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Received: 13.01.2019

Accepted: 05.02.2019

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Guarantees of Human Rights in Competition Proceedings in the European Union and the Republic of Lithuania

Abstract: This article focuses on the protection of human rights in disputes related to competition proceedings. The European Convention on Human Rights is regarded as a most effective instrument for the protection of human rights at the international level. National courts of the European Union member states have also developed specific systems for the protection of human rights. Entities that are charged with breaches of EU competition law, in most cases complain about breaches of two provisions of the ECHR: Article 6 of the Convention which guarantees the right to a fair trial and Article 8 which guarantees the right to respect for private life. In this article, we also discuss a couple of cases decided by the Competition Council of Lithuania, which raise doubts regarding proper guarantee of the right to a fair trial. One of the key problems is that during the questioning of witnesses the Competition Council makes an audio recording of the interview but afterwards deletes the recording without allowing the undertakings under investigation to have access to the Council's case file. The article concludes with a short summary.

Keywords: antitrust damage, human rights, procedural rights, Competition Council, Lithuania, the European Convention on Human Rights

1. Introduction

The instrument based on the European Convention on Human Rights (hereinafter – ECHR) is still regarded as a most effective tool for the protection of

human rights at the international level.¹ However, national courts of the European Union member states have also developed specific systems for the protection of human rights. Initially it was recognised that fundamental human rights are enshrined in the general principles of Community law.² Later on special importance of the Convention on human rights and fundamental freedoms was emphasised³ and jurisprudence of the European Court of Human Rights (hereinafter ECtHR) was quoted.⁴ On the other hand in some cases EU courts have stated that the ECHR is not a part of EU law and the claimant cannot refer directly to the provisions of the Convention in EU courts⁵ or “were the appellant’s view to be upheld, this would impinge seriously on the effectiveness of Community competition law”.⁶ Therefore, some authors who compare the protection of certain rights under EU law with the ECHR emphasise certain differences.⁷ On the other hand, other authors claim that statements about the alleged conflict between legal practices are highly exaggerated.⁸

Courts of the EU have not been analysing application of the fundamental rights in competition cases for a long time. For example, during the period from 1995 to 2005 courts of the EU only heard around thirty competition cases in which

- 1 D. Jočienė, Europos Žmogaus Teisių Teismo jurisprudencijos įtaka nacionalinei teisei bei jurisprudencijai, tobulinant žmogaus teisių apsaugą. Konvencijos ir Europos Sąjungos teisės santykis. *Jurisprudencija*. 2007, 7(97): 17-27, p. 17.
- 2 Judgment of CJEU of 12 November 1969 on the case of Erich Stauder v. Ville d’Ulm – Sozialamt, 29-69, point 7.
- 3 Judgment of the CJEU of 21 September 1989 on the case of Hoechst AG v. European Commission, 46/87 and 227/88, point 13; Judgment of the CJEU of 18 June 1991 of Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and other C 260/89, point 41.
- 4 Judgment of the CJEU of 30 April 1996 on the case of P v. S and Cornwall County Council, C 13/94, point 16; Judgment of the CJEU of 11 July 2002 on the case of Mary Carpenter v. Secretary of State for the Home Department, C 60/00, point 42; Judgment of the CJEU of 22 October 2002 on the case of Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes, C 94/00, points 29, 52.
- 5 Judgment of the CJEU of 20 February 2001 on the case of Mannesmannröhren-Werke AG v. European Commission, T 112/98, points 59, 75; Judgment of the CJEU of 14 May 1998 on the case of Mayr-Melnhof Kartongesellschaft mbH v. European Commission, T 347/94.
- 6 Judgment of the CJEU of 18 September on the case of Volkswagen AG v. European Commission, C 338/00, points 94-97; Judgment of the CJEU of 8 March 1995 on the case of Société Générale v. European Commission, T 34/93, points 445, 448.
- 7 Van Overbeek, W. The right to remain silent in Competition Investigations: The Funke decision of the Court of Human Rights makes revision of the ECJ’s case law necessary. *European Competition Law Review*. 1994, 15: 127; Waelbroeck, D. Competition law proceedings before the European Commission and the right to a fair trial: no need for reform? *European Competition Journal*. 2009, 5(1): 97-143.
- 8 Rosas, A. International Human Rights Instruments in the Case-Law of the European Court of Justice. In: *Teisė besikeičiančioje Europoje. Liber Amicorum Pranas Kūris*. Vilnius: Mykolo Romerio universitetas, 2008, p. 368-371, p. 372.

companies complained about breaches of fundamental rights. However, EU courts began to hear more serious breaches after the Charter of Fundamental Rights of the European Union was proclaimed on 7 December of 2000.⁹ It should be noted that even after publication of this document, EU courts while recognising fundamental rights as a general principles of EU law, quite often were referring to the procedural or formal deficiencies of the competition process and were avoiding analysis of the disputes related to the complaints concerning breaches of fundamental rights.¹⁰

