022-11-10, i. k. 2022-22722.*

[120] KT Newsletter 'Procedure for setting fines for Competition Law infringements has been improved', 9 November 2022. Available at: PROCEDURE FOR SETTING FINES FOR COMPETITION LAW INFRINGEMENTS HAS BEEN IMPROVED | Competition Council of the Republic of Lithuania (kt.gov.lt) (accessed 15 May 2024).

In the competition law context, this study focused on the two administrative courts involved in the review process of the KT's decisions: the VAAT (now the RAT) and the LVAT (which reviews the VAAT's judgments, and checks their soundness and legitimacy without overstepping the boundaries of the claim). This study, which predominantly focused on quantitative research, has revealed that the KT's decisions are regularly appealed to the Lithuanian Administrative Courts, claimants utilizing both instances. To commemorate the 20th year anniversary since Lithuania joined the EU (also obtaining an obligation to enforce Regulation 1/2003), the 2004–24 period for investigation was chosen. One hundred and thirteen cases were identified dealing with Articles 101 and 102 TFEU (and national equivalents), with the success rate of appeal in Lithuania being relatively low (ie 14 per cent in terms of fully successful appeals), manifesting respect to the autonomous role of the executive branch, such as administrative bodies, predominantly, in this context, the KT. Save for some exceptions, the administrative courts mostly confirmed the KT's decisions, especially in the context of its priorities policy, with any interventions being calibrated in a manner to avoid any encroachment upon the KT's discretion, thus upholding the concept of judicial deference, substantial rather than 'minimal' deference. The LVAT also noted that even though there are not many competition cases, disputes in this area, as a rule of thumb, tend to be large in scope and feature a wide range of problematic issues and unusual factual circumstances.[121] A relatively high number of claimants (29 per cent) were successful in relation to the reduction of the fines imposed by the KT (in this study, falling under the 'partially successful' category). One may argue that this is because the vast majority of businesses in Lithuania belong to the SMEs category; therefore, high fines are 'unaffordable' for these businesses, as the courts in several cases noted the relatively poor financial situation of undertakings in their justification for the fine reduction. To enhance transparency and legal certainty, the KT has recently amended its guidelines of the methodology for setting fines.

In terms of the specific provisions, there is a clear focus of the KT on restrictive agreements 'by object' (ie notably, bid-rigging) based solely on Article 5 LoC. A similar trend is also noted in Latvia, while Croatia maintains a more balanced approach (embracing cases related to either the domestic equivalents of Article 101 TFEU or Article 102 TFEU), whereas in Bulgaria the cases based on the domestic equivalent of Article 102 TFEU prevail. Finally, the findings also reveal a predominant focus on the national provisions, with only 27 per cent of appealed cases embracing the EU element.

Given that competition cases are complex, featuring a wide range of problematic issues and unusual factual circumstances, it is, yet, to be seen whether the administrative courts will take a more intrusive recourse and how judicial review will develop in the future in Lithuania.

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[121] Annual report of Supreme Administrative Court 2017.

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