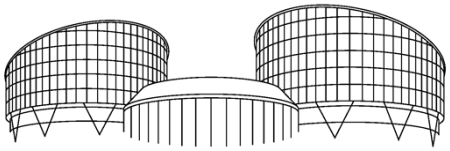

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF ORLEN LIETUVA LTD. v. LITHUANIA

(Application no. 45849/13)

JUDGMENT

STRASBOURG

29 January 2019

FINAL

29/04/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Orlen Lietuva Ltd. v. Lithuania,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ganna Yudkivska, *President,*
Egidijus Kūris,
Iulia Antoanella Motoc,
Carlo Ranzoni,
Georges Ravarani,
Marko Bošnjak,
Péter Paczolay, *judges,*
and Marialena Tsirli, *Section Registrar,*

Having deliberated in private on 4 December 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 45849/13) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a legal entity registered under Lithuanian law, Orlen Lietuva Ltd. ("the applicant company"), on 11 July 2013.

2. The applicant was represented by Mr M. Juonys and Mr K. Kačerauskas, lawyers practising in Vilnius. The Lithuanian Government ("the Government") were represented by their Agent, Ms K. Bubnytė-Širmenė.

3. The applicant company alleged a breach of legal certainty under Article 6 § 1 in view of the imposition of a fine after the expiry of the applicable limitation period and the different interpretation of the limitation period that had been taken in two allegedly similar cases. It also alleged a breach of Article 7, given the high level of the fine imposed.

4. On 21 June 2017 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant company is a legal entity registered in Mažeikiai.

6. In 2004 the Competition Council (*Konkurencijos taryba*) opened an investigation into the applicant company's alleged abuse of its dominant position on the fuel market. The investigation covered the applicant

company's activities between 2002 and 2004. According to the applicant company, the last action that fell within the scope of the investigation was undertaken on 31 December 2004.

7. On 7 March 2005 the Competition Council decided to broaden the scope of the investigation and to find out whether the applicant company's activities had affected trade between the European Union member States, as defined in Article 82 of the Treaty establishing the European Community ("the TEC") – now Article 102 of the Treaty on the Functioning of the European Union ("the TFEU" – see paragraph 43 below).

8. On 22 December 2005 the Competition Council found that the applicant company had abused its dominant position on the fuel market, and fined it 32,000,000 Lithuanian litai (LTL – approximately 9,267,841 euros (EUR)).

9. The applicant company appealed against the decision of the Competition Council of 22 December 2005 (see paragraph 8 above). It argued that the Competition Council had committed procedural violations and that it had also made mistakes in defining the scope of the market and the scope of the geographical market, and that its ruling that the applicant company had abused its dominant position on the fuel market had thus been unjustified. The applicant company also described as unjustified the Competition Council's ruling that its pricing had been discriminatory and that the applicant company had obliged other economic entities to sign loyalty and non-competition agreements (see paragraph 16 below), and that it had discriminated against other economic entities. The applicant company also described as unfounded the Competition Council's ruling that it had sold diesel fuel for differing prices to different economic entities and had thus discriminated against them and that it had sold arctic diesel fuel to one economic entity for a better price than that which it had offered to others. The applicant company was also dissatisfied with the level of the fine and was of the view that that it had been disproportionate.

10. On 28 June 2008 the Vilnius Regional Administrative Court stated the following. The court held that the Competition Council had a right to investigate whether actions of economic entities had been in accordance with Article 82 of the TEC. The court emphasised that the Law on Competition enabled the Competition Council to initiate an investigation upon its own initiative if it gave sufficient reasons for doing so. In the present case, the Competition Council had given sufficient reasons for broadening the investigation to cover Article 82 of the TEC. The court found that the Competition Council had committed some procedural violations and decided to annul parts of its decision. The court also examined the case on the merits. It held that the Competition Council had defined the scope of the market and the geographical market incorrectly, and that that had had a major impact on its decision. It followed that further conclusions reached by the Competition Council regarding the applicant company's dominant position, its abuse of that dominant position and

compliance with Article 82 of the TEC could not have been just because they had been based on incorrect data.

11. The Competition Council appealed. On 8 December 2008 the Supreme Administrative Court delivered its decision, stating that it disagreed with the first-instance court regarding a number of procedural violations but holding that the Competition Council had not extensively explained why it had ignored the applicant company's arguments regarding the scope of the market. In order to establish the scope of the market, it was necessary to investigate further. The court thus decided to return the case to the Competition Council for additional investigation (*grąžinti bylą Konkurencijos tarybai atlikti papildomą tyrimą*).

12. On 15 January 2009 the Competition Council decided that the Supreme Administrative Court's decision (see paragraph 11 above) obliged it to undertake additional investigative measures into the applicant company's activities and decided to reopen the investigation (*atnaujinti tyrimą*) with regard to the applicant company.

13. On an unspecified date, the applicant company appealed against the decision of the Competition Council to recommence the investigation. It submitted that the investigation of the applicant company's activities had covered the period between 2002 and 2004. Although the initial investigation had not mentioned the end date of the actions examined, it could be presumed that the last investigated action had been undertaken on 31 December 2004. Domestic law provided that economic entities could only be held liable for breaches of the Law on Competition up to three years after the date of the violation in question or, if the violation was continuous, three years after the date of the last action that had been contrary to the Law on Competition (see paragraph 27 below). The applicant company stated that the last such action had been undertaken by it on 31 December 2004 and that the limitation period had ended on 31 December 2007; it could thus not be held responsible for breaches of the Law on Competition.

14. On 25 May 2009 the Vilnius Regional Administrative Court dismissed the applicant company's complaint. The court held that final court decisions had to be executed, and that in view of the fact that the decision of the Supreme Administrative Court of 8 December 2008 had become final (see paragraph 11 above), the Competition Council had an obligation to reopen the investigation into the applicant company's activities.

15. The applicant company lodged an appeal, which was dismissed by the Supreme Administrative Court on 13 May 2010. The court provided its reasoning in five short paragraphs, holding that by its impugned decision the Competition Council had merely restarted the previous investigation (rather than opening a new one) (*skundžiamu nutarimu yra tik atnaujinamas anksčiau vykdytas tyrimas vykdant Lietuvos vyriausiojo administracinio teismo įpareigojimą, o ne pradedamas naujas tyrimas*), and that the

provision of the domestic law regarding the limitation period was only applicable in respect of new investigations.

16. In order to comply with the decision of the Supreme Administrative Court of 8 December 2008 (see paragraph 11 above), on 16 December 2010 the Competition Council carried out an additional investigation into the applicant company's activities. The Competition Council clarified the definition of the geographical scope of the market, narrowing it to the territory of Lithuania. The Competition Council found that the applicant company had undertaken actions that had restricted competition – namely, it had abused its dominant position by applying discriminatory pricing, by imposing yearly loyalty requirements on other economic entities (that is to say by requiring them to agree to purchase a certain amount of fuel per year from the applicant company) and by restricting parallel imports and the onward sale by its clients of cheap fuel. The applicant company raised an issue regarding the limitation period, claiming that it had expired and that the Competition Council therefore had to terminate the investigation. The Competition Council was of the view that a limitation period had to be calculated from the time at which the economic entity in question had ceased engaging in unlawful activity. One of the breaches committed by the applicant company had started in 2002; one had started in 2003; and the rest had started in 2004. There was no information that the applicant company had ended its unlawful activities (except for one of them). Thus, the three-year limitation period had not even started to run. Moreover, there was no information that the applicant company had changed its behaviour on the relevant markets in such a way that it no longer undertook actions contrary to the Law on Competition and the TFEU; therefore, the violation had been continuous, and it could not be held that the limitation period had expired. Even if the limitation period had started running before the Competition Council's issuance of its decision of 22 December 2005, the calculation of it would nevertheless have ceased to run on the day that the Competition Council adopted its decision. The time-limit for holding the applicant company liable should have started running on 8 December 2008 – the date of the Supreme Administrative Court's partial annulment of the decision of the Competition Council. Otherwise, it would have been impossible for the Competition Council to rectify the shortcomings in its decision owing to the length of the court proceedings. Such a situation would have been contrary to the principles of justice and reasonableness because the harmful actions in question could have continued and there would have been no opportunities to require the applicant company to terminate them. Moreover, it would have been impossible to enforce the execution of the court's decisions. The calculation of the limitation period provided by the applicant company was favourable to other economic entities that had breached the Law on Competition. Such economic entities would only have to behave in such a manner as to ensure that the court proceedings in respect of their own behaviour lasted for a long time.

