VILNIUS UNIVERSITY

DARIUS MINIOTAS

ASSESSMENT OF VERTICAL AGREEMENTS RESTRICTING COMPETITION BY THEIR OBJECT

Summary of Doctoral Dissertation
Social Sciences, Law (01 S)

Vilnius, 2015

The Dissertation was prepared during the period of 2010 – 2014 at Vilnius University

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The dissertation will be defended at the public meeting of the Law Research Council on 12th June, 2015 at 13:00 in the 302 Hall of Vilnius University Faculty of Law.
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The summary of the doctoral dissertation was distributed on 12th May, 2015.

The doctoral dissertation is available for review at the library of Vilnius University and the website of Vilnius University: www.vu.lt/lt/naujienos/ivykiu-kalendorius

VILNIAUS UNIVERSITETAS

DARIUS MINIOTAS

TIKSLĄ RIBOTI KONKURENCIJĄ TURINČIŲ VERTIKALIŲJŲ SUSITARIMŲ VERTINIMAS KONKURENCIJOS TEISĖJE

Daktaro disertacijos santrauka

Socialiniai mokslai, teisė (01 S)

Vilnius, 2015

Disertacija rengta 2010–2014 metais Vilniaus universitete

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Disertacija ginama Vilniaus universiteto Teisės mokslo krypties taryboje.

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Disertacija bus ginama viešame Teisės mokslo krypties tarybos posėdyje 2015 m. birželio 12 d. 13 val. Teisės fakulteto 302 auditorijoje.

Adresas: Saulėtekio al. 9, I rūmai, LT-10222 Vilnius, Lietuva.
Disertacijos santrauka išsiųsta 2015 m. gegužės 12 d.
Disertaciją galima peržiūrėti Vilniaus universiteto bibliotekoje ir Vilniaus universiteto interneto svetainėje adresu: www.vu.lt/lt/naujienos/ivykiu-kalendorius

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Introduction. The performed research is focused on the legal and economic assessment of vertical agreements which have as their very object the appreciable restriction of competition. This summary presents the key features of the research. It begins with some background information which explains the chosen path of the research. Then the scientific objective and scope of the thesis are defined. The summary continues with explaining scientific novelty of a research, providing a brief review of previous scholarly works in this area and description of the used research sources. Further sections of the summary provide an explanation of the methodology of the research and the concise overview of the five main parts of the thesis. Finally, the conclusions of the research as well as publications of the author and his personal details are presented.

It is unquestionable nowadays that economic analysis is an inseparable part of competition law and practice. However, such position started to dominate only recently. In the early days of the application of competition rules both European Union (hereinafter – EU) and United States (hereinafter – US) jurisdictions often lacked economic logic when dealing with competition issues. Especially inconsistent and erratic was the treatment of vertical agreements which are concluded between the undertakings operating at the different levels of products' distribution chain. At first it was hardly noticed that such agreements are concluded for the entirely different purposes than the agreements between the competing undertakings operating at the same level of distribution chain. Equalisation of the market effects as well as reasons of vertical and horizontal relations determined long-lasting negative treatment of vertical agreements. And only in the second half of the twentieth century it was acknowledged, at first in the US, and then in the EU, that vertical agreements possess significant potential in increasing economic efficiency and stimulating competition, consequently their assessment must be performed by relying on the economic analysis of their effects instead of application of formal rules. This new direction of competition policy gradually determined the modern competition law approach which now treats most of the vertical agreements as beneficial for competition and consumer welfare.

While analysing the practice of the assessment of vertical agreements from the historical perspective, two types of agreements, which traditionally have always been distinguished as the most serious violations of competition law, may be identified. The first category consists of the resale price maintenance agreements, which allow the

producer to indicate to its distributor the specific resale price of the supplied product. The distributor then should apply such price to its further consumers which purchase the product. In the second category fall the vertical agreements granting absolute territorial protection for the distributors of the product. Under such agreements the producer assigns a specific territory to each of its distributors and grants them an exclusive right to distribute its products within that territory. Moreover, the producer prohibits its distributors to execute sales within the territory assigned to another distributor, thus protecting the distributors from competing with each other. Actual effect of such agreements in the context of EU's internal market is the restriction of parallel trade within the EU.

Notwithstanding the general shift of focus towards the economic effects of vertical agreements, the treatment of these two categories of agreements, defined in the EU competition law as restricting competition by their very object, has hardly changed. Long-standing practice of the European Commission (hereinafter – Commission) established strict presumptions of illegality of such agreements, thus creating the legal environment where such types of agreements are always or almost always prohibited. In the context of the described legal environment the question arises whether these agreements in fact possess the potential of such exclusively negative effects on competition that it is justifiable to create a factual illegality regime, which effectively deters the undertakings from using such agreements in practice.

The objective and scope of the research. The objective of the research is to analyse and evaluate whether EU as well Lithuanian practice of application of competition rules to vertical agreements restricting competition by their object corresponds to the reformed EU's "more economic approach" competition policy course[1]. This objective presupposes the object of the research – analysis of two previously identified categories of vertical agreements, i.e. resale price maintenance and absolute territorial protection. These types of vertical agreements have been repeatedly defined as restricting competition by their object both in the practice of the Court of Justice of the European Union (hereinafter –

[1] Wider economic approach to competition rules was one of the main objectives of the EU competition law reform, which took place in 1996 – 2004. The basis of this concept was the shift from the formal application of competition rules to more effects-based analysis.

CJEU) and in academic literature[2], therefore the initial qualification of these agreements as such is not questioned in this study. Nevertheless, the Commission, as the main institution enforcing competition policy within the EU, in its practice has defined even more types of vertical agreements which it named *hardcore* restraints[3] and which, in Commission's opinion, should also be considered as restricting competition by their object. It is the opinion of the author that hardcore restraints and agreements restricting competition by their object are separate legal categories and the Commission's qualification of hardcore restraints as restricting competition by their object exceeds Commission's competence in the field of the EU competition law as only the CJEU may qualify the specific restraints as such. Due to this reason the research does not include the analysis of certain types of vertical agreements, which Commission considers as restricting competition by their object in the same way as resale price maintenance and absolute territorial protection[4].

The research is mainly focused on the analysis of general competition rules applicable to the most prevalent types of vertical agreements related to the purchase, sale or resale of goods or services. Consequently, the scope of this analysis does not include specific competition rules applicable only to certain types of vertical agreements, such as research and development, motor vehicle and technology transfer agreements. In addition, the research does not encompass special competition regulations applicable only to specific sectors of industry, such as agriculture, postal services, insurance and some others. Nevertheless it should be noted that the application of competition rules in each individual case is heavily influenced by the specific legal and economic context in which the agreement in question takes part. As an example, in the fourth part of the thesis a study on application of competition rules in the pharmaceutical sector is provided. In other cases the specific characteristics of the industry or the object of the agreement are described only when they directly influence the application of general competition rules.

[2] *E. g.* WHISH, R.; BAILEY, D. *Competition Law*. 7th ed., Oxford: Oxford University Press, 2012, p. 124.
[3] Please refer to Article 4 of the Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OL, 2010, L 102/1. In addition please note that the terms „vertical agreement" and „vertical restraint" for the purposes of this research are used as synonyms.
[4] *Ibid*, paragraphs (c), (d) and (e) of Article 4.