2. National courts and competition authorities are obliged to ensure protection of human rights

Entities charged with breaches of EU competition law, in most cases complain about the breach of two provisions of the ECHR: Article 6 of the Convention which guarantees right to a fair trial and Article 8 which guarantee the right to respect for private life. In most Constitutions and international treaties, such provisions traditionally aim to protect human rights during criminal proceedings.¹¹ The ECtHR has developed the concept of a “criminal charge” which, under certain circumstances, also encompasses administrative processes.¹² Although EU courts don't want to agree that during proceedings related to EU competition law issues related to criminal charges are analysed, we should recognise that investigations of the European Commission correspond to the criteria of the concept of a “criminal charge”. Therefore, during EU competition proceedings the undertakings should have all the above-mentioned guarantees established in the ECHR.

The right of the EU Commission to request information¹³ and the right to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents,¹⁴ illustrates the conflict between effective investigation of the breach of competition law and right of the person not to incriminate himself. The Court of Justice emphasises the obligation to cooperate, which means that the undertaking may not evade requests for the production of

9 E.M. Ameye, The Interplay between Human Rights and Competition Law in the EU. *European Competition Law Review*. 2004, 25(6): 332-341, p. 333.

10 *Ibidem*.

11 K. Dekeyser, C. Gauer, The New Enforcement System for Articles 81 and 82 and the Rights of Defence. In: *International Antitrust Law & Policy: Fordham Corporate Law*. 2004, p. 552.

12 The process is recognised as a criminal case if it meets the so-called “Engel criteria”, which has been formulated by the Judgment of the ECtHR of 8 June 1976 on the case of Engel and Others v. the Netherlands, No. 22, point 82.

13 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 C 365 E, 19.12.2000, p. 284), Article 18.

14 *Ibidem*, para e) of part 2 of the Article 20.

documents on grounds that by complying with such request it would be required to give evidence against itself.¹⁵ On the other hand the right against self-incrimination (or the right to remain silent) although not directly enshrined in Article 6 of the ECHR has been developed in the practice of the ECtHR.¹⁶ Therefore, while evaluating the right of the undertaking against self-incrimination we suggest paying attention to the elements of the analogous right, which are established in jurisprudence of the ECtHR.

Oral proceedings, during which undertakings are charged with breach of competition law, are usually held behind closed doors. Such feature could be considered problematic, since the public character of proceedings before judicial bodies protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained.¹⁷

The other aspect of competition proceedings related to Article 6 of the Convention is the right to confidentiality of communication between attorney and client. The ECtHR recognises that right of the person to communicate with the attorney stems from the para c) of part 3 of Article 6 of the ECHR, which establishes the right of the defendant to defend himself in person or through legal assistance.¹⁸ Article 8 of the ECHR, which guarantees the right to respect for private and family life, home and correspondence, also protects such communication.¹⁹ In the opinion of the ECtHR, the Convention does not make a difference, whether the person who acts on behalf of the client is recognised as a practising attorney.²⁰ The Court of Justice stated that the confidentiality of written communications between lawyers and clients should be protected at Community level and must be connected to “the client’s rights of defence” and second, that the exchange must emanate from “independent lawyers”, that is to say “lawyers who are not bound to the client by a relationship of employment”.²¹ Therefore, we could raise the question of whether without recognition of such protection towards the communication between the suspected company

15 Judgment of the CJEU of 29 June 2006 on the case of European Commission v. SGL Carbon AG, C 301/04 P, points 47-50.

16 Judgment of the ECtHR of 25 February 1993 on the case of Funke v. France, No. 256-A, point 43.

17 Judgment of the ECtHR of 8 December 1983 on the case of Axen v. Germany, No. 72, point 25.

18 Judgment of the ECtHR of 28 November 1991 on the case of S. v. Switzerland, No. 12629/87, point 48.

19 Judgment of the ECtHR of 22 December 2008 on the case of Iliya Stefanov v. Bulgaria, No. 65755/01; Judgment of the ECtHR of 22 December 2008 on the case of Aleksanyan v. Russia, No. 46468/06.

20 Judgment of the ECtHR of 21 March 2002 on the case of Nikula v. Finland, No. 31611/96, point 53; Judgment of the ECtHR of 29 January 2002 on the case of A.B. v. Netherlands, No. 37328/97, points 82-83.

21 Judgment of the CJEU of 14 September 2010 on the case of Akzo Nobel Chemicals Ltd ir Akros Chemicals Ltd v. European Commission, C 550/07, points 40-45.

and its lawyers bound by the relationship of employment, it is possible to ensure an appropriate level of confidentiality between the correspondence of the lawyer and its client during competition proceedings.