The Competition Council also drew attention to the provisions of the Code of Administrative Offences, wherein it was stated that if a court annulled a decision to impose a sanction on an economic entity or to terminate the procedure regarding the imposition of a sanction (or if that first-instance decision was annulled by an appellate court), the time-limits would start to run again from the date on which the court's or appellate court's decision became final (see paragraph 31 below). The Supreme Administrative Court held that responsibility for violations of the Law on Competition was an administrative responsibility in the broad sense and that the principles of administrative responsibility could also be applied to violations of the Law on Competition (see paragraph 38 below). The Competition Council decided that the provisions of the Code of Administrative Offences had to be applied in the applicant company's case and that – irrespective of the rules of the Law on Competition – the time-limit had to be calculated from the day on which the Supreme Administrative Court had adopted its decision. The provisions of European Union law also provided that the limitation period for imposing fines had to be suspended when the European Commission's decision was reviewed by the European Union Court of Justice (see paragraph 47 below). The Competition Council was of the view that the national competition authority could not be more limited than the European Commission in its ability to suspend the limitation period.

The Competition Council also relied on the decision of the Supreme Administrative Court of 13 May 2010, whereby the court held that the Competition Council had been obliged to reopen the investigation and not to start a new one (see paragraph 15 above). The Competition Council found that the applicant company had breached the Law on Competition and the TFEU and fined it LTL 8,231,000 (approximately EUR 2,383,862).

17. The applicant company lodged a complaint with the Vilnius Regional Administrative Court and asked it to annul the order of the Competition Council of 16 December 2010 (see paragraph 16 above). The applicant company's arguments were based, *inter alia*, on the fact that the limitation period for imposing the fine had been missed and that the applicant company could not be held responsible for violations of the Law on Competition and of the TFEU. The applicant company argued, *inter alia*, that the Law on Competition set the most serious economic sanctions of all those provided under the Lithuanian legal system and that such high fines threatened the continuity of the activities of economic entities and that because of that it was logical that the law provided that the limitation period could not be suspended or renewed.

18. On 15 April 2011 the Vilnius Regional Administrative Court dismissed the applicant company's complaint. As regards the limitation period and its calculation, the court held that the investigation into the applicant company's activities had been started on 15 July 2004. The Competition Council was of the view that the limitation period had not

started running before 22 December 2005 and that even if it had, it must have stopped when the Competition Council had adopted its decision (see paragraph 8 above). When the Supreme Administrative Court had annulled part of the Competition Council's decision (see paragraph 11 above), the time-limit for responsibility for violations of competition law had had to be reset. The Vilnius Regional Administrative Court decided that the investigation had merely been reopened and that no new investigation had been initiated (*nagrinėjamu atveju tyrimas tiesiog buvo atnaujintas, o ne pradėtas naujas*) and that the applicant company's arguments regarding the limitation period had been unfounded.

19. The applicant company appealed, raising the issue of the limitation period. On 21 January 2013 the Supreme Administrative Court upheld the arguments of the Vilnius Regional Administrative Court (see paragraph 18 above). It added that there was disagreement between the parties about the dates on which the applicant company had committed violations. Because the Competition Council had investigated the applicant company's activities between 2002 and 2004, the court held that the last violation had been committed by the applicant company on 31 December 2004. The court also observed that the Competition Council had not proved that the violation had continued after 31 December 2004, and did not accept its arguments that the applicant company's violation had been continuous or that the limitation period had not started running at all. The court then emphasised the importance of the principle of *res judicata* – that is to say the factual and legal aspects had been examined in another decision of the court and had to be accepted, and that a party to the proceedings or another person who had participated in the case (where the parties to the proceedings were the same) could rely on that court's decision without having to prove the same circumstances again. In addition, one of the most important elements of the principle of the rule of law was the principle of legal certainty, which required that the principle of *res judicata* be respected. Accordingly, when the courts resolved a case, their decisions should not be questioned or left unexecuted, because courts' decisions (together with legal norms) were a guarantee of the stability of public life and the certainty of social relations. Having regard to that, the Supreme Administrative Court was of the view that on 13 May 2010 it had already examined the Competition Council's right to reopen the investigation into the applicant company's activities (see paragraph 15 above). As a result, the legality of the reopening of the investigation had the power of *res judicata* and could not be questioned again.

The Supreme Administrative Court also referred to another one of its cases, decided by different composition with an exception of one judge, on 21 June 2012, which had concerned the sale of dairy products ("the dairy products case"). In that case it had examined the relevant provisions of the Law on Competition – namely their application when a case concerning a violation of competition law was transferred for examination to a court,

which then annulled the decision of the Competition Council and returned the case to it for further investigation (see paragraph 40 below). However, the court held:

> "In the opinion of the extended composition of the court, the reasoning provided in the dairy products case is not applicable to the present case firstly, because of the abovementioned arguments regarding the influence of the decision of 13 May 2010 and the principle of *res judicata*. Moreover, the circumstances of the instant case and the one in which the decision of 21 June 2012 has been adopted, are not the same or so similar that they could be examined similarly. In the administrative case no. A[520]-2136/2012 the court has examined the legality of the decision of the Competition Council whereby the economic entity was suspected of a breach of the provisions of the Law on Competition and in the instant case the applicant company is suspected of breaching both the Law on Competition and the TFEU. In the opinion of the extended composition of the court, this circumstance also determined the conclusion that the two cases are substantively different and the decision, taken in one of them, cannot be a precedent in determining the other one."

The court thus decided that the Competition Council's ruling that (i) the limitation period had not expired and (ii) the applicant company could be held liable for the breaches of the Law on Competition had been lawful.

The court did however lower the fine to LTL 7,819,450 (approximately EUR 2,264,669).

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitutional provisions

20. Article 46 of the Constitution provides that the economy of Lithuania shall be based on the right of private ownership, freedom of individual economic activity, and economic initiative. The State shall support economic efforts and initiative that are useful to society. The State shall regulate economic activity so that it serves the general welfare of the Nation. 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.

21. Article 138 of the Constitution provides that international treaties ratified by the Seimas shall form a constituent part of the legal system of the Republic of Lithuania.

22. The Law Supplementing the Constitution of the Republic of Lithuania with the Constitutional Act "On Membership of the Republic of Lithuania in the European Union" and Supplementing Article 150 of the Constitution of the Republic of Lithuania (No. IX-2343) of 13 July 2004 provides that the Republic of Lithuania, as a member State of the European Union, shall share with the European Union (or confer with the European Union regarding) the responsibilities of its State institutions in those areas specified in the founding Treaties of the European Union to the extent that by doing so it would, together with the other member States of the European

Union, meet its membership commitments in those areas (as well as enjoying membership rights). The norms of European Union law shall constitute a constituent part of the legal system of the Republic of Lithuania. Where they concern the founding Treaties of the European Union, the norms of European Union law shall be applied directly, while in the event of the collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania (see also paragraph 32 below).

B. Law on Competition

23. At the material time, Article 9 provided that it was prohibited to abuse a dominant position within a relevant market by undertaking any acts that restricted or could restrict competition or limited without a justified reason the possibilities of other economic entities to operate in a market or breached the interests of consumers, including by: (1) the direct or indirect imposition of unfair prices or other conditions in respect of purchase or sale; (2) the imposition of restrictions on trade, production or technical development, to the detriment of consumers; (3) the application of different (that is to say discriminatory) conditions to different economic entities in similar contracts and creating different competitive conditions in respect of those economic entities; (4) the conclusion of an agreement whereby additional obligations were imposed on another party to that agreement and those obligations (as regards their commercial nature or purpose) had no direct connection with the object of the contract.