The research is carried out in order to verify the **hypothesis** that the current EU legal regime applicable to vertical agreements which restrict competition by their object is incompatible with the economic goals of the EU's competition law and the effects-based economic approach to competition issues.

The research focuses mainly on the EU competition law dimension and the analysis of the practice of the CJEU and the Commission. The analysis related to Lithuanian competition law practice is of relatively smaller scope, however this is due to objective reasons. First, Lithuanian competition law practice is only in the second decade of the application of EU-harmonized competition rules and during this period there has been only several cases involving vertical agreements restricting competition by their object, while the practice of the CJEU and the Commission is incomparably larger. Second, the authorities applying Lithuanian competition rules in practice heavily rely on EU precedents. The identified reasons determine that Lithuanian competition law has not defined specific rules or practice related to the assessment of vertical agreements restricting competition by their object and in essence is dependent on the EU practice. The analysis of the US jurisprudence in the relevant areas also forms a major part of the research due to the fact that US competition law system is one of the oldest competition law systems in the world and US antitrust scholars and practitioners acted a significant role in the process of defining the modern application of competition rules.

It should be noted that the first two parts of the thesis concentrate on the analysis of more general issues, which, nevertheless, are essential for the proper understanding of the problems addressed during the research. The first part discusses the goals of EU competition law. The main provisions of the EU competition law established in Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter – TFEU) are very general, therefore the authorities which implement competition policy are granted with a wide discretion of their application and interpretation. In order to understand why the competition rules are being applied in one way or another, it must be clear what goal or goals are pursued by the competition law. The second part of the thesis reveals the nature of vertical agreements and their main economic features as well as main rules of the assessment of such agreements. The analysis provided in this part concentrates on the problems of qualification and evaluation of the vertical agreements. The third and the fourth parts of the thesis are devoted to extensive analysis of specific

types of vertical agreements, while the fifth part discusses optimal legal rules and provides proposals for future enforcement of competition law.

Scientific novelty. Until now there has been no research in Lithuania focusing on the extensive analysis of vertical agreements restricting competition by their object. In 2001 Irmantas Norkus defended doctoral dissertation "Prohibited Agreements under the Competition Law of European Community"[5] where he provided the overall assessment of all agreements falling within Article 101 TFEU. The research path chosen by I. Norkus determined that vertical and horizontal agreements were analysed together, without emphasis on their different features. Resale price maintenance and absolute territorial protection agreements were touched only slightly as the major part of I. Norkus' work was concentrated on the various procedural issues and the harmonization of the Lithuanian competition law with the EU competition rules.

In 2004 Daivis Švirinas published monograph titled "Regulation of Vertical Agreements in Competition Law"[6] where he presented an extensive analysis of general economic and legal questions related to the assessment of vertical agreements as well as evaluation of certain separate types of such agreements. An extensive scope of research performed by D. Švirinas meant that questions comprising the main part of this thesis were discussed only episodically and while assessing the vertical agreements restricting competition by their object D. Švirinas presented the relevant practice of the EU institutions and abstained from any critique regarding the competition policy pursued by the Commission. It must be stressed, however, that one of the main purposes of D. Švirinas' research was to provide initial understanding of vertical agreements in Lithuanian competition law and assist in preparations for the direct implementation of the EU competition rules.

More than ten years have passed since I. Norkus and D. Švirinas performed their respective studies and during this time no extensive research in the field of vertical agreements was performed in Lithuania. This period, however, marked significant developments in the field of vertical agreements, which in turn established the need to

[5] NORKUS, I. *Draudžiami susitarimai pagal Europos Bendrijos konkurencijos teisę: daktaro dis. soc. mokslai: teisė (01S)*. Vilnius: Vilniaus universitetas, 2001.
[6] ŠVIRINAS, D. *Vertikaliųjų susitarimų reglamentavimas konkurencijos teisėje*. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2004.

rethink their assessment. Due to these reasons the decisions adopted by the CJEU, US Supreme Court and national competition authorities during the period of 2005 – 2014 are given great attention in this thesis, thus determining the novelty and relevance of the research.

After the Commission adopted Regulation No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices and modernized the assessment system of vertical agreements, the general consensus between the scholars was that vertical agreements are no longer a significant area of interest both in the EU and US competition law jurisdictions. However, such situation changed significantly when the General Court in *GlaxoSmithKline*[7] and US Supreme Court in *Leegin*[8] adopted entirely new approach to vertical agreements which historically were considered as prohibited *per se*. These landmark decisions also coincided with the forthcoming expiration of Regulation No 2790/1999[9] and the respective review of the EU vertical agreements legal regime.

It is not surprising that after such developments there has been an increase of studies in the international academic literature related to the vertical agreements restricting competition by their object. Nevertheless, it should be noted that major part of these works materialised in the form of articles in periodical journals or new editions of competition law textbooks. In such cases it is objectively impossible to expect an extensive analysis of issues at hand. Among the more comprehensive studies is the thesis regarding resale price maintenance agreements prepared by I. Paldor in the University of Toronto and published in 2007[10] as well as doctoral dissertation of B. Jedličková, which was prepared in 2011 in the University of Glasgow and concerns the analysis of vertical territorial and price restraints in the EU and US jurisdictions[11]. It should be stressed that both of these authors are of the opinion that resale price maintenance and absolute

[7] General Court decision of 27 September 2006 in case T-168/01 *GlaxoSmithKline Services v. Commission* (2006), ECR II-2969.
[8] US Supreme Court decision of 28 June 2007 in case *Leegin Creative Leather Products Inc. v. PSKS Inc.*, 551 U.S. (2007).
[9] Article 13(3) of the Regulation 2790/1999 established that this Regulation expires on 31 May 2010.
[10] PALDOR, I. *Rethinking RPM: Did The Courts Have It Right All Along?* A Thesis Submitted in Conformity with the Requirements for the Degree of Doctor of Juridical Sciences (SJD). Canada: University of Toronto, 2007. Available at: <http://ssrn.com/abstract=994750> [accessed on 2014-02-13].
[11] JEDLIČKOVÁ, B. *The Law of Vertical Territorial and Price Restraints in the EU and in the USA: A Critical Analysis of Vertical Territorial and Price Restraints – An Argument Against Legalisation.* Submitted in Fulfilment of the Requirements for the Degree of PhD in Law. The United Kingdom: School of Law, University of Glasgow, 2011. Available at: <http://theses.gla.ac.uk/3313/1/2012JedlickovaPhD.pdf> [accessed on 2014-03-03].

territorial protection agreements are anticompetitive, therefore their factual illegality is the correct legal standard. The author of this research questions such position. One of the latest works in the field of vertical restraints is a study of Hungarian academic and practitioner C. I. Nagy published in 2013 and analysing EU and US legal regulation related to vertical agreements[12].

