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## **Advantages and Disadvantages of Competition Welfare Standards – Note by Lithuania**

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This document reproduces a written contribution from Lithuania submitted for Item 6 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

More documents related to this discussion can be found at  
<https://www.oecd.org/competition/advantages-and-disadvantages-of-competition-welfare-standards-