24. Article 17 § 1 provides that the Competition Council is an independent State authority, which reports to Parliament. It implements national competition policy and oversees observance of the Law on Competition. The Competition Council is independent and autonomous in issuing its decisions.

25. Article 36 § 1 provides that a fine of up to 10% of the gross annual income realised in the preceding business year can be imposed on economic entities in respect of prohibited agreements, abuse of a dominant position, the implementation of a notifiable concentration without the permission of the Competition Council, the continuation of a concentration during the period of its suspension or an infringement of concentration conditions or mandatory obligations established by the Competition Council.

26. At the material time, Article 39 (2) provided that after examining a case concerning a decision delivered by the Competition Council, a court could decide to annul that decision (or parts thereof) and to return the case to the Competition Council for additional investigation.

27. Article 40 § 3 of the Law on Competition, as in force at the material time, provided that legal entities could be held responsible for a violation of the Law on Competition within three years of the date of that violation or, if the violation was continuous, within three years of the date on which the violation had occurred.

28. On 3 May 2011 an amended Law on Competition entered into force. Legal entities could be held responsible for a violation within three years of the date of that violation or, if the violation was continuous, within five years of the date on which the last such violation had been committed (Article 40 § 3). The limitation period was to be suspended (i) while the Competition Council performed an investigation, (ii) when a court had suspended an investigation being undertaken by the Competition Council, or (iii) when there was a dispute in the domestic courts about a decision taken by the Competition Council to impose sanctions.

C. Other legislative provisions

29. Article 15 § 1 of the Law on Administrative Proceedings provided that the Supreme Administrative Court should ensure uniform practice among the administrative courts as regards the interpretation and application of laws and other legal acts.

30. Article 153 § 2 (12) of the Law on Administrative Proceedings provided that proceedings could be reopened when it was necessary to ensure the uniform development of the case-law of the administrative courts.

31. Article 35 § 4 of the Code of Administrative Offences provides that when (i) a decision to impose a sanction on an economic entity (or to terminate the procedure to be followed when imposing such a sanction) is annulled by a court or (ii) a first-instance decision is annulled by the appellate court, the relevant time-limit shall be reset and shall start to run again from the date on which the court's or appellate court's decision became final.

D. Domestic case-law

1. Case-law of the Constitutional Court

(a) As to the place of the European Union law in the Lithuanian legal system

32. The Constitutional Court held that the Constitution consolidated the principle that in cases when national legal acts established a legal regulation that competed with that established by an international treaty, then the international treaty should be applied. The Constitutional Court also, with regard to European Union law, established *expressis verbis* the "collision rule", which consolidated the principle that European Union legal acts were to take priority in cases where the provisions of the European Union arising out of the founding Treaties of the European Union competed with the legal regulations established by Lithuanian national legal acts (regardless of their legal force). The only exception to this rule was the Constitution itself (decisions of the Constitutional Court of 14 March 2006, 21 December 2006, 8 May 2007 and 4 December 2008).

(b) As to court precedents and continuity of jurisprudence

33. The Constitutional Court has emphasised the importance of the continuity of jurisprudence (rulings of 12 July 2001, 10 May 2003, 13 February 2004, 13 December 2004, 14 March 2006, 28 March 2006, 24 October 2007, and 3 February 2014).

34. On 28 March 2006 the Constitutional Court examined, among other issues, the power of court precedents, possibilities to deviate from them. It held:

> "It was mentioned that the principle of a State under the rule of law enshrined in the Constitution implies continuity of jurisprudence, as well as that creation of new court precedents and arguing (grounding) the court precedents may not be rationally legally unreasoned volitional acts. Since courts of general jurisdiction, *inter alia,* the Supreme Court of Lithuania and the Court of Appeal of Lithuania, must, under their competence, ensure the continuity of the corresponding jurisprudence *(inter alia,* the fact that the practice of courts of general jurisdiction would be corrected (it would be deviated from the precedents that had been binding on courts by then and new precedents would be created) only when it is unavoidably and objectively necessary, constitutionally grounded and reasoned, and that such correction of the practice of courts of general jurisdiction (deviation from the previous precedents that had been binding on courts by then and creation of new precedents) would in all cases be properly (clearly and rationally) argued (first of all, in the decisions of the corresponding courts of general jurisdiction themselves)), as the courts of the highest instances of the systems of specialised courts established under Paragraph 2 of Article 111 of the Constitution (in the system of administrative courts—the Supreme Administrative Court) are under analogous obligation, so must the Constitutional Court, referring to its already formed constitutional doctrine and precedents, ensure the continuity of the constitutional jurisprudence (its consecution, consistency) and the predictability of its decisions."

35. On 24 October 2007 the Constitutional Court further elaborated on the doctrine on court precedents. It stated:

> "The principle of a state under the rule of law entrenched in the Constitution implies continuity of jurisprudence... Disregarding the maxim that the same (analogous) cases have to be decided in the same way, which arises from the Constitution, would also mean disregarding the provisions of the Constitution on administration of justice, that of the constitutional principles of a state under the rule of law, justice, equality of people before the court and other constitutional principles... The practice of courts of general jurisdiction in cases of corresponding categories has to be corrected and new court precedents in these categories may be created only when it is unavoidably and objectively necessary, when it is constitutionally grounded and justified... No creation or reasoning of a new court precedent may be determined by accidental (in the aspect of law) factors. The imperatives of the activity of the courts of general jurisdiction and legal regulation of this activity arising from the Constitution... should also be applied *mutatis mutandis* to the activity of the specialised courts established under Paragraph 2 of Article 111 of the Constitution and its legal regulation.
>
> ...
>
> Court precedents are sources of law – *auctoritate rationis;* the reference to the precedents is a condition for the uniform (regular, consistent) court practice as well as that of implementation of the principle of equity entrenched in the Constitution. Therefore, it is not permitted to unreasonably ignore court precedents. In order to

perform this function properly, the precedents themselves should be clear. Court precedents may not be in conflict with the official constitutional doctrine, either.

On the other hand, it is not permitted to overestimate, let alone make absolute, the significance of court precedents as sources of law. Court precedents must be invoked with particular care. It needs to be emphasised that in the course of consideration of cases by courts, only those previous decisions of courts have the power of a precedent, which were created in analogous cases, i.e. the precedent is applied only in those cases whose factual circumstances are identical or very similar to the factual circumstances of the case in which the precedent was created, and with regard to which the same law should be applied as in the case in which the precedent was created. In a situation where there is competition of precedents (i.e. when there are several differing court decisions adopted in analogous cases) one must follow the precedent that was created by the court of higher instance (a higher court). Also, account should be taken of the time of the creation of the precedent and of other factors of significance, as, for instance: of the fact whether the corresponding precedent reflects the established court practice, or whether it is a single occurrence; of whether the reasoning of the decision is convincing; of the composition of the court that adopted the decision (whether the corresponding decision was adopted by a single judge, or by a college of judges, or whether by the enlarged college of judges, or whether by the entire composition of the court (its chamber)); whether there were any dissenting opinions of judges expressed because of the previous court decision; of possible significant (social, economic etc.) changes which took place after the adoption of the corresponding court decision, which has the significance of a precedent, etc. As mentioned before, in cases when the correction of court practice is unavoidably and objectively necessary, the courts may deviate from the previous precedents, which had been binding on the courts until then, and create new precedents, however, it must be done by properly (clearly and rationally) arguing it. It needs to be specially emphasised that, when deviating from its previous precedents, the court must not only properly argue the adopted decision itself (i.e. the created precedent itself), but also clearly set forth the reasoning and the arguments substantiating the necessity to deviate from the previous precedent."