Although the questions related to resale price maintenance and / or absolute territorial protection to a larger or lesser extent have been tackled by major part of international academic community prominent in the issues of competition law and economics (D. Bailey, R. Van den Bergh, J. Drexl, J. Goyder, A. Jones, B. Klein, V. Korah, T. A. Lambert, M. Lao, H. P. Marvel, O. Odudu, N. Petit, R. Whish are among the most important authors), the amplitude in the differences of opinions is striking. For example, one of the authors of the economic analysis of law, Chicago University professor R. A. Posner, when discussing the approach to resale price maintenance agreements, states that *per se* illegality rule of such agreements, which existed in the US legal system from 1911 until 2007, is "a sad mistake" as there are no reasonable grounds to hold such agreements as anticompetitive[13]. An opponent of such position, the former commissioner in the US Federal Trade Commission P. J. Harbour, indicates that vertical maintenance of minimum resale prices is almost exclusively harmful to consumers and usually determines higher prices without any redeeming value[14]. The performed review of most recent works in this area shows that the assessment of vertical agreements restricting competition by their object remains a controversial issue, therefore this research aims to contribute to the ongoing debate by providing argumentative and critical analysis of these vertical agreements, thus contributing to the academic discussions and implementation of the competition policy not only in Lithuanian, but in international competition law systems as well. The author of the research is not only a theorist, but also a practitioner specialising in the field of competition law since 2007, therefore this experience allowed him to examine the issues universally and submit proposals which may be successfully applied in practice.

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[12] NAGY, C. I. *EU and US Competition Law: Divided in Unity?* Farnham: Ashgate Publishing, 2013.
[13] POSNER, R. A. *Antitrust Law*. 2nd ed., Chicago: University of Chicago Press, 2001, p. 189.
[14] HARBOUR, P. J. *An Open Letter to the Supreme Court of the United States from Commissioner Pamela Jones Harbour.* Available at: <http://www.ftc.gov/public-statements/2007/02/open-letter-supreme-court-united-states-commissioner-pamela-jones-harbour> [accessed on 2014-03-03].

Sources of the research. The sources which were analysed during the course of research may be distributed in the following categories:

International and national legal acts

While identifying the legal norms applicable to the vertical agreements restricting competition by their object the analysis focused on Article 101 TFEU, which establishes main rules of assessment of such agreements, as well as implementing regulations adopted by the Commission and the European Council. When establishing the competition rules applicable in other jurisdictions, US Sherman Act and its amendments were analysed as well as certain competition law provisions in other countries, including Lithuania.

Court practice

Both TFEU and the Sherman Act establish very vague and laconic competition rules, therefore it is not surprising that the main task of interpretation and application of these rules was *de facto* assigned to the highest courts. Although the EU law in theory does not rely on case-law as heavily as the US law, the Court of Justice is known for the meticulous following of its previous precedents and departing is possible only in a very exceptional cases[15]. Due to these reasons both Court of Justice and the US Supreme Court decisions play a significant role in the process of interpretation and application of competition law, consequently these decisions are one of the most important sources of the research. The practice of the Lithuanian Supreme Administrative Court in the field of vertical agreements is minimal, therefore it is analysed only episodically. The author also considers that the opinions of Advocate Generals delivered before the Court of Justice are very important source of research due to the sophistication and depth of legal and economic analysis presented in those opinions.

[15] JONES, A. The Journey Toward an Effects-Based Approach under Article 101 TFEU – The Case of Hardcore Restraints. *The Antitrust Bulletin*, 2010, Vol. 55, No. 4, p. 798.

Decisions of the Commission, Lithuanian Competition Council and other national competition authorities

Decisions of various authorities which enforce competition rules, especially the Commission, are also an important source of research. Not every case decided by the Commission is appealed, therefore those Commission decisions which come into force without the legal review by the European Courts are an important indication of implemented competition policy both for the academics and businesses throughout Europe.

Soft law documents adopted by the Commission

During the course of research the author relies on various guidelines concerning the implementation of the competition rules, other documents published by the Commission, public statements and speeches of its representatives responsible for the competition policy. These documents, while not mandatory in the process of application of competition rules, clearly indicate the direction of competition policy pursued by the Commission and in such way even bind the Commission itself to a certain extent. Soft law documents published by the Commission create legal expectations for businesses and their advisors and provide a legal basis for self-assessment of various agreements. They are of as significant value for the national competition authorities, especially those of new Member States, which often lack relevant experience. Therefore it is not surprising that even in purely national cases the competition authorities perform the competition assessment by relying on the principles established in relevant Commission's guidelines.

Doctrine of competition law and economics

As it was already mentioned, during the recent years there has been an increase in academic studies related to the assessment of vertical agreements. This does not mean, however, that the previous works in the field of competition law are no longer relevant. During the course of research the author took great interest in the works of Chicago antitrust school[16], especially R. H. Bork and R. A. Posner, which, although published

[16] This term is used to define a school of thought which advocates monetarism and free market. Its most prominent members worked in the University of Chicago and greatly influenced the development of modern competition law.

some 30 – 40 years ago, remain surprisingly relevant even today. Major part of the works analysed during the research are interdisciplinary and represent the school of Law and Economics. Numerous studies in the field of competition law were written by economists who analysed competition rules from the perspective of economics science and especially one of its branches – Theory of Industrial Organization. The author also refers to articles published in the most important competition law periodicals, such as *The Antitrust Bulletin, Journal of Law and Economics, European Competition Law Review, Common Market Law Review* and others, as well as other books, publications of articles and newest editions of classical textbooks. The material for the research was collected during two visits to Max Planck Institute for Competition and Innovation in 2012 and 2013. The vast resources of the Institute allowed the author to perform thorough and comprehensive research and the author is extremely grateful for that.

Methodology. Alongside the traditional methods of research – *teleological, systemic analysis, historical, comparative* and *logical,* a great emphasis was placed on the method of *economic analysis of law*. As stated by G. Lastauskienė, in Lithuanian legal doctrine economic analysis of law was largely ignored and only recently it started to appear in academic discussions[17]. In its most general sense the economic analysis may be defined as a specific analysis method, which is used in order establish, change and (or) apply legal rules by relying on economic postulates, theories and arguments. As proven by one of the most prominent advocates of this method and the author of the fundamental work *Economic Analysis of Law,* R. A. Posner[18], any field of law may be analysed from the economic perspective. The competition law, however, is one of the few fields where this method is dominant. Without proper understanding of economic conceptions and theory, successful application of competition rules is impossible. All main definitions and conceptions of competition law – restriction of competition, market power, economic efficiency, total and consumer welfare (surplus), are categories of economic nature. These circumstances determine that economic analysis of law is the prevailing method of

Their fundamental view is that economic efficiency is the sole goal of competition policy. It is considered that the achievement of effects-based approach to competition law is attributable mainly to this school of thought.

[17] LASTAUSKIENĖ, G. Ekonominiai argumentai teisėje: jų vieta ir ribos. *Teisė,* 2013, t. 89, p. 35.

[18] In 2011 already the eighth edition of this work was published, POSNER, R. A. *Economic Analysis of Law.* 8th ed., Austin: Wolters Kluwer Law & Business, 2011 (first published in 1972).

this research, present in all parts of the thesis and manifesting by the evaluation of the analysed vertical agreements effects on the market structure, interaction between the supply and demand, impact to the economic efficiency and consumer welfare, and for the purposes of this evaluation applying theories and conceptions developed in the science of economics. It should be stressed that the author does not seek to present insights of purely economic nature – the application of economic analysis of law during this research evidenced by analysing how various economic theories may influence (change) the legal assessment of vertical agreements. While the synthesis of law and economics is inevitable in such process, the research itself is legal in its nature and is intended for the reader with background in legal sciences. Therefore, the thesis provides thorough explanations of definitions developed in economics science, intentionally avoids using complex graphs and formulas and presents the arguments in legal language.