Another problematic question is the classified identity of the person or of the undertakings, who have submitted confidential information to the European Commission. In the *Mannesmannröhren-Werke* case the General Court, while recognising the importance to guarantee anonymity of informers, stated that doubts raised by the claimant concerning the validity of the evidence submitted by the classified witness were not sufficient to force the Commission to reject the evidence.²² On the other hand, the ECtHR claims that testimony of the classified witness does not constitute breach of the Convention *per se*, however it limits exercise of the rights of the defence and therefore the applicant should have the right to verify the testimony of the witness, to challenge them and to question the witness by himself.²³ Therefore, we can raise the question of whether rights of the defence that are limited in competition cases are compensated by the duly organised judicial process, which ensures protection of the right to a fair trial.

Regulation No. 17/62 established the right of the European Commission to enter any premises, land and means of transport of undertakings.²⁴ Regulation No. 1/2003 extended this right to include carrying out inspections in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings²⁵. Such expansion of the rights of the European Commission raises doubts concerning correspondence to Article 8 of the Convention, especially bearing in mind that the Strasbourg court has recognized such right not only in relation to private premises, but also in relation to the premises of undertakings.²⁶

Shared competence to apply the Article 101 and 102 of the TFEU poses a danger that several parallel investigations of the national competition authorities and/or European Commission may take place. This means that given that the undertaking acted in the markets of three separate member states and breached Article 101 and 102 of the TFEU, such actions of the undertaking can cause three different investigations in three separate member states, which all may result in the application

22 Judgment of the CJEU of 8 July 2004 on the case of Mannesmannröhren-Werke AG v. European Commission, T 44/00, point 84.

23 Judgment of the ECtHR of 20 November 1989 on the case of Kostovski v. Netherlands, No. 166, points 41-44.

24 Regulation No. 17/62: First Regulation implementing Articles 85 and 86 of the Treaty (OJ 013, 21/02/1962 P. 0204 – 0211) para d of part 1 of the Article 14.

25 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 C 365 E, 19.12.2000, p. 284) part 1 of the Article 21.

26 Judgment of the ECtHR of 16 December 1992 on the case of Niemietz v. Germany, No. 251-B.

of fines. It is possible to question correspondence of such process to the *non bis in idem* principle that is enshrined in Article 4 of Protocol No. 7 of the ECHR and in the Charter of Fundamental Rights of the European Union.

3. Problems related to the protection of human rights during Lithuanian Competition Council proceedings

The Competition Council of the Republic of Lithuania (hereinafter the CC) has very wide powers of inspection and collection of evidence during the investigation of a breach of Competition law. On the other hand, the undertakings under investigation do not have the same powers as the CC to prepare their defence. The right of the undertakings to a fair trial can only be exercised with effect if they have access to the same information as the CC and the CC is obliged to disclose all of that information to them. Therefore, the wide powers of the CC are legitimate only insofar as they allow the undertakings to exercise their right to a fair trial effectively.

The CC, during its investigation of alleged breaches of Competition law, most often question employees of the undertakings under investigation and other witnesses. Such questioning by the CC has to correspond to *inter alia*: (i) the Rules of procedure adopted by the resolution of the Competition Council; (ii) EU law provisions, Articles 41, 47 and 48 of the Charter of Fundamental Rights of the European Union, practice of the Court of Justice; (iii) Article 6 of the ECHR, which establishes the right to a fair trial as well as the principle of procedural equality and principle of adversarial process; (iv) Legal acts of the Republic of Lithuania and jurisprudence of the Lithuanian courts.

3.1. Rules of procedure of the Competition Council regulating audio recording during proceedings

Procedure concerning the questioning of the accused and witnesses during the investigation of an alleged breach of Competition law, is established in the rules of procedure adopted by the Competition Council (hereinafter Rules of procedure of the CC). The Competition Council of Lithuania by Resolution of 1 February 2018 No. 1S-10 (2018) has adopted the “last” wording of the Rules of procedure of the CC.²⁷ The last wording came into force on 1 January 2019. In this article, we are referring to the last wording.

Article 52 of the Rules of the procedure of the CC provides that *“Oral explanations of the person have to be recorded by the officer at the explanatory protocol, which has to capture the correct content of the explanations. The authorized officer may suggest for the person who provides explanations to write all the explanations to the protocol by himself.*

²⁷ The Act of 1 February, 2018 – Regarding Approval of the Rules of Procedure of the Competition Council of the Republic of Lithuania (Registry of Legal Acts 2018, No 2273).