(c) As to economic sanctions

36. On 3 November 2005 the Constitutional Court examined the case on whether provisions of the Law on the Control of Tobacco, which had not provided that the administrative courts could not lower fines even if there had been circumstances mitigating responsibility, and the fine had obviously been disproportionate, were in accordance with the Constitution and the principles of equity and the rule of law. The Constitutional Court held:

"[A]ll the sanctions – monetary fines – established in the provisions...of the Law on the Control of Tobacco... are called "economic sanctions" in this law, by their legal content and other features are close to administrative sanctions - administrative penalties for corresponding violations of law – established in some other laws *(inter alia,* in the Code of Administrative Offences) and virtually they are not different from the former; although the so-called economic sanctions... especially when one has in mind the fact that such individual type of legal liability or an individual legal institute as "economic liability" does not exist at all, the so-called economic sanctions... should be categorised as belonging to the same legal institute, i.e. to the institution of administrative legal liability.

...

> The constitutional principles of justice and of a state under the rule of law do not permit establishing such penalties for violations of law, as well as such sizes of the fines, which would evidently be disproportionate (inadequate) to the violation of law and the objective sought (the Constitutional Court's rulings of 6 December 2000, 2 October 2001, and 26 January 2004). The penalties established for violations of the laws must be of such size which is necessary for the sought legitimate and generally important objective—to ensure the observance of the laws, the fulfilment of the established duties (the Constitutional Court's ruling of 26 January 2004).
>
> The constitutional principle of justice demands to differentiate the established penalties for violations of law (thus, also the imposed administrative penalties and monetary fines) so that the nature of the violation of law, circumstances mitigating and aggravating the responsibility could be taken into account, that, while taking account of that, a milder punishment could be imposed than the minimum one provided for in the sanction (the Constitutional Court's ruling of 26 January 2004).
>
> ...
>
> In the context of the constitutional justice case at issue, it needs to be noted that provided certain sanctions established in laws by their size (strictness) amount to criminal punishments, no matter whether these sanctions may be categorised as belonging to a certain type of legal liability (criminal, administrative, disciplinary or other legal liability), and no matter how respective sanctions are named in laws, the laws must necessarily establish procedural guarantees (which stem from the Constitution, *inter alia,* from its Article 31) for persons who are held legally liable under corresponding laws. In this context, it needs to be emphasised that the provisions of Article 31 of the Constitution cannot be construed as being designed only to the persons who are held criminally liable.
>
> Neither is it permitted to disregard this imperative also in the cases where laws establish certain sanctions which, although are referred to as "economic sanctions" in the laws, by their content and other features should be categorised as belonging to the institute of administrative legal liability, however, by their size (strictness) amount to criminal punishments."

37. On 21 January 2008 the Constitutional Court examined the case on whether the rules on the Law on the Control of Alcohol were in accordance with the Constitution and the constitutional principles of equity, rule of law and legitimate expectation. The Constitutional Court referred to its ruling of 3 November 2005 and also held:

> "... [I]n the courts' practice, the "economic sanctions" for violations of the Law on the Control of Alcohol (as well as the "economic sanctions" for violations of the Law on the Control of Tobacco) are treated namely as administrative sanctions ..."

2. Other relevant domestic case-law

38. In its decision of 3 June 2004, the Supreme Administrative Court held that responsibility for violations of the Law on Competition was an administrative responsibility in a broad sense and that the principles of administrative responsibility could be applied to violations of the Law on Competition as well.

39. In its decision of 8 December 2008, the Supreme Administrative Court ruled that the procedural norms of the European Union member States in the field of the enforcement of competition law rules were not

harmonised. Legal acts adopted in Lithuania had legal force in Lithuania, including those which prescribed the investigation by the Competition Council of Lithuania of violations of the Law on Competition and the TEC. However, in order to harmonise the national and the European Union rules on competition, as defined in Article 1 § 3 on the Law on Competition, and to ensure the proper application of these rules in Lithuania, it was necessary to take into account the procedural rules on competition, as valid under European Communities' competition law. Under Article 10 of the TEC, it was not allowed to apply such national procedural norms that would render virtually impossible or excessively difficult the exercise of rights conferred by Articles 81 and 82 of the TEC (the principle of effectiveness) or to apply such rules that were less favourable than those governing similar domestic actions (the principle of equivalence) (decision no. A-248-715-08).

40. On 26 January 2012 the Vilnius Regional Administrative Court examined the dairy products case (see paragraph 19 above). It explained that analogy of law could be applied (in accordance with both general legal theory and Article 4 § 6 of the Code on Administrative Proceedings), but only when: 1) there was a legal gap; 2) there was a law regulating similar relationships; and 3) there were similarities between relationships governed by legal norms and those not governed by them, which allowed the conclusion to be drawn that the application of analogy of law would not be contrary to the essence and type of legal relationship in question. The court furthermore held that at the material time, the relevant provision of the Law on Competition had not provided that limitation periods had to be suspended once a case had been transferred to a court and renewed once the relevant investigation had been reopened by the Competition Council. The current provisions of the Law on Competition providing that the limitation period for imposing fines is five years (but that it is possible to suspend it if the case is examined before a court) came into force on 3 May 2011 (see paragraph 28 above). The court held that the provisions that had been in force at the material time were a conscious decision of the legislature. Even the explanatory report on the amendments to the Law on Competition stated that the three-year limitation period had not provided for any cases when the time-limit for imposing sanctions could be suspended. The court furthermore stated that general limitation periods, which were listed in the Code of Administrative Offences, were not applicable in the field of competition law because Article 40 of the Law on Competition provided a specific time-limit for the imposition of fines, and that analogy of law could thus not be applied. Moreover, the possibility (as stipulated in the Law on Competition) to suspend that time-limit was not provided in the case-law of the Supreme Administrative Court. The court refused to follow the decision of the Supreme Administrative Court of 13 May 2010 (see paragraph 15 above), stating that the factual circumstances of two cases were different.

The court held that the Competition Council had applied the new provisions of the Law on Competition retroactively because it had held that

the limitation period had been suspended when the case had been examined before the Supreme Administrative Court. However, provisions of competition law could not have a retroactive effect. The only exception to this rule in the field of administrative law was that the law could have a retroactive effect if it mitigated liability for violations of administrative law (*lex benignior retro agit*); however, in the present case the amendments to the Law on Competition did not mitigate such liability. The court had to follow the law; it could not assume the functions of the legislature by, in the absence of legal regulation, creating new legal norms and applying them to any specific case. Article 4 § 6 of the Law on Administrative Proceedings obliged the court to apply a law regulating a similar relationship in the absence of any law regulating the issue in question, and, if there was no such law – to apply the principles of fairness and reasonableness. Having regard to that, the court concluded that the limitation period had been provided in the Law on Competition, as worded at the material time and that no analogy of law could be applied. The court thus decided that the decision of the Competition Council had been unlawful because it had been issued after the expiry of the limitation period.

41. On 21 June 2012 the Supreme Administrative Court examined an appeal in the dairy products case concerning a decision of the Competition Council of 9 June 2011 to impose a fine on two economic entities for breaches of the Law on Competition. The economic entities were of the view that the Competition Council had imposed the fines after the expiry of the limitation period, because the investigated actions had ended in December 2007 and the fines had been imposed in June 2011. The Supreme Administrative Court found that in February 2008 the Competition Council had issued a decision to impose fines on the two economic entities that had participated in the dairy products market. In June 2009 the Supreme Administrative Court had obliged the Competition Council to additionally investigate the activities of the two economic entities. In July 2009 the Competition Council had reopened the investigation. In 2011 the Competition Council had found that the economic entities had breached the Law on Competition; accordingly, it had imposed fines on them. The Supreme Administrative Court held that Article 40 § 3 of the Law on Competition, valid at the material time, had provided that economic entities could be held responsible for a breach of the Law on Competition within three years of the day on which such a breach had been committed or, in the case of a continuous breach – within three years of the day on which the last of the actions constituting a breach of the law had been undertaken. There was no dispute that the last such action had occurred in December 2007. Article 40 § 3 of the Law on Competition did not provide that the limitation period could be suspended or restarted when a case regarding a violation of competition law was transferred to a court or when then a decision of the Competition Council was annulled and the case returned to it for additional investigation.