Teleological method is used mostly in the first part of the thesis in order to reveal the goals of the EU and Lithuanian competition law. Considering that competition law is inseparable from the evolutionary developments of the market, it is very dynamic in its nature. This factor determines that as time passes the goals of competition law may change and are in fact changing (evolving). Therefore, the teleological analysis was performed not only with respect to the goals of the original creators of competition rules in the EU and Lithuanian legal systems, but also by reviewing the officially declared priorities of competition authorities during the recent years, which are the clear indication of the aims those institutions are trying to achieve by enforcing competition rules. This in turn allows determining the course of modern competition law.

Systemic analysis method is used in the second part of the thesis in order to reveal the dichotomy of the qualification of vertical agreements restricting competition by their object or effect while applying Article 101 TFEU. This method was also applied in analysing the relations between Article 101(1) TFEU which establishes a general prohibition of agreements which restrict competition, and Article 101(3) TFEU, which provides possibility of an exemption from the general prohibition, as well as the compliance of such provisions with the economic theory.

Historical method was used mainly in the third and fourth parts of the thesis by analysing how legal assessment of vertical agreements restricting competition by their object developed and changed. Extensive historical analysis of legal regulation and

treatment of such agreements allowed forming a complete view regarding the historical tendencies of their evaluation and prevailing position of the competition authorities. Historical method was combined with a *comparative* method, which was used to compare the treatment of analysed vertical agreements in different legal jurisdictions. For the purposes of this research the mostly developed jurisdictions of the EU and the US were chosen, the analysis also included Lithuanian jurisdiction. Further to these three main jurisdictions, several examples from other jurisdictions are provided as well.

Additional methods of *logical analysis*, *deduction*, *induction* and *generalisation* were used in order to establish tendencies in the assessment of vertical agreements restricting competition by their object, to formulate interim and final conclusions, submit proposals for future development of competition law.

During the course of this research no separate empirical analysis was performed, however the author has analysed and compared the previous empirical works done by other scholars and presented their reasoned evaluation.

Defended statements. The statements defended by the thesis are the following:

1. Plurality of the goals of EU competition law and continuous prevalence of the internal market integration goal is a serious obstacle in the process of creation competition law tradition based on sound economic arguments.
2. Restriction of competition in its nature is an economic category. The usage of this conception to solve various issues of social or public nature which are not related to competition has distorted its development, allowed the creation of various subsidiary doctrines of application of Article 101 TFEU and conditioned its vague and obscure understanding in the EU competition law.
3. Vertical agreements restricting competition by their object are treated as *de facto per se* illegal in EU competition law. Notwithstanding the existing possibility of an individual exemption pursuant to Article 101(3) TFEU, such agreements will always or almost always be considered as illegal. Therefore, even in cases where such agreements may have positive effects on competition, the undertakings are effectively deterred from concluding such types of agreements in practice.
4. Long-standing position that vertical agreements which restrict competition by their object are always negative for the competition and consumer welfare is ill-founded.

Such types of vertical agreements are characterised by their ambiguous effects, therefore the application of their factual illegality regime is unjustifiable.

5. Automatic condemnation of resale price maintenance and absolute territorial protection agreements without taking into account the market position of the parties concluding such agreements is incompatible with the modern effects-based approach to competition law.

Summary of the thesis. As it was mentioned, the thesis consists of five main parts. In order to properly understand the content of the research, these parts are briefly summarised below.

The first part – Goals of EU Competition Law

The analysis begins with a quote from R. H. Bork's seminal work *The Antitrust Paradox „Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point the law – what are its goals. Everything else follows from the answer we give"*[19]. Consequently, the first part of the thesis is dedicated to an examination of the multiple goals of EU competition law. Considering that the object of the research is vertical agreements, only goals of Article 101 TFEU are examined as Article 102 TFEU deals with the conception of dominance and its application in practice was heavily influenced by ordoliberal school of thought. These circumstances determined that discussion regarding possible specific goals of Article 102 TFEU falls out of the scope of this research.

The author identifies a total number of four goals which are pursued by applying Article 101 TFEU. The protection of competition and creation of an internal market are two instrumental goals (measures) which help to achieve the ultimate goals – to ensure maximum consumer welfare by an efficient allocation of limited resources (i.e. economic efficiency). Commission considers that competitive process is vital for market integration, and market integration in its turn is essential condition for effective allocation of resources and consequent increase of consumer welfare in the internal market.

[19] BORK, R. H. *The Antitrust Paradox: A Policy at War with Itself*. New York: Basic Books, 1993, p. 50.

The analysis continues with separate discussion regarding each of the identified goals. It is concluded that the consumer welfare should be the ultimate goal pursued by Article 101 TFEU. Nevertheless it is argued that the market integration goal remains one of the main factors when applying Article 101 TFEU. Furthermore, after reviewing recent Commission's documents and public announcements, as well as CJEU decisions, it may be seen that there are differences in rhetoric of these institutions and different goals are promoted.

The author argues that the application of Article 101 TFEU with multipartite goals in mind creates difficulties in pursuing the competition policy based on economic efficiency and consumer welfare. R. H. Bork states that competition law must pursue one virtue, one goal, and only then it becomes rational, consistent and effective tool. When competition policy pursues many goals, both of economic and political nature, the clash between those goals is preprogramed. This also means that the discretion of undertakings to create efficient distribution systems is restricted by political and not economic reasons. In other words, the restriction of competition within the scope of Article 101 TFEU becomes not legal or economic, but political category, and until this political element remains dominant without actually taking into account whether the competition was in fact restricted in its economic sense, EU competition law shall be applied in an arbitrary and conformist manner.

The part concludes by briefly discussing the goals of Lithuanian competition law. Lithuanian Constitution and the Law on Competition establish two main goals of competition law: (i) prohibition to monopolise industry; (ii) protection of fair competition. Competition policy in Lithuania is implemented by the Competition Council which in 2012 has adopted its enforcement priorities. The current enforcement priority states that Competition Council shall only interfere in the functioning of the market where such interference shall significantly contribute to the protection of effective competition, thus ensuring better consumer welfare. The author notes that the market integration goal is absent from Lithuanian competition law, which is not surprising as market integration goal is alien to national competition law systems.

The second part – Legal and Economic Context of Vertical Agreements

The analysis continues with thorough review of legal regulation of vertical agreements and their economic features. The author reveals the differences between horizontal and vertical agreements as well as the reasons why undertakings conclude vertical agreements and establish vertical restraints. Legal rules applicable to vertical agreements are thoroughly analysed in this part. Major attention is dedicated to the problem of distinction between agreements restricting competition by their object and by their effect. The object / effect dichotomy has been one the most difficult problems of modern competition law due to unclear scope of analysis required for qualification of an agreement as one or another. This problem has been the focus of several very recent Court of Justice decisions in *Expedia*[20], *Allianz Hungária*[21] and *Groupement des cartes bancaires*[22] and these decisions are thoroughly discussed in the thesis.