In case of need, additional documents or other annexes are attached to the protocol. The authorized officer, having informed the person and remarking about it in the explanatory protocol, has the right to make audio or video recording of the explanations". This means that the Rules of the procedure of the CC provide that persons may be questioned in two ways: 1) by immediate recording of the testimony of the person in the protocol; 2) by making audio or video recording and remarking about it in the protocol. In the case of officials making an audio or video recording during questioning, this has to be remarked about in the explanatory protocol at the time. The Rules of the procedure of the CC do not provide for the possibility to make an audio or video recording without first informing the person being questioned for the purpose of preparing a protocol after the event. Moreover, it is prohibited to delete audio recordings. Such legal regulation is applicable in all cases where representatives of state institutions question private persons. We believe that non-compliance with such requirement breaches the rights of the person questioned, since representatives of that person do not have full access to the content of the material concerning the examination of witnesses.

Non-provision of the audio or video recording to the representatives of suspected undertakings, may raise doubts whether the process of interrogation was carried out by the CC properly and whether testimony of witnesses to be presented were not chosen selectively.

3.2. The Competition Council during competition proceedings has to respect the right to a fair trial established in Article 6 of the ECHR – principle of procedural equality and principle of adversarial process

The Competition Council recognises that during the competition proceedings it is necessary to respect Article 6 of the ECHR. The ECtHR has recognised that provisions of the Convention also ensure protection of the rights of the legal entities. Institutions of Strasbourg have stated in competition cases that the amount of fine imposed led to recognition that a "criminal charge" has been addressed. The case *Société Stenuit v. France* was tried under French competition law rules; the company has been penalised with an administrative fine of 50,000 French francs. The ECHR decided that this fine amounts to a criminal sanction, since it has criminal and deterrent elements. The ECtHR held that competition law bearing in mind the gravity of fines and their repressive nature has the character of criminal law. Therefore, in relation to the parties involved in such cases, the full protection of Article 6 of the Convention is applicable.²⁸ Parts 1 and 3 of Article 6 of the ECHR establish the principle of "equality of arms".²⁹

28 Judgment of the ECtHR of 27 February 1992 on the case of *Société Stenuit v. France*, No. 232-A, points 62-65.

29 Judgment of the ECtHR of 18 March 1997 on the case of *Foucher v. France*, No. 22209/93, point 36; Judgment of the ECtHR of 23 October 1996 on the case of *Ankerl v. Switzerland*, No.

The Court of Justice and the Supreme Administrative Court of the Republic of Lithuania both recognised that competition proceedings amount to criminal proceedings in the meaning of the ECHR. Therefore, the CC while carrying out an investigation concerning a suspected breach of competition law, has to ensure that the parties under investigation are subject to no lesser legal guarantees than those provided under ECHR.

The right to be acquainted with all the case material collected by the officials is one of the key guarantees during competition proceedings. Access to the file of the Competition Council or of the European Commission is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence. The undertakings should be able to access not only the documents based on which the competition authority is formulating its charges, but to all the materials of the case, except business secrets and confidential information. Such right is also known as a principle of equality of arms – a necessary element of the right to be heard.³⁰

The principle of equality of arms, similarly as a principle of prohibition of discrimination, requires behaving in the same way in identical cases. In the legal process, it means that both parties in civil and criminal cases should be able to lay out their position and defend themselves at any stage of the proceedings. Equality of arms does not mean determination of truth at any price, but determination of the truth by making sure that both parties have an equal chance to prove their position.

Although Article 6 of the Convention does not directly establish the principle of procedural equality, however, it is one of the most important principles developed in the practice of the ECtHR. Principle of equality of arms, similarly as the principle of competitive process, is very important in order to exercise the right to defence. Without guarantee of the principle of equality of arms, it is not possible to implement the other rights enshrined in Article 6. For example, the right to have sufficient time and opportunity to prepare a defence, the right to defend himself in person or through legal assistance of his own choosing or to examine or have examined witnesses against him and the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.³¹ Without procedural equality, there will be no equal litigation between the parties and the outcome of the case will not be just.

17748/91, point 38; Judgment of the ECtHR of 18 February 1997 on the case of *Nideröst Huber v. Switzerland*, No. 18990/91, point 23.

30 Nasutavičienė J. *Žmogaus teisių ir pagrindinių laisvių konvencijoje įtvirtintų įmonių teisių apsaugos problemos ES konkurencijos teisėje*. Daktaro disertacija. Mykolo Romerio Universitetas. 2012. p. 78.

31 Štarienė, L. *Teisė į teisingą teismą pagal Europos Žmogaus Teisių Konvenciją*. Monografija, Mykolo Romerio universitetas, Vilnius, 2010, p. 253-254.

The ECtHR provides that in order to ensure effective participation in the administrative process, the parties should be acquainted with the evidence collected by the state institutions in order to be able to influence the process of the litigation.³² The ECtHR recognises that the ability of the person (*inter alia* legal person) to provide its materials and to be acquainted with the evidence is one of the key aspects of the legality of the judicial process.³³ Where administrative institutions do not disclose their documents to the parties in the case, it may cause the breach of their rights, since it has negative effect on their ability to influence the judicial process.³⁴ Therefore, in order to ensure “the right judicial procedure” parties of the case should be able to access the evidence of the administrative institutions.