The Supreme Administrative Court emphasised that Article 40 § 3 of the Law on Competition was clear and unequivocal. The fact that no exceptions to the calculation of the limitation period had been provided meant that the legislature had not meant to provide them. In other words, the aforementioned provision meant that the limitation period had to be calculated in a similar manner in all cases and that it did not depend on the circumstances of the examination of the case by the Competition Council or before the courts. The court also held that fines provided in the Law on Competition fell within the category of economic sanctions. Similar sanctions were provided by the Law on the Control of Tobacco, the Law on the Control of Alcohol, and the Law on Advertising, and they came close to constituting penalties for administrative offences and could even come close to constituting criminal sanctions. The domestic case-law provided that legal norms pertaining to responsibility and sanctions could not be interpreted in a broader sense. The analogy of law in both criminal and administrative law was an exception, and could only be justified if it narrowed the scope of responsibility. If analogy of law was applied in calculating the limitation period to the detriment of an applicant, it would mean that an economic entity could be held responsible otherwise than in accordance with the rules provided explicitly by law. This would be contrary to the principles of legal certainty and the rule of law. A person could only be held responsible if the grounds of responsibility were clearly defined, and all doubts had to be interpreted in his or her favour. These were the general principles, and the court could not negate them.

The Supreme Administrative Court also examined whether the relevant provisions of the Code of Administrative Offences regulating the calculation of the limitation period could be applied in the case at issue. The court held that they could not, because the Code of Administrative Offences was not the act that had determined the scope of investigation of the Competition Council. Even though there was some case-law indicating that responsibility for violations of the Law on Competition was an administrative responsibility in a broad sense, the general calculation of the limitation period set in the Code of Administrative Offences could not be applied in the area of competition law. The Supreme Administrative Court also held that a speedy reaction after a violation had a greater preventive effect. Moreover, the essence of the limitation period was to ensure that the persons responsible were held liable for certain violations within a specific time-limit set in advance. The substance of the limitation period determined that the court proceedings could not be endless and that the status of an economic entity could not be left unclear for a long period of time. The court then held that the Competition Council had argued that responsibility for breaches of competition law had not been newly ascribed to the economic entities and that the issue of the validity of those economic entities being held so responsible had been additionally assessed. The court, however, held that, irrespective of the course of the investigation, until the

adoption of the decision of the Competition Council at issue, there had been no final decision to hold the economic entities responsible. The court disagreed with the Competition Council about the additional assessment of the validity of the economic entities' responsibility. The court also held that economic entities at issue had been held responsible after the expiry of the limitation period. The court also found that when the Supreme Administrative Court had adopted its decision in June 2009, the Competition Council had still had a possibility to carry out additional investigation and adopt a new decision without missing the limitation period.

The court also mentioned the applicant company's case and the decision of the Supreme Administrative Court of 13 May 2010 regarding it; it also held that the circumstances of the two cases were different and that the relevant case-law was moreover constantly evolving and that the interpretation of certain legal norms could change over time. The court also noted that the Law on Competition did not establish the possibility for a court to oblige the Competition Council to carry out a new investigation; rather, it could only oblige the Competition Council to undertake an additional investigation. In such circumstances, it was not relevant to assess a new investigation and an additional investigation differently and to differentiate in respect of the calculation of the limitation period. The court held that, contrary to the case of the applicant company, in the present case the case-law on the application of the relevant provisions of the TFEU was irrelevant because it did not concern violations of those provisions; rather, the court held that in the present case it had exceptionally to relate to the national legal norms regarding the calculation of the limitation period and found that the Competition Council had missed the limitation period for adopting its decision.

The court also held that its decision in the present case had to be assessed as providing clear directions with regard to the interpretation of Article 40 § 3 of the Law on Competition. Such a development of case-law was constitutionally justified and necessary in order to ensure the protection of persons concerned against being held responsible without any clear legal grounds.

III. RELEVANT EUROPEAN UNION LAW AND PRACTICE

42. Article 4 § 3 of the Treaty on European Union provides that the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

43. Articles 101 and 102 of the TFEU prohibit: (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion

of competition within the internal market; and (ii) any abuse by one or more undertakings of a dominant position within the internal market (or in a substantial part of it) in so far as it may affect trade between Member States.

44. Article 288 of the TFEU provides that a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

45. Recital 31 of Regulation No. 1/2003 provides that the rules on limitation periods for the imposition of fines and periodic penalty payments were laid down in Council Regulation (EEC) No. 2988/74(11), which also concerns penalties in the field of transport. In a system of parallel powers, the acts, which may interrupt a limitation period, should include procedural steps taken independently by the competition authority of a Member State. To clarify the legal framework, Regulation (EEC) No. 2988/74 should therefore be amended to prevent it applying to matters covered by this Regulation, and this Regulation should include provisions on limitation periods.

46. Article 5 of Regulation No. 1/2003 provides that the competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the TEC in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions: (1) requiring that an infringement be brought to an end; (2) ordering interim measures; (3) accepting commitments; and (4) imposing fines, periodic penalty payments or any other penalty provided for in their national law.

47. Article 25 § 6 of Regulation No. 1/2003 provides that the limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

48. In its judgment in *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* (nos. 430/93 and C-431/93) of 14 December 1995, the Court of Justice of the European Communities held that that in the absence of Community rules governing the matter, it was for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down detailed procedural rules governing actions for safeguarding rights that individuals derived from the direct effect of Community law. However, such rules could not be less favourable than those governing similar domestic actions, nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

49. In its judgment in *Rosalba Palmisani v. Istituto nazionale della previdenza sociale (INPS)* (no. C-261/95) of 10 July 1997, the Court of Justice of the European Communities held that national law must not render practically impossible or excessively difficult the exercise of the rights conferred by [European Union] law.

50. In its judgment in *Pfleiderer AG v. Bundeskartellamt* (no. C-360/09) of 14 June 2011, the Court of Justice of the European Union held that

Member States could not render the implementation of European Union law impossible or excessively difficult and, specifically, in the area of competition law, they had to ensure that the rules which they established or applied did not jeopardise the effective application of Articles 101 TFEU and 102 of the TFEU.

51. In its judgment in *Bundeswettbewerbsbehörde and Bundeskartellanwalt v. Schenker & Co. AG and Others* (no. C-681/11) of 18 June 2013, the Court of Justice of the European Union held that Article 5 of Regulation No. 1/2003 admittedly did not provide expressly that the national competition authorities had the power to find an infringement of Article 101 of the TFEU without imposing a fine, but that it did not exclude that power either. However, in order to ensure that Article 101 of the TFEU was applied effectively in the general interest, the national competition authorities had to proceed, exceptionally, by not imposing a fine in the event that an undertaking had infringed that provision intentionally or negligently. Such a decision not to impose a fine could be made under a national leniency programme only in so far as the programme was implemented in such a way as not to undermine the requirement of the effective and uniform application of Article 101 TFEU.

THE LAW

I. THE GOVERNMENT'S OBJECTION

52. The Government submitted that the applicant company had failed to lodge an application within six months. They maintained that the question of the limitation period had already been considered and resolved by the Supreme Administrative Court in its decision of 13 May 2010, which constituted the final decision in the present case and was indeed *res judicata* (see paragraph 15 above).

53. The applicant company argued that the decision of 13 May 2010 of the Supreme Administrative Court (see paragraph 15 above) could not have any effect on it because it could not foresee whether a fine would be imposed, how high it would be and whether the limitation period would be applied. It was the applicant company's view that its rights had been breached after the decision of 21 January 2013 had been adopted (see paragraph 19 above).