This part also deals with other doctrines of application of Article 101 TFEU, most namely objective justification, ancillary restrains and restraints of public nature. Conceptions of trade between member states and appreciable restriction of competition (*de minimis* doctrine) are also analysed, including the review of *Expedia* case and new edition of Commission‘s *de minimis* notice[23]. It should be noted that all these conceptions are analysed in the context of vertical agreements restricting competition by their object.

The analysis concludes with review of possibilities to apply individual exemption established in Article 101(3) TFEU to vertical agreements restricting competition by their object. After reviewing the established presumptions the author concludes that despite theoretical declaration that every agreement in principle may satisfy the conditions of Article 101(3) TFEU, the possibility for the agreement restricting competition by its object to escape the prohibition of Article 101(1) by means of an individual exemption is virtually non-existent. Such situation creates an effective *per se*

[20] Court of Justice decision of 13 Decenber 2012 in case C-226/11 *Expedia Inc. v. Autorité de la concurrence and Others* (2012), ECLI:EU:C:2012:795.
[21] Court of Justice decision of 14 March 2013 in case C-32/11 *Allianz Hungária Biztosító Zrt and Others v. Gazdasági Versenyhivatal* (2013), ECLI:EU:C:2013:160.
[22] Court of Justice decision of 11 September 2014 in case C-67/13 P *Groupement des cartes bancaires (CB) v. European Commission* (2014), ECLI:EU:C:2014: 2204.
[23] Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice). OJ C291, 2014, p. 1-4.

illegality regime of such agreements, deterring undertakings from their usage in practice. The author concludes that despite shift of focus in the treatment of vertical agreements from formal to more economic approach, the position towards vertical agreements restricting competition by their object remains exclusively negative. In further parts of the thesis the author analyses whether such position is compatible with the economic theory.

The third part – Resale Price Maintenance

Third part of the thesis is dedicated to analysis of resale price maintenance agreements. For the purposes of this research the author analyses the most serious restraint of minimum resale price maintenance (vertical price fixing). The restraints of maximum and recommended resale prices are not analysed as they usually are not considered as seriously restricting competition, with the exception of cases where parties possess significant market power.

After introductory remarks and brief discussion of general economic effects of resale price maintenance, the author continues with analysis of economic theories justifying the use of resale price maintenance and theories of harm condemning such vertical restraint. Nine theories of positive effects to competition and consumer welfare are identified: (i) solution of a free-riding problem; (ii) facilitation of inter-brand competition; (iii) quality certification theory; (iv) loss leader theory; (v) theory of contract enforcement mechanism; (vi) theory of sufficient outlets; (vii) demand risk theory; (viii) facilitation of new product's entry into market; (ix) short-term marketing campaigns. On the other hand, five theories of harm are discussed: (i) facilitation of producers' cartel; (ii) facilitation of distributors' cartel; (iii) increase in prices and reduction of consumer welfare; (iv) harm to informed consumers not affected by free-riding problem; (v) raising barriers of entry to the market. Further the author analyses empirical studies of the actual effects of resale price maintenance. The analysis is performed with respect to two factors: (i) impact on price levels; (ii) relation with cartels.

After performed analysis the author concludes that while resale price maintenance has certain potential of harm to consumers, especially in the form of increased prices, it also may bring positive effects in numerous cases both to consumers and the market, thus outweighing the negative effects.

The part continues with the thorough analysis of legal treatment of resale price maintenance in the EU, US and Lithuanian jurisdictions, some examples are also provided from the Netherlands, United Kingdom and Germany. Each of the three main jurisdictions are analysed separately, by revealing provisions of legal acts applicable to these agreements as well as extensive case-law. Major part of the analysis is dedicated to US Supreme Court's decision in *Leegin* case – the case itself is analysed in a greater detail and its impact both for the US and EU competition law systems is extensively discussed.

The author concludes that there are neither theoretical, nor empirical basis to treat resale price maintenance in an exclusively negative way. Such types of agreements may have either positive or negative impact on competition, all depending on various factors, such as factual circumstances of their conclusion and execution, market share of its parties and the overall structure and conditions of the market. The author agrees that resale price maintenance agreements in principle should be approached with caution. However, their automatic condemnation even in such cases where the parties to the agreement occupy extremely minor position in the relevant market is incompatible with economic theory of vertical agreements assessment and, consequently, with the competition policy of a "more economic approach" to vertical agreements as declared by the Commission.

The fourth part – Absolute Territorial Protection

The fourth part discusses vertical agreements where producer grants absolute territorial protection to its distributors, thus eliminating competition among them. The author analyses the economic reasons of producer's incentives to protect its distributors from inter-brand competition. Two main reasons are identified: (i) elimination of a free-riding problem; (ii) geographical price discrimination. The negative effect of such agreements is isolation of separate markets which might not be a major problem in the US jurisdiction, but in the EU it is in a direct conflict with market integration imperative as it restricts parallel trade.

The author continues with the analysis of legal treatment of such agreements in the EU, US and Lithuanian jurisdictions with heavy focus on relevant Commission's practice and case-law. Similarly as in the case of resale price maintenance it is concluded

that despite some mitigating changes in Commission's policy after the reform of vertical agreements was introduced in 1999 – 2000, the practice of the Commission sends a clear message of a *de fact per se* prohibition policy of such agreements.

The analysis continues with the focus on developments in the industry of pharmaceuticals where several recent cases forced to rethink approach to territorial restrictions despite the Commission's hard stance. The author introduces main legal and economic features of pharmaceutical industry and continues with discussion of General Court's decision in *GlaxoSmithKline* case where the General Court stated that restriction of parallel trade should not be considered as restriction by object and should be assessed according to its effects. Although on appeal the Court of Justice decided that the General Court erred in law by delivering such statement, the decision of the General Court was very convincing in its analysis of the features of pharmaceutical sector which determine the need to rethink application of competition rules. Similarly, Advocate General Jacobs' opinion in *Syfait* is thoroughly analysed as the Advocate General delivered very sophisticated analysis of the pharmaceutical sector and applied competition rules not formally, but taking into account the specific features of the market[24].

The analysis in this part concludes that General Court's decision in *GlaxoSmithKline* and Advocate General Jacobs' opinion in *Syfait* were the most significant of the recent attempts to dislodge the entrenched formalism of the assessment of vertical agreements and to promote economic analysis when determining the restriction of competition by object. These attempts were not successful as the market integration imperative remained a decisive factor in these cases. As it is universally agreed that consumer welfare should be the ultimate goal of modern competition law, the author questions whether consumer welfare should be in fact sacrificed for the sake of market integration.

The fifth part – Conditions of an Optimal Legal Regime

In the final part of the thesis the author discusses the conditions of an optimal legal regime. By using examples from F. H. Easterbrook's seminal work *The Limits of*

[24] Advocate General Jacobs opinion of 28 October 2004 in case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. GlaxoSmithKline plc and GlaxoSmithKline AEVE*, ECR I-4611.