3.3. EU law establishes the right to access the file of the European Commission or the Competition Council

Commission Regulation No. 773/2004 of 7 April 2004 “Relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty” (hereinafter Regulation concerning the conduct of proceedings)³⁵ establishes the main principles concerning access to the file of competition authority. Part 1 of Article 3 of the Regulation concerning the conduct of proceedings provides that “*It shall also inform the person interviewed of its intention to make a record of the interview*”. Part 3 of Article 3 provides that “*a copy of any recording shall be made available to the person interviewed for approval*”. Part 2 of Article 4 of the Regulation provides that “*a copy of any recording made pursuant to paragraph 1 shall be made available to the undertaking or association of undertakings concerned after the inspection*”. We believe that since in order to ensure due process officials of the European Commission are obliged to follow specific obligations concerning the securing of evidence, it is possible that the same requirements could also be applicable to officials of the Competition Council. However, in recent court proceedings officials of the Competition Council of the Republic of Lithuania have claimed that they are not obliged to follow the principles concerning use of the evidence and recording established in the aforementioned Regulation.

The European Commission Notice on the rules for access to the Commission’s file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement (hereinafter Commission Notice) and Council Regulation (EC)

32 Judgment of the ECtHR of 16 February 2000 on the case of *Jasper v. United Kingdom*.

33 Judgment of the ECtHR of 24 March 1988 on the case of *Olsson v. Sweden*, No. 130, point 90.

34 Judgment of the ECtHR of Human Rights of 7 August 1996 on the case of *Johansen v. Norway*, point 66.

35 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004, (OJ L 68, 6.3.2004, p. 1).

No 139/2004 (hereinafter Council Regulation)³⁶ resolve all questions concerning access to the file. The Commission Notice provides that the parties must be able to acquaint themselves with the information in the Commission's file, so that based on this information they can effectively express their views on the preliminary conclusions reached by the Commission in its objections. For this purpose, they will be granted access to all documents making up the Commission's file, with the exception of internal documents, business secrets of other undertakings, or other confidential information.³⁷ The 'Commission file' in a competition investigation (hereinafter also referred to as "the file") consists of all documents, which have been obtained, produced or assembled by the Commission during the investigation. In the Commission Notice the term "document" is used for all forms of information support, irrespective of the storage medium. This covers also any electronic data storage device as may be or become available.³⁸

The undertakings should be able to express their position concerning the legality and importance of the data, which is present at the file. This right encompasses access to all documents that are used by the competition authority in order to prove the breach of Competition law.³⁹ The undertakings, whose actions are under scrutiny, should be able to access the same documents, which are accessible to the officials of the competition institutions that are investigating alleged breaches of the law.⁴⁰ Similarly, undertakings should be able to access all the documents that are at the disposal of the Commission.⁴¹ Ability to get all the documents increases chances for successful litigation.⁴² Competition authorities cannot be given the unilateral

36 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, (2005/C 325/07).

37 *Ibidem*, para. 10.

38 *Ibidem*, para. 8 and footnote 6.

39 Judgment of the CJEU of 13 February 1979 on the case of Hoffman-La Roche, 85/76, points 9 and 11; Judgment of the CJEU of 25 October 2011 on the case of Solvay v. Commission, C 109/10 P, point 53; Judgment of the CJEU of 7 January 2004 on the case of Aalborg Portland and Others v. Commission, C 204/00, point 66.

40 Judgment of the CJEU of 7 June 1983 on the case of SA Musique Diffusion Francaise and Others v. Commission, C 100/80, point 29.

41 Judgment of the CJEU of 29 June 1995 on the case of Solvay v. Commission, T 30/91, point 59; Judgment of the CJEU of 18 December 1992 on the case of Cimenteries CBR and Others v. Commission, T 10/92, point 38; Judgment of the CJEU of 1 April 1993 on the case of BPB Industries and British Gypsum v. Commission, T 65/89, point 30; Judgment of the CJEU of 15 October 2002 on the case of Limburgse Vinyl Maatschappij and Others v. Commission, C 238/99, points 315 and 316; Judgment of the CJEU of 7 January 2004 on the case of Aalborg Portland and Others v. Commission, C 204/00, points 66 and 67; Judgment of the CJEU of 10 May 2007 on the case of SGL Carbon AG v. Commission, C 328/05, point 55.