54. The Court reiterates that the six-month rule, in reflecting the wish of the Contracting Parties to the Convention to prevent past decisions being called into question after an indefinite lapse of time, serves the interests not only of the respondent Government but also of legal certainty as a value in itself. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and State

authorities the period beyond which such supervision is no longer possible (see *Daróczy v. Hungary*, no. 44378/05, § 17, 1 July 2008). The rule also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised. Lastly, the rule should ensure that it is possible to ascertain the facts of the case before that possibility fades away, making a fair examination of the question at issue next to impossible (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, §§ 39-41, 29 June 2012, and *Zubkov and Others v. Russia*, nos. 29431/05 and 2 others, § 100, 7 November 2017).

55. The requirements contained in Article 35 § 1 concerning the exhaustion of domestic remedies and the six-month period are closely interrelated. As a rule, the six-month period runs from the date of the final decision in the process of the exhaustion of domestic remedies. Where it is clear from the outset, however, that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of the applicant gaining knowledge of those acts or their effect on or the prejudice they caused towards the applicant. At the same time, Article 35 § 1 cannot be interpreted in a manner that would require an applicant to lodge his complaint with the Court before his position in connection with the matter has been finally settled at the domestic level (ibid. § 101).

56. In the present case, the Court notes that on 8 December 2008 the Supreme Administrative Court had expressly ordered the Competition Council to carry out an additional investigation into the applicant company's activities. The decision to carry out that investigation was taken by the Competition Council on 15 January 2009. The applicant company appealed against that decision, as a result of which the Supreme Administrative Court adopted its decision of 13 May 2010, in which it held that the Competition Council had merely performed an additional investigation. Afterwards, the proceedings before the Competition Council continued (see paragraph 16 above). It is therefore clear that when the Supreme Administrative Court adopted its decision of 13 May 2010, the applicant company could not predict the outcome of the proceedings before the Competition Council and whether it would receive a fine in the end.

57. The Court thus considers that the decision of the Supreme Administrative Court of 13 May 2010 had merely been an intermediate step in the applicant company's case and that the proceedings could not be divided into two separate sets each one with independent and separable domestic remedies. Indeed, following the decision issued by the Competition Council in the course of the additional investigation, the Supreme Administrative Court delivered a decision on 21 January 2013 whereby it confirmed its previous decision of 13 May 2010, but examined the issue of the limitation period in more depth. The Court is of the view that requiring the applicant company to apply to the Court on two different

dates (after the decision of the Supreme Administrative Court of 13 May 2010 and the decision of the same court of 21 January 2013) would be to construe the six-month time-limit too inflexibly.

58. In that connection, it reiterates that the six-month rule is autonomous and must be construed and applied according to the facts of each individual case, so as to ensure the effective exercise of the right to individual application (see *A.N. v. Lithuania*, no. 17280/08, § 76, 31 May 2016 and the references therein, and *Aldeguer Tomás v. Spain*, no. 35214/09, § 62, 14 June 2016). The Court thus finds that the six-month period in the instant case started running from the date of the Supreme Administrative Court's decision of 21 January 2013, and dismisses the Government's objection.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

59. The applicant company complained that it had been deprived of a fair hearing and that the principle of legal certainty had been breached when the limitation period had not been applied and it had been fined. It was also the applicant company's view that in a very similar case the same domestic court had adopted a different decision, which had also constituted a breach of the principle of legal certainty. The relevant part of Article 6 § 1 reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by [a] tribunal..."

A. Admissibility

1. Applicability of Article 6 of the Convention

60. Although the parties did not raise the issue of applicability of Article 6, the Court reiterates that the concept of a "criminal charge" within the meaning of Article 6 § 1 of the Convention is an autonomous one. The Court's established case-law sets out three criteria to be considered in the assessment of the applicability of the criminal aspect, commonly known as the "Engel criteria" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22). The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative, and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see, in particular, *Jussila v. Finland* [GC], no. 73053/01, §§ 30-31, ECHR 2006-XIV; *Ezeh and Connors v. the United Kingdom* [GC],

nos. 39665/98 and 40086/98, § 82, ECHR 2003-X; and *Blokhin v. Russia* [GC], no. 47152/06, § 179, ECHR 2016).

61. As to the legal classification of the offence under domestic law, the Court notes that the behaviour for which the fine was imposed on the applicant is formally classified as an administrative rather than a criminal offence under Lithuanian law; this was confirmed by the Constitutional Court and the Supreme Administrative Court (see paragraphs 36-38 above). Neither the applicant company nor its directors were the subject of a criminal conviction by the Lithuanian courts (see, *mutatis mutandis*, *Valico Srl. v. Italy* (dec.), no. 70074/01, 21 March 2006). Furthermore, the fine imposed on the applicant company was based on the provisions of the Law on Competition (see paragraphs 23 and 25 above) and not on the provisions of the Criminal Code (see, *mutatis mutandis, A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, § 39, 27 September 2011). The amount of the fine was determined by an independent authority – the Competition Council (see paragraph 24 above). However, the Court observes that the Supreme Administrative Court held that fines for violations of the Law on Competition could amount *de facto* to criminal sanctions, given their high amounts (see paragraph 41 above).

62. As to the nature of the offence in question, the Court notes that the offence for which the applicant company was fined was defined by the Law on Competition – that is to say under legislation that applied to all economic entities and not just to a particular group. The Court moreover considers that the fine imposed on the applicant company was not intended to serve as pecuniary compensation for breaches of competition law but as a penalty to deter reoffending because the penalty the applicant company risked incurring was rather severe as it amounted to up to 10% of its annual turnover in the preceding business year (see paragraph 25 above), it being understood that the actual penalty imposed on the applicant company is relevant but cannot diminish the importance of what was initially at stake (see, among other authorities, *Ezeh and Connors*, cited above, § 120; *Dubus S.A. v. France*, no. 5242/04, § 37, 11 June 2009; and *Müller-Hartburg v. Austria*, no. 47195/06, § 46, 19 February 2013).

63. In the light of the foregoing, the Court finds these elements sufficient to draw the conclusion that the purported competition-related administrative offence was of a criminal character and thus that Article 6 applies under its criminal head.

2. Conclusion

64. The Court notes that the complaints under Article 6 are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It furthermore notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

65. The Government outlined the supremacy of the international treaties in Lithuania, and the principle of the direct applicability of the legal norms of the European Union in the event of a conflict between them and the national law (see paragraphs 21, 22 and 32 above).

66. The Government stated that competition policy and freedom of competition were important concepts, both at the national and the European Union level. National competition law provisions had been harmonised with European Union law, and this was reflected in the domestic legislation (see paragraph 22 above).

67. The Government submitted that limitation periods served several important purposes and that the interpretation of the limitation period depended on peculiarities of the national legal systems of each State, which meant that it was primarily a matter for domestic authorities.

68. The Government furthermore submitted that the relevant legal provisions of the Law on Competition, which had been in force until 3 May 2011, had provided that the limitation period was three years. The rules in force at the material time had not explicitly provided for the suspension of the limitation period. Since 3 May 2011 the limitation period had been five years, and it had been allowed to suspend the limitation period in certain circumstances (see paragraph 28 above). The Government claimed that these amendments were necessary in order to ensure that economic entities did not escape liability.

69. The Government relied on the domestic case-law and stated that, after broadening the scope of the investigation with regard to the applicant company so that it encompassed possible violations of the TFEU, the European Union legal norms had come into play. Pursuant to Article 4 § 3 of the Treaty on European Union, the member States had to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaty on European Union (see paragraph 42 above). Moreover, national procedural legal norms that would render the application of Articles 81 and 82 of the TEC excessively difficult or impossible in practise could not be applied (principle of effectiveness) − (see paragraphs 48-50 above). Also, under European Union law rules, national procedural rules governing actions arising from the direct effect of European Union law could not be less favourable than those relating to similar actions of a domestic nature (the principle of equivalence – see paragraphs 48-51 above). The Government furthermore stated that, taking into account the direct applicability of the legal norms of the European Union, the domestic authorities were obliged to directly apply the rules on the suspension of the limitation period established by 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 (Regulation No. 1/2003) (see paragraphs 45 and 47 above). If the domestic courts had applied the limitation period established in the Law on Competition, this would have infringed the principle of the effectiveness of European Union law and would have prevented the Competition Council from correcting the deficiencies in its previous investigation.