Antitrust[25] the author reveals the possibilities of errors when enforcing competition rules. These errors are of two types: Type I and Type II. Type I errors occur when competition authorities prohibit agreements which in fact do not restrict competition. Type II errors occur when agreements which restrict competition remain undetected. The author argues that the optimal legal regime is achieved when the overall amount of errors is minimal. Rules of *per se* prohibition increase Type I errors and rule of reason or similar rules increase Type II errors. However, it is argued that Type II errors are more acceptable as the costs of such errors shall be reduced by the market itself and self-regulation, while Type I errors are incurable. Consequently, the author calls for more reasoned approach to vertical agreements restricting competition by their object with focus on the economic effects of such agreements and not their mere form. Proposals are submitted on how to achieve such approach in the context of Lithuanian competition law.

Conclusions

1. EU competition law tradition is characterized by the plurality of the goals it tries to achieve. This determines that during the application of competition rules various different and often conflicting values are implemented. Although EU competition law recognises consumer welfare as its ultimate goal, coexisting goals of protection of competition and especially market integration remain significant factors, directly influencing the assessment of vertical agreements in the process of application of competition rules.
2. Multipartite nature of the goals of EU competition law creates serious obstacles for the assessment of vertical agreements based on sound economic arguments. Long-standing prioritisation of the market integration goal enforced by the Commission distorted the conception of restriction of competition which was interpreted by relying on not economic, but social or political arguments. Absence of united conception of restriction of competition based on economic logic determined confusion in applying Article 101(1) TFEU and created subsidiary doctrines, which interpreted this concept by endorsing public policy objectives.
3. EU and Lithuanian competition law establish *de facto per se* illegality regime with respect to vertical agreements restricting competition by their object, namely resale

[25] EASTERBROOK, F. H. The Limits of Antitrust. *Texas Law Review,* 1984, Vol. 63, No. 1.

price maintenance and absolute territorial protection. Although such types of agreements in theory may escape the prohibition by satisfying the conditions of an individual exemption provided in Article 101(3) TFEU, rebuttal of established illegality presumptions is nearly an impossible task for the undertakings and especially smaller businesses.

4. EU competition regulation, especially Article 101 TFEU, does not establish proper distinction between the vertical and horizontal agreements restricting competition by their object. Absolute majority of horizontal agreements restricting competition by their object are harmful to consumers and competition. This factor encumbers the development of proper treatment of vertical agreements as the same legal provisions and the same precedents are being applied to agreements of an entirely different economic nature. Such situation establishes conditions for unjustified comparison or even coincidence of such legal relations, thus creating inefficient and economically erroneous evaluative rules.

5. Economic analysis of vertical agreements restricting competition by their object does not confirm the assumption that such types of agreements are characterised by their exclusively negative impact for competition and consumer welfare:

   5.1. There are at least nine well-founded and widely recognised economic theories proving that vertical price fixing may bring positive effects on competition and consumer welfare. Meanwhile, the main theories of harm of such agreements related to the risks of cartel between distributors or producers are not sufficiently convincing to substantiate the need of *per se* prohibition of such agreements. The analysis of existing empirical studies confirms this position and does not allow stating that *per se* or *de facto per se* prohibition of such vertical agreements is appropriate legal standard.

   5.2. While assessing the agreements related to absolute territorial protection it is necessary to confront the conception of geographical price discrimination. The effect of this phenomenon on consumer welfare is ambiguous – it may be either positive, or negative, depending on the living standard and payment abilities of the consumers. Considering from the position of countries of lower living standard geographical price discrimination is beneficial for consumers and increases their welfare. Such vertical agreements may also be an effective

measure of solving the free-riding problem or introducing a new product to the market. However, the restriction of parallel trade conditioned by such agreements is incompatible with the political goal of EU competition law – integration of the markets of different Member States. This clash of different goals of consumer welfare and market integration significantly restricts the possibilities to evaluate absolute territorial protection agreements from the positions of economic efficiency and consumer welfare. As it may be seen from the analysed examples in pharmaceutical industry, the conflict between market integration on one hand, and economic efficiency as well as consumer welfare on the other hand, is a real problem and not a hypothetical construct.

6. After the vertical agreements regulation reform and especially after the 2010 edition of Vertical Restraints Guidelines it may be stated that there are slight positive developments in the policy of the Commission with respect to vertical agreements restricting competition by their object. As Commission declares and pursues economic approach to vertical agreements, certain mitigation of an established negative position is an inevitable process as such position was historically formed relying solely on the market integration imperative and consequently is no longer compatible with the direction of the modern competition law, which calls for an economic analysis of features of an agreement in question. However, these manifestations of a more positive approach are considered as cosmetic result of a certain compromise on the Commission's behalf and acknowledge only a very small portion of the potential of positive effects on competition by such types of agreements.
7. Consistent increase in importance of economic analysis in the process of assessment of vertical agreements was trampled by the decision of the Court of Justice in *Expedia* and the following review of *de minimis* notice. Automatic condemnation of the vertical agreements restricting competition by their object and affecting trade between Member States without regarding the market position of the parties to such an agreement is considered a formal and unacceptable example of application of competition rules. Economic test of market power is the main and most proper evaluation standard of vertical agreements in all modern competition law jurisdictions, therefore its disregard is unjustifiable.

8. Lithuanian competition law, when evaluating cases of purely national dimension which do not affect trade between member states, should distance itself from political dogmas of EU competition law and endorse economic assessment. While pursuing this goal the *de minimis* doctrine should be expanded to include all vertical agreements. Furthermore, vertical price fixing as well as absolute territorial protection agreements concluded by undertakings which do not occupy 30 percent of the relevant market and do not have market power should be assessed by presuming that such agreements are not able to appreciably restrict competition and bring negative impact on consumer welfare.

List of publications

Thesis related publications

1. MINIOTAS, D. Ar vertikalus kainų fiksavimas yra blogis? *Teisė*, 2012, t. 85.
2. MINIOTAS, D. Lygiagrečios prekybos ribojimo farmacijos sektoriuje vertinimas. *Teisė*, 2013, t. 86.

Other publications

1. MINIOTAS, D. EU Competition Law – No Place for National Rules? *The Interaction of National Legal Systems: Convergence or Divergence?* Vilnius University, Conference Papers, 2013.

Personal details

Darius Miniotas was a PhD student of Vilnius University Faculty of Law during the period of 2010 – 2014. He started taking interest in competition law during his master of law studies at Vilnius University Faculty of Law and chosen a topic from this field for his final master thesis which was successfully defended and awarded the highest grade. After finishing master law studies in 2008 he started practicing competition law as an assistant attorney in a law office. Due to constantly growing interest in the area of competition law he decided to pursue further education and in 2010 was accepted into PhD studies of Vilnius University.

During the years 2011 – 2012 Darius Miniotas has been a lecturer at Vilnius University Faculty of Law in the field of civil law. He has also been awarded two scholarship grants by the Max Planck Institute for Innovation and Competition in Munich which allowed him to perform his research at the Institute in 2012 and 2013. In 2012 he has also passed a bar exam and became an attorney.

Through the course of his PhD studies Darius Miniotas published articles regarding the issues of vertical price fixing and restriction of parallel trade, he has also presented his research results in international legal conferences. In 2014 he has received a grant from the Research Council of Lithuania for its academic achievements.

Current research interests of Darius Miniotas include economic analysis of law and application of competition rules in new technology markets.