42 Judgment of the CJEU of 18 December 1992 on the case of Cimenteries CBR and Others v. Commission, T 10/92, point 38.

right to evaluate what documents could be used (or be useful) for the defence of the undertakings.⁴³

Whether the right to defence is breached should be evaluated on a case-by-case basis. In order to decide that the rights of the defence are infringed, it is sufficient to establish that non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment. The possibility of such influence exists if a provisional examination of the evidence reveals that the documents not disclosed might have played a significant role in the outcome of the case. Where the right to defence is infringed, the administrative procedure and hence the appraisal of the facts in the decision is defective.⁴⁴ In cases where access to documents only became available during the litigation procedure, undertakings only have to explain how the documents under consideration (or other data received) could have been useful for the defence. It needs to be emphasised that the Court of Justice does not require the undertaking to prove that the decision of the competition authority would have been different if the undisclosed documents had been made available.⁴⁵

Infringement of the right of access to the Commission file (audio or video records, and other evidence) during the procedure prior to adoption of the decision can, in principle, cause the decision to be annulled if the rights of defence of the undertaking concerned have been infringed.⁴⁶ In such case, the infringement committed is not remedied by providing access during the judicial proceedings relating to an action in which annulment of the contested decision is sought.⁴⁷ It is common ground that belated disclosure of documents in the file does not place the undertaking contesting the Commission's decision back into the position it would have had if those documents had been available at the time of presenting its written and oral observations to the Commission.⁴⁸

The right of the undertakings to be acquainted with the file of the competition authorities is also guaranteed by Articles 41, 47 and 48 of the Charter of Fundamental Rights of the European Union, which guarantees the right to good administration, right to an effective remedy and to a fair trial, as well as the right of defence. The

43 *Ibidem*, point 81.

44 *Ibidem*, point 68.

45 Judgment of the CJEU of 29 June 1995 on the case of *Solvay v. Commission*, Case T-30/91, para. 57; Judgment of the CJEU of 15 October 2002 on the case of *Limburgse Vinyl Maatschappij and Others v. Commission*, C 238/99, point 318; Judgment of the CJEU of 7 January 2004 on the case of *Aalborg Portland and Others v. Commission*, C 204/00, point 131.

46 Judgment of the CJEU of 15 October 2002 on the case of *Limburgse Vinyl Maatschappij and Others v. Commission*, C 238/99, point 317.

47 *Ibidem*, para. 318.

48 Judgment of the CJEU of 7 January 2004 on the case of *Aalborg Portland and Others v. Commission*, C 204/00, point 103.

Charter became obligatory after the Treaty of Lisbon entered into force. The Court of Justice recognised the right of the legal person to rely on Article 47 of the Charter, which establishes the right to an effective remedy. The Court of Justice recognised that the right to an effective remedy before a court, enshrined in Article 47 of the Charter (found under Title VI of the Charter) relating to justice, in which other procedural principles are established that apply to both natural and legal persons.⁴⁹ Therefore, the EU courts recognise that the right to an effective remedy is also guaranteed to legal persons not just natural persons.

3.4. Guarantee of the presumption of innocence towards undertakings under investigation

The Supreme Administrative Court of the Republic of Lithuania (hereinafter the Supreme Administrative Court) recognised in its decision of 1 March 2012⁵⁰ that the existing legal regulation, which establishes fines for breaches of competition law, provides sufficient background to claim that liability for the infringement of such law is even stricter than criminal liability. Moreover, the Supreme Administrative Court by its decision of 11 February 2003⁵¹ recognised that if, in an administrative case the expected fine by its strictness may be equal to a criminal sanction, then the person under investigation should have the same rights as the accused person in criminal proceedings as well as the guarantees foreseen in the ECHR. The Supreme Administrative Court in its decision of 22 December 2016, added that while breaches of competition law and the sanctions applied are not regulated by criminal law, on the basis of the third “Engel criteria” it can be concluded that sanctions should be viewed as criminal in the meaning of the Convention. The Court noted that the undertakings who are investigated by the CC should have to be granted the guarantees provided in Article 5 of the Convention, however, it does not mean that the CC pursued the applicant’s criminal prosecution.⁵²

Part 2 of Article 6 of the ECHR provides that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to the law. Moreover, the presumption of innocence also means that the burden of proof is placed on the accusing party (prosecutor) and every doubt is taken for the benefit of

49 Judgment of the CJEU of 22 December 2010 on the case of DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH prieš Bundesrepublik Deutschland, C 279/09, point 40.

50 The decision of the Supreme Administrative Court of the Republic of Lithuania of 1 March 2012, Administrative case No. A⁵⁰²-1668/2012.

51 The decision of the Supreme Administrative Court of the Republic of Lithuania of 11 February 2003, Administrative case No. 259_03.

52 The decision of the Supreme Administrative Court of the Republic of Lithuania of 22 December 2018, Administrative case No. eA-2330-520/2016.

the accused.⁵³ The Supreme Administrative Court in the decision of 13 August 2012⁵⁴ stated that during the investigation of breaches of competition law it is necessary to take into account the presumption of innocence. Moreover, Article 2 of Regulation 1/2003 provides that in any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement.