70. The Government submitted that the applicant company's case and the dairy products case, in which the domestic courts had interpreted the same provision of the Law on Competition regarding limitation periods, had had different factual circumstances. In particular, in the applicant company's case, the Competition Council had investigated whether the applicant company's activities had been in line with the Law on Competition and the TFEU. In the dairy products case, however, the Competition Council had investigated whether the economic entity's activities had been in line with domestic law only and had not given rise to a necessity to apply the principle of effectiveness enshrined in European Union law. The Government relied on the Supreme Administrative Court's reasoning in the dairy products case, where it had held that the decisions adopted in the applicant company's case should not be regarded as constituting a precedent (see paragraph 41 above).

71. The Government noted that the Supreme Administrative Court had interpreted the same provision of the Law on Competition differently in two cases. The Government argued, however, that the interpretation provided by the Supreme Administrative Court on 21 June 2012 (see paragraph 41 above) was only relevant in cases that did not attract the application of the rules of European Union law. Moreover, there had been no other cases involving the interpretation of the provision of the Law on Competition at issue; thus, there were no profound and long-standing differences in the case-law of the Supreme Administrative Court. The Government argued that the Lithuanian legal system was organised in such a way as to ensure the uniformity of its case-law. More specifically, only decisions adopted in similar cases could have the power of precedent. Having regard to the different factual circumstances in, respectively, the applicant company's case and the dairy products case, the necessity to apply the doctrine of court precedents did not arise. Lastly, under domestic law, proceedings could be reopened when it was necessary to ensure uniformity in the case-law of the administrative courts (see paragraph 30 above). However, the applicant company had failed to use this mechanism.

(b) The applicant company

72. The applicant company submitted that domestic competition law, namely the Law on Competition, did not provide for the suspension of the limitation period, and that that had been confirmed by the Government (see paragraph 68 above). The applicant company also observed that it was the

Government's view that the limitation period had had to be suspended in the light of the direct applicability of European Union legal norms – namely Regulation No. 1/2003. The applicant company submitted, however, that the Government had failed to indicate which specific provisions of the TFEU had allowed the authorities and the courts to ignore the limitation period. The applicant company also claimed that Article 25 of Regulation No. 1/2003 was only applicable to actions undertaken by the European Commission and was not applicable to procedures conducted by the national competition authorities. This had been confirmed by the Supreme Administrative Court in the course of the dairy products case (see paragraph 41 above). Even interpreted together with other Articles of Regulation No. 1/2003, Article 25 could not be read as obliging the national authorities to suspend the limitation period in competition cases.

73. The applicant company also stated that Article 5 of Regulation No. 1/2003 provided that national competition authorities had the power to apply Articles 81 and 82 of the TEC in individual cases and to impose the fines provided in their national law (see paragraph 46 above). It was the applicant company's view that national competition authorities only had to apply the substantive provisions of European Union law and that procedural issues were left to the discretion of the member States of the European Union.

74. The applicant company noted that the legal form of the Regulation had been expressly chosen by the European Union institutions in order not to leave any discretion to the member States. The applicant company observed that if Regulation No. 1/2003 was intended to control the calculation of limitation periods by the national competition authorities (in accordance with the general principles of European Union law), there would be no need for the member States to adopt national rules governing the same issues. On the contrary, if they did so, it would constitute a breach of European Union law (see paragraph 44 above).

75. The applicant company agreed with the Government that the principle of effectiveness was an important concept of European Union law, but that neither the Competition Council nor the domestic courts had based their decisions to suspend the limitation period on the necessity to directly apply the provisions of European Union law. Moreover, the question of whether the three-year limitation period, established in domestic law, would render application of Community law excessively difficult (if not impossible) had not been raised in the applicant company's case.

76. The applicant company submitted that only one of the alleged violations committed by it had been related to European Union law and that even if Regulation No. 1/2003 was applicable for the calculation of the limitation period, it was completely unclear why the European Union law governing limitation periods would apply to violations of national competition law (namely the Law on Competition) or even to violations committed before Lithuania's accession to the European Union.

77. The applicant company maintained that the Supreme Administrative Court had considered two very similar cases within a period of seven months. The applicant company did not agree that considering the infringement in the light of a different Article of the Law on Competition could have led to the imposition of different procedural rules concerning sanctions. It was obvious to the applicant company that the same provision should not have been interpreted differently.

78. The applicant company stated that in its case, the Supreme Administrative Court had made a vague statement that there was a difference between additional and new investigations. However, in the dairy products case the same court had held that the rules for the calculation of the limitation period should be the same in both the new and additional investigations (see paragraph 41 above). In the applicant company's view, the requirement to respect the *res judicata* power of the decision of the Supreme Administrative Court of 13 May 2010 had not justified the different interpretation of the calculation of the limitation period.

79. Lastly, the applicant company submitted that it had not had to request the Supreme Administrative Court to reopen the proceedings on the basis of inconsistencies within its case-law as that request had been an extraordinary measure and the applicant company would have risked missing the six-month time-limit to submit its complaint to the Court.

2. The Court's assessment

(a) General principles

(i) On divergent case-law of domestic courts

80. The Court refers to its judgment in the case of *Lupeni Greek Catholic Parish and Others v. Romania* ([GC], no. 76943/11, § 116, 29 November 2016), in which it recapitulated the principles applicable to cases concerning conflicting decisions in the case-law. These principles are as follows:

(a) In this type of case, the Court's assessment has always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 56, 20 October 2011). This principle guarantees a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see *Hayati Çelebi and Others v. Turkey*, no. 582/05, § 52, 9 February 2016, and *Ferreira Santos Pardal v. Portugal*, no. 30123/10, § 42, 30 July 2015).

(b) However, the possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal

courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention (see *Nejdet Sahin and Perihan Sah*in, cited above, § 51, and *Albu and Others v. Romania*, nos. 34796/09 and 63 others, § 34, 10 May 2012).

(c) The requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law. Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see *Nejdet Sahin and Perihan Sahin*, cited above, § 58, and *Albu and Others*, cited above, § 34).

(d) It is not in principle the Court's function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts. Equally, giving two disputes different treatment cannot be considered to give rise to conflicting case-law when this is justified by a difference in the factual situations at issue (see *Hayati Çelebi and Others*, cited above, § 52, and *Ferreira Santos Pardal*, cited above, § 42).

(e) The criteria which guide the Court in its assessment of the circumstances in which contradictory decisions by different domestic courts ruling at final instance entail a violation of the right to a fair hearing, enshrined in Article 6 § 1 of the Convention, consist in establishing, firstly, whether "profound and long-standing differences" exist in the case-law of the domestic courts; secondly, whether the domestic law provides for a mechanism for overcoming these inconsistencies; and, thirdly, whether that mechanism has been applied and, if appropriate, to what effect (see *Nejdet Sahin and Perihan Sahin*, cited above, § 53; *Hayati Çelebi and Others*, cited above, § 52; and *Ferreira Santos Pardal*, cited above, § 42).

81. The Court furthermore notes that the process of unifying and ensuring the consistency of the case-law may require a certain amount of time (see *Albu and Others*, cited above, § 39). The Court also reiterates that there must come a day when a given legal norm is applied for the first time (see, *mutatis mutandis, Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 115, ECHR 2015).

(ii) On reasoning of court decisions

82. The Court reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. Without requiring a detailed answer to every argument advanced by the complainant, this obligation

presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 84, ECHR 2017 and the cases cited therein). Thus, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons for the lower court's decision (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I). Moreover, it is acceptable under Article 6 § 1 of the Convention for national superior courts to dismiss a complaint by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue (see *Baydar v. the Netherlands*, no. 55385/14, § 46, 24 April 2018).