Disertacijos reziumė

Disertacijos problematika susijusi su tikslą riboti konkurenciją turinčių vertikaliųjų susitarimų vertinimu Europos Sąjungos (toliau – ES), o kartu ir Lietuvos Respublikos, konkurencijos teisėje. ES konkurencijos politikai persiorientavus prie ekonominės vertikaliųjų susitarimų poveikio analizės, tikslą riboti konkurenciją turinčių vertikaliųjų susitarimų vertinimas mažai kuo pasikeitė. Nustatytos griežtos šių vertikaliųjų susitarimų neteisėtumo prezumpcijos įtvirtino teisinę aplinką, kurioje tokio pobūdžio susitarimai bus visada arba beveik visada uždrausti. Šio teisinio reguliavimo kontekste kyla klausimas, ar šie susitarimai iš tiesų pasižymi tokiu išimtinai neigiamo poveikio konkurencijai potencialu, kuris pateisina tokių susitarimų faktinio neteisėtumo režimo įtvirtinimo ir jų naudojimo praktikoje atgrasymo efektą.

Darbo tikslas yra išanalizuoti ir įvertinti, ar ES, o kartu ir Lietuvos Respublikos, konkurencijos taisyklių taikymo praktika tikslą riboti konkurenciją turinčių vertikaliųjų susitarimų atžvilgiu atitinka platesniu ekonominiu požiūriu (angl. – *more economic approach*) pagrįstą reformuotos ES konkurencijos teisės kryptį. Šis tikslas suponuoja ir tyrimo objektą – dviejų tikslą riboti konkurenciją turinčių vertikaliųjų susitarimų rūšių, t. y. perpardavimo kainų palaikymo ir absoliučios teritorinės apsaugos, teisinę ir ekonominę analizę.

Tyrimas atliekamas siekiant patikrinti hipotezę, kad ES nustatytas tikslą riboti konkurenciją turinčių vertikaliųjų susitarimų teisinis režimas yra nesuderinamas su ekonominiais ES konkurencijos teisės tikslais ir ekonominio susitarimų poveikio rinkai vertinimu pagrįsta konkurencijos teisės idėja.

Šalia tradicinių teisės tyrimų metodų – teleologinio, sisteminės analizės, istorinio, lyginamojo, loginio, atliekant tyrimą didelė reikšmė skiriama ekonominės teisės analizės metodui. Bendrąja prasme ekonominė teisės analizė gali būti apibūdinama kaip specifinis analizės metodas, kurį naudojant ekonominių postulatų, teorijų, ir argumentų pagalba yra nustatomos, keičiamos ir (ar) taikomos teisinės taisyklės. Konkurencijos teisė yra viena iš nedaugelio teisės sričių, kurioje šis metodas yra vyraujantis. Nesant tinkamo ekonominių koncepcijų bei teorijų suvokimo konkurencijos taisyklių sėkmingas pritaikymas iš esmės yra neįmanomas. Visos pagrindinės konkurencijos teisės

koncepcijos bei sąvokos – konkurencijos ribojimas, rinkos galia, ekonominis efektyvumas, bendroji ir vartotojų gerovė (perviršis), yra ekonominio pobūdžio kategorijos. Šios aplinkybės lemia, kad ekonominė teisės analizė yra dominuojantis šio tyrimo metodas, figūruojantis visose disertacijos dalyse ir pasireiškiantis nagrinėjamų vertikaliųjų susitarimų poveikio rinkos struktūrai, pasiūlos ir paklausos sąveikai, ekonominiam efektyvumui, vartotojų gerovei įvertinimu, tuo tikslu pritaikant ekonomikos moksle išvystytas teorijas bei koncepcijas. Nors analizuojant konkurencijos teisę teisės ir ekonomikos sintezė yra neišvengiama, tačiau, turint omenyje, kad tyrimas orientuotas į teisininko išsilavinimą turintį skaitytoją, pateikiami išsamūs ekonomikos moksle išvystytų sąvokų paaiškinimai, sąmoningai siekiama išvengti tyrimo apkrovimo diagramomis, grafikais bei formulėmis, dėstomus argumentus formuluojant teisine kalba.

Tyrimas susideda iš penkių pagrindinių dalių. Pirmojoje dalyje koncentruotai aptariami ES konkurencijos teisės tikslai. Pagrindinės vertikaliesiems susitarimams taikomame Sutarties dėl Europos Sąjungos veikimo (toliau – SESV) 101 straipsnyje įtvirtintos konkurencijos teisės normos yra pakankamai abstrakčios, todėl konkurencijos politiką įgyvendinančios institucijos turi plačią jų taikymo bei interpretavimo diskreciją. Norint suvokti, kodėl konkurencijos taisyklės taikomos vienokiu ar kitokiu būdu ir ar jos taikomos tinkamai, turi būti aišku, kokio tikslo ar tikslų siekia konkurencijos teisė. Šioje dalyje identifikuojami ir aptariami keturi savarankiški SESV 101 straipsnio tikslai: (i) rinkos integracija; (ii) konkurencijos apsauga; (iii) ekonominis efektyvumas; (iv) vartotojų gerovė. Atlikus analizę daroma išvada, kad ES konkurencijos teisės tikslų daugialypiškumas yra rimta kliūtis siekiant modernios, ekonominiu efektyvumu ir vartotojų gerove paremtos konkurencijos sistemos sukūrimo.

Antrojoje dalyje atskleidžiama vertikaliųjų susitarimų prigimtis ir ekonominės savybės bei pagrindinės teisinės tokių susitarimų vertinimo taisyklės, koncentruojantis ties savo tikslu konkurenciją ribojančių vertikaliųjų susitarimų kvalifikavimo ir vertinimo problematika, susijusia su konkurencijos ribojimo pagal tikslą ir poveikį atskyrimu, reikšmingumo (*de minimis*) doktrinos bei individualiosios išimties taikymo klausimais. Ypač didelis dėmesys yra skiriamas konkurencijos ribojimo pagal tikslą ir poveikį dichotomijai, kuri yra viena didžiausių šiuolaikinės konkurencijos teisės problemų. Nagrinėjant šią problemą analizuojami ir komentuojami naujausi Teisingumo Teismo sprendimai *Expedia, Allianz Hungária* and *Groupement des cartes bancaires*

bylose. Analizė baigiama aptariant SESV 101 straipsnio 3 dalyje nustatytos individualiosios išimties taikymo galimybes tikslą riboti konkurenciją turintiems vertikaliesiems susitarimams. Išnagrinėjus nustatytas prezumpcijas daroma išvada, kad nepaisant teorinės galimybės, teigiančios, kad iš esmės bet kuris susitarimas gali tenkinti individualiosios išimties sąlygas, tikslą riboti konkurenciją turinčių vertikaliųjų susitarimų atžvilgiu tokia galimybė praktiškai neegzistuoja. Nustatytos tokių susitarimų neigiamo vertinimo prezumpcijos ir prielaidos sukuria tikslą riboti konkurenciją turinčių vertikaliųjų susitarimų *de facto per se* neteisėtumo režimą, taigi kartu ir efektyvų jų taikymo atgrasymo efektą. Nepaisant teigiamų tendencijų vertikaliųjų susitarimų vertinimo srityje, požiūris į tikslą riboti konkurenciją turinčius vertikaliuosius apribojimus išlieka formalus ir išimtinai neigiamas. Tolesnėse darbo dalyse analizuojama, ar tokia ES konkurencijos teisės pozicija yra suderinama su ekonomine teorija.

Trečioji bei ketvirtoji disertacijos dalys yra skirtos išsamiai konkrečių vertikaliųjų susitarimų rūšių analizei. Trečiojoje dalyje analizuojami perpardavimo kainų palaikymo susitarimai, aptariamos jų sudarymo priežastys. Siekiant nustatyti tokių susitarimų poveikį konkurencijai, identifikuojamos devynios teigiamo poveikio konkurencijai teorijos ir penkios žalos konkurencijai teorijos, analizuojami ir vertinami atliktų empirinių tyrimų rezultatai. Didelė analizės dalis yra skirta teisiniam tokių susitarimų vertinimui ES, Jungtinių Amerikos Valstijų ir Lietuvos Respublikos teisinėse sistemose, analizuojamos tokiems susitarimams taikytinos teisės normos ir teismų praktika. Atlikus analizę daroma išvada, kad nėra jokio teorinio ir empirinio pagrindo vertikalaus kainų fiksavimo susitarimus vertinti vienareikšmiškai neigiamai. Šie vertikalieji apribojimai, priklausomai nuo faktinių jų sudarymo ir vykdymo aplinkybių, juos sudariusių ūkio subjektų rinkos galios bei bendros situacijos rinkoje, gali turėti tiek teigiamą, tiek ir neigiamą poveikį konkurencijai. Neneigtina, kad tokie susitarimai turėtų būti vertinami atsargiai, tačiau jų automatinis pasmerkimas net ir tais atvejais, kai juos taiko itin mažą rinkos dalį užimantys ūkio subjektai, yra nesuderinamas su ekonomine vertikaliųjų apribojimų poveikio teorija, o kartu – ir su Europos Komisijos deklaruojama „platesnio ekonominio požiūrio“ konkurencijos politika.

Ketvirtojoje dalyje analizuojami vertikalūs susitarimai, kuriais gamintojas savo platintojams nustato absoliučią teritorinę apsaugą, apsaugodamas juos nuo tarpusavio

konkurencijos. Tiriant tokio pobūdžio susitarimus atskleidžiamos jų sudarymo priežastys, taip pat teigiamas ir neigiamas poveikis konkurencijai. Išanalizavus Europos Komisijos ir Teisingumo Teismo praktiką šioje srityje tampa aišku, kad absoliučios teritorinės apsaugos susitarimai prieštarauja vienam esminių ES tikslų – rinkos integracijos imperatyvui. Siekiant pademonstruoti, kad rinkos integracijos ir vartotojų gerovės tikslai gali būti nesuderinami, pasitelkiami pavyzdžiai iš farmacijos sektoriaus ir atliekama šiame sektoriuje sudaromų vertikaliųjų susitarimų analizė. Remiantis atlikta analize daroma išvada, kad ES konkurencijos teisėje Europos Komisijos ir didžiąja dalimi Teisingumo Teismo neigiamas požiūris į absoliučios teritorinės apsaugos susitarimus yra paremtas trimis glaudžiai susijusiais siekiais: (i) vidaus rinkos integracija, kurią padeda pasiekti (ii) konkurencija tarp to paties gamintojo prekių ir (iii) nevaržoma lygiagreti prekyba. Sutariant, kad galutinių vartotojų gerovė turėtų būti pagrindinis šiuolaikinės konkurencijos teisės tikslas, autorius kelia klausimą, ar lygiagrečios prekybos ribojimo *de facto per se* draudžiamumas užtikrina maksimalią vartotojų gerovę, ir ar visgi šiuo atveju vartotojų gerovė nėra paaukojama vidaus rinkos integracijos vardan.

Penktojoje dalyje nagrinėjamos optimalaus tikslą riboti konkurenciją turinčių vertikaliųjų susitarimų teisinio režimo prielaidos ir pateikiami pasiūlymai dėl teisinio reguliavimo tobulinimo.

Atlikus tyrimą daroma išvada, kad ekonominė tikslą riboti konkurenciją turinčių vertikaliųjų apribojimų analizė nepatvirtina prielaidos, kad šie apribojimai pasižymi išimtinai neigiamu poveikiu konkurencijai bei vartotojų gerovei, todėl *per se* ar *de facto per se* draudimas režimas nėra tinkamas tokių vertikaliųjų susitarimų vertinimo standartas.

Po vertikaliųjų susitarimų vertinimo reformos ir ypač 2010 metais paskelbtos atnaujintos Vertikaliųjų apribojimų gairių redakcijos, Europos Komisijos politikoje stebimos nežymiai palankesnės tikslą riboti konkurenciją turinčių vertikaliųjų susitarimų vertinimo tendencijos. Komisijai deklaruojant bei siekiant įgyvendinti ekonominiu požiūriu grįstą vertikaliųjų susitarimų vertinimo politiką, susiformavusios pozicijos švelninimas yra neišvengiamas procesas, nes istoriškai rinkos integracijos imperatyvu paremta šių apribojimų *per se* draudimo strategija yra nebesuderinama su ekonominės susitarimų savybių analizės reikalaujančia šiuolaikinės konkurencijos teisės kryptimi.

Tačiau šios pozityvesnės pozicijos apraiškos vertintinos kaip viso labo tam tikri kosmetiniai, kompromisiniai sprendimai, tik labai maža apimtimi pripažįstantys teigiamo tikslą riboti konkurenciją turinčių vertikaliųjų susitarimų poveikio konkurencijai potencialą.

Tyrimo išvadose taip pat teigiama, kad nuoseklus ekonominės analizės reikšmės didėjimas vertikaliųjų susitarimų vertinimo procese buvo pamintas Teisingumo Teismo sprendimu *Expedia* byloje ir po to sekusia Europos Komisijos inicijuota *de minimis* pranešimo nauja redakcija. Automatinis tikslą riboti konkurenciją turinčių ir kartu poveikį prekybai tarp valstybių narių darančių vertikaliųjų susitarimų pasmerkimas neatsižvelgiant į tai, kokią atitinkamos rinkos dalį užima susitarimą sudarančios įmonės, laikytinas formalistiniu ir nepriimtinu konkurencijos taisyklių taikymo pavyzdžiu. Ekonominis rinkos galios testas yra pagrindinis ir tinkamiausias vertikaliųjų susitarimų vertinimo standartas visose modernios konkurencijos teisės jurisdikcijose, todėl jo ignoravimas yra nepateisinamas.

Galiausiai daroma išvada, kad Lietuvos konkurencijos teisė poveikio prekybai tarp valstybių narių neturinčiais atvejais turėtų atsiriboti nuo politinio pobūdžio ES konkurencijos teisės dogmų bei vadovautis išimtinai ekonominio pobūdžio vertinimu. Siekiant šio tikslo mažareikšmiškumo doktrinos taikymo apimtis turi būti išplėsta visų vertikaliųjų susitarimų atžvilgiu, o 30 procentų atitinkamos rinkos dalies neužimančių bei rinkos galios neturinčių ūkio subjektų sudarytų vertikalaus kainų fiksavimo ir absoliučios teritorinės apsaugos susitarimų vertinimas atliekamas preziumuojant, kad tokie susitarimai nėra pajėgūs reikšmingai apriboti konkurencijos bei neigiamai įtakoti vartotojų gerovės.