4. Some problematic cases in Lithuania concerning guaranteeing the right of access to the file of the Competition Council

On 5 December 2016 the CC passed resolution No. 2S-15/2016 “Concerning correspondence of the actions of the undertakings, which participated in the public procurement for the purchase of a technique, pursuant to Article 5 of the Competition Law”. By this resolution the CC recognised that two undertakings, UAB Rovaltra and UAB Žagarės inžinerija, have concluded an anticompetitive agreement. Subsequently, this resolution of the CC was appealed and is currently still under investigation at the Supreme Administrative Court.⁵⁵ This means that a final decision in the case has still to be made.

During investigation of this case, the applicants raised some alleged breaches of human rights. One of the main arguments relates to the alleged failure of the CC to guarantee the right of defence and access to the file. While challenging the resolution of the CC both applicants (UAB Rovaltra and UAB Žagarės inžinerija) noted that the CC was not following its own rules of procedure. As previously mentioned, Article 52 of the Rules of the procedure of the CC provides that “[...] *The authorized officer, having informed the person and remarking about it in the explanatory protocol, has the right to make audio or video recording of the explanations*”. Moreover, as also mentioned, we believe that it is strictly prohibited to delete audio recordings. Such legal regulation is applicable in all the cases when the representatives of state institutions question natural persons. We believe that non-compliance with such requirement breaches the rights of the person under examination, since their representative(s) do not have full access to the content of the material concerning examination of the witnesses.

53 V. Valančius, R. Norkus, Lietuvos administracinės ir baudžiamosios justicijos sąlyčio aspektai, *Jurisprudencija*, 2006, 4(82); 91-98.

54 The decision of the Supreme Administrative Court of the Republic of Lithuania of 13 August 2012, Administrative case No. A⁸⁵⁸-1516/2012.

55 One of the authors of this article Dr. Raimundas Moisejevas was acting as an attorney on behalf of UAB „Žagarės inžinerija“ and UAB „Rovaltra“.

In the abovementioned case the CC, while questioning all the witnesses, have made audio recordings. However, such recordings were not noted in the explanatory protocols prepared by the CC. Initially, the CC claimed that all material related to the case had been submitted to the court but did not elaborate or provide any additional details. The defendant's attorney had to ask the court to invite one of the officials of the CC to testify in the proceedings in order to respond to the questions raised in the request and provide clear answers concerning the availability of the audio recordings of the witnesses and of his clients. The Vilnius County Administrative Court has invited the official of the CC to the court hearing and questioned her. During this questioning some quite interesting facts have emerged.

- Firstly, officials of the CC have been audio recording the interviews of representatives of the companies under investigation and other witnesses.
- Secondly, the CC claimed that it made the audio recordings of the interviews in order to write the explanatory protocols and afterwards all of the recordings were simply deleted.
- Thirdly, some discrepancies concerning the facts provided in the explanatory protocols prepared by the CC and the evidence given by witnesses were established.

4.1. Discrepancies concerning the facts provided in the explanatory protocols of the CC and the evidence given by witnesses

Here, we would like to elaborate more on the abovementioned nonconformity between the protocol prepared by the CC and the actual evidence given by one of the witnesses.

The attorney representing UAB Rovaltra and UAB Žagarės inžinerija requested the CC to question two witnesses and provided a list of questions they should be asked. One witness (we will name him X) possessed important information about the preparation of the alleged anticompetitive agreement. In this case, some suspicions existed that a third person could have prepared some of the documents. If these suspicions proved to be of substance, it would mean that the undertakings under investigation had not concluded an anticompetitive agreement. Therefore, the testimony of witness X in this regard was very important. The CC invited witness X to interview and questioned him. As the attorneys for the undertakings did not represent the witness they were not allowed to be present during the interview.

In the subsequent court hearing at Vilnius County Administrative Court the official of the CC who conducted the interview and witness X were both questioned. This established the following:

- 1) the CC official claimed that an audio recording had not been made during the interview with witness X, whereas witness X claimed that an audio recording had been made;

- 2) the CC official claimed that witness X had not been invited to the CC as a witness for questioning, the invitation was only for the purpose of “conversation” (the Law on Competition does not foresee any possibility to hold simple “conversations” with witnesses and moreover, in this instance the CC had used the information provided by witness X as evidence);
- 3) the CC official claimed that the interview with witness X had lasted only 10-15 minutes, whereas witness X claimed that he had been questioned for about one hour;
- 4) the CC official claimed that witness X was asked only one question, whereas witness X said that he was asked more than 5 questions;
- 5) the CC official claimed that witness X has not mentioned any third persons who could have prepared public procurement documents for the undertakings under investigation, whereas witness X said that he has mentioned specific persons who had prepared documents for the tender;
- 6) the CC decided to name its explanatory protocol with witness X as a protocol of the establishment of factual circumstances. However, the Law on Competition does not foresee that the CC by questioning a witness could make a protocol concerning the fixing of factual circumstances;
- 7) as result of the prolonged discussion with witness X, which lasted for about one hour, the CC official wrote only one sentence representing the testimony of witness X and further, had not recorded in the protocol any of the questions that witness X was asked to address.