83. The Court will not, in principle, intervene, unless the decisions reached by the domestic courts appear arbitrary or manifestly unreasonable and provided that the proceedings as a whole were fair, as required by Article 6 § 1 (see *Tibet Menteş and Others v. Turkey*, nos. 57818/10 and 4 others, § 48, 24 October 2017). It follows that a domestic judicial decision cannot be described as arbitrary to the point of prejudicing the fairness of the proceedings unless no reasons are provided for it or the reasons given are based on a manifest factual or legal error committed by the domestic court, resulting in a "denial of justice" (*Moreira Ferreira (no. 2),* cited above § 85, and *Tibet Menteş and Others*, cited above, § 49).

(b) Application of the general principles to the present case

84. The Court notes at the outset that the Government's main arguments justifying the need to suspend the limitation period stem from the supremacy of international treaties and European Union law in the legal system of Lithuania (see paragraph 69 above). It is true that the Competition Council in its decision of 16 December 2010 referred to Article 25 of Regulation No. 1/2003 (see paragraph 16 above); however, the domestic courts had not used this argument in their reasoning in any form. Accordingly, it was not demonstrated in the domestic courts' decisions that it was their intention to apply the relevant provisions of European Union law and the Court does not find it necessary to examine that issue any further.

85. The Court considers that the applicant company raises two issues: (i) the disparity between the relevant case-law in the dairy products and the applicant company's cases, and (ii) as a result of the reasoning given in the applicant company's case – or rather the alleged lack of it – the failure to apply the limitation period stipulated by the Law on Competition. The Court will analyse those issues consecutively.

(i) On divergent case-law

86. The Court observes that only two decisions were delivered by the Supreme Administrative Court within a short period of time regarding the interpretation of the limitation period stipulated under the Law on

Competition. The dairy products case came up when the proceedings in the applicant company's case had already been ongoing for quite some time. The issue of legal certainty raised by the applicant company in respect of two different decisions delivered in two similar cases was only examined before the Supreme Administrative Court in 2013 (see paragraph 19 above). This issue ran parallel to the formation of jurisprudence on the application of limitation periods in cases concerning competition law. While it is true that the Supreme Administrative Court reached different conclusions in two cases that were similar to a certain extent, it cannot be said that there were "profound and long-standing differences" in the case-law of the Supreme Administrative Court.

87. Even though under domestic law, proceedings can be reopened when necessary in order to ensure the uniform development of the case-law of the administrative courts (see paragraph 30 above), the Court finds no reason to further examine whether the aforementioned provision in respect of overcoming judicial inconsistences could have been applied in the instant case and to what effect (see, *mutatis mutandis*, *Emel Boyraz v. Turkey*, no. 61960/08, § 73, 2 December 2014). The Court reiterates that time is needed to develop continuous and consistent case-law and that only one precedent existed at the time (the dairy products case) concerning the application of limitation periods in competition cases (and even that precedent stipulated a condition (see paragraph 41 above)). Given these circumstances, and bearing in mind that it is not its function to compare different decisions delivered by national courts (even if delivered in similar proceedings), the Court considers that the different outcome reached in the applicant company's case does not, in itself, constitute a violation of Article 6 of the Convention.

88. It thus remains to be seen whether the reasoning provided by the Supreme Administrative Court in the applicant company's case was sufficient.

(ii) On reasoning of decisions

89. The Court considers that the core of the applicant company's arguments was that the Supreme Administrative Court should have relied on the interpretation of the Law on Competition made in the dairy products case. Although the Court is mindful of the fact that the Supreme Administrative Court's interpretation of the domestic law in the applicant company's case had a direct effect on the outcome of the proceedings, it is not the Court's task, as repeatedly stated in its case-law, to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see *Nejdet Şahin and Perihan Şahin*, cited above, § 49).

90. Therefore, it is not for this Court to question under Article 6 of the Convention whether the domestic courts' interpretation of the limitation period was appropriate, since that would effectively involve substituting its

own views for those of the domestic courts as to the proper interpretation and content of domestic law (see, *mutatis mutandis*, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 101, ECHR 2001-V).

91. The Court reiterates in that regard that the applicant company was able to submit its arguments at two levels of jurisdiction; both sets of proceedings complied with the requirements of adversarial proceedings. The Court notes that the Supreme Administrative Court referred to the *res judicata* effect of the judgment of the same court of 13 May 2010 in the applicant company's case (see paragraph 15 above) and the importance of the finality and execution of judgments in general. The Court does not find this argument unreasonable or arbitrary. However, the Supreme Administrative Court's reasoning regarding why it would not apply the principles established in the dairy products case was relatively succinct (see paragraph 19 above) and it was not explained why the fact that the applicant company's case attracted the application of the European Union law differentiated it from the dairy products case. Nevertheless, in the absence of any consistent jurisprudence regarding the issue in question, the Court finds that the Supreme Administrative Court's decision was not based on a manifest factual or legal error, resulting in a "denial of justice" (see *Moreira Ferreira (No. 2)*, cited above, § 85).

92. The Court does not underestimate the importance of the doctrine of a court precedent and accepts that dynamic interpretation is a tool that provides the courts with the necessary degree of flexibility to ensure the realisation of rights guaranteed by the Convention and its Protocols. The Court also notes that Lithuania accentuates the doctrine of court precedent rather than that of consistent jurisprudence. The case-law of the Constitutional Court confirms that while courts are not formally bound to follow any of their previous decisions, it is in the interests of legal certainty, foreseeability and equality before the law that they should not depart, without good reason, and proper argumentation, from precedents laid down in previous cases (see paragraphs 33-35 above). In the present case, the Supreme Administrative Court provided reasons for its final ruling and while the Court agrees that the reasoning was succinct, it does not mean that there was no reasoning at all.

93. The Court, having regard to the entirety of the domestic proceedings, to the Supreme Administrative Court's role in those proceedings (and to the nature of the task that it was required to carry out and the manner in which the applicant company's interests were presented and protected before it), observes that it cannot be convincingly argued that the Supreme Administrative Court's decision in the applicant company's case lacked reasoning. Nor does the fact that the Supreme Administrative Court gave an unfavourable interpretation of domestic law suggest, in and of itself, that its reasoning suffered from arbitrariness or manifest unreasonableness.

(iii) Conclusion

94. Having regard to the considerations set out above, the Court considers that that the different outcome reached in the applicant company's case compared with the dairy products case did not constitute a violation of Article 6 of the Convention. Equally, the Court considers that the Supreme Administrative Court's reasoning in the applicant company's case was sufficient for the purposes of Article 6 § 1 of the Convention. It therefore concludes that there has been no violation of that provision.

III. ALLEGED VIOLATION OF ARTICLE 7 § 1 OF THE CONVENTION

95. The applicant company claimed that the fine of EUR 2,383,862, imposed after the three-year limitation period had expired constituted a penalty within the meaning of Article 7 § 1 of the Convention and this penalty had been applied after the expiry of the limitation period. Article 7 § 1 reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

96. The parties disagreed whether Article 7 of the Convention was applicable to the present case. While the Government considered that Article 7 was not applicable, the applicant company mainly reiterated the arguments that it had already raised under Article 6 § 1 of the Convention.

97. The Court notes that it has classified domestic rules on limitation periods as procedural laws, inasmuch as they do not define offences and penalties and can be construed as laying down a simple precondition for the assessment of the case (see *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, § 149, ECHR 2000-VII; *Previti v. Italy* (dec.), no. 1845/08, § 80, 12 February 2013; and *Borcea v. Romania* (dec.), no. 55959/14, § 64, 22 September 2015). The applicant company did not show that the limitation period provided by the Law on Competition pertained to the definition of the offence or the penalty; instead, relevant domestic provisions on the statute of limitation defined a precondition for the examination of the case by the domestic authorities. Accordingly, the Court notes that the material in its possession does not disclose any appearance of a violation of Article 7 § 1 of the Convention. This part of the application must therefore be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 6 § 1 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 29 January 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

Ganna Yudkivska
President