Given the degree of disparity between the facts presented by the CC in the protocol and the actual testimony of witness X, it is quite clear that the protocol of the CC does not reflect a true account of the examination of the witness. Moreover, it has to be borne in mind that in the present case the CC has questioned a large number of witnesses and, on the basis of the discrepancies described above, it is not altogether clear how to evaluate the validity of the questioning of the other witnesses in the meaning of due process.

It should be noted that Vilnius County Administrative Court, by way of the decision handed down on 27 April 2017 in case No. eI-1923-473/2017, has failed to recognise both the breach of the right to a fair trial and breach of the right to an effective defence. In consequence, the decision of that court was appealed to the Supreme Administrative Court.

As previously mentioned, the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004,⁵⁶ provides that the parties must be able to acquaint themselves with the information

56 Commission Notice, *op. cit.*

in the Commission's file, so that, on the basis of this information, they can effectively express their views on the preliminary conclusions reached by the Commission in their objections. For this purpose, they will be granted access to all documents making up the Commission file, with the exception of internal documents, business secrets of other undertakings, or other confidential information.⁵⁷ It was also mentioned that the Commission file in a competition investigation consists of all documents, which have been obtained, produced or assembled by the Commission during the investigation.

It is interesting to note that the CC, while investigating the actions of undertakings, still fails to grant full access to the file of the competition authority to those under investigation and deletes audio recordings made during investigatory interviews. On 17 December 2018, the CC passed Resolution No. 2S-7 (2018) "Regarding the compliance of actions of undertakings providing driving training services with the requirements of Article 5 of the Republic of Lithuania Competition Law".⁵⁸ In this case, in the explanatory protocols the CC wrote that audio recordings were made. Probably the CC decided to improve its protocols bearing in mind previous disputes. However, the CC has still to grant access to those audio recordings to the undertakings under investigation. Moreover, the head of one of the undertakings involved has said that during questioning at the CC he asked the CC official for permission to make a recording of the proceedings using his own means (a mobile phone). The CC official refused the request, stating that they alone are doing the recording. Moreover, after being questioned he observed that what the CC official had noted in the protocol was at variance with the answers he had provided and asked for corrections to be made. Indeed, the CC official had written in the draft protocol that the head of the undertaking under investigation recognises its involvement in the anticompetitive agreement. This conclusion was contested by the head of the undertaking and the protocol amended.⁵⁹

5. Conclusions

Entities that are charged with breaches of EU competition law, in most cases complain about breaches of two provisions of the ECHR: Article 6 of the Convention, which guarantees the right to a fair trial and Article 8 of the Convention, which

57 *Ibidem*, para. 10.

58 Resolution of the Competition Council of the Republic of Lithuania Regarding the compliance of actions of economic entities providing driving training services with the requirements of Article 5 of the Law on Competition of the Republic of Lithuania, available at: https://kt.gov.lt/uploads/docs/docs/3705_2de8c4a97568bfd851c2746d0f8b23f4.pdf (accessed 30.04.2019).

59 This information was received from one of the heads of the undertakings under investigation during legal consultation.

guarantees the right to respect for private life. In most constitutions and international treaties such provisions traditionally aim to protect human rights during criminal proceedings. ECtHR has developed the concept of a “criminal charge” which, under certain circumstances, also encompasses the administrative process. We should recognise that investigations of the European Commission correspond to the criteria of the concept of a “criminal charge”. Therefore, during EU competition proceedings the undertakings are entitled to all the aforementioned guarantees established in the ECHR. The right of the EU Commission to request information and the right to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents, illustrates the conflict between the effective investigation of a breach of competition law and the right of the person not to incriminate himself. In the article, we have also discussed cases decided by the Competition Council of Lithuania, in which one could suspect a breach of the guarantee of the right to a fair trial. One of the key problems here, is that during the questioning of witnesses the CC makes audio or video recordings but afterwards deletes those recordings without allowing the undertakings under investigation to have access to the CC file.

Proceedings conducted by the CC are completely different from court proceedings. At the CC the official cannot be asked questions and the ability to gain access to the CC file is limited. The CC invites of its own choosing the witnesses that are to be called upon, decides what questions should be asked, how the information should be collected, recorded and so on.

In competition proceedings the Competition Council and in some cases also the courts are using the standard of “balance of probabilities” used in civil cases, instead of the standard of “beyond reasonable doubt” used in criminal cases. Nevertheless, from the standpoint of effective protection of human rights it would be more appropriate if in competition proceedings the same guarantees and standards of proof would be applied as those in criminal law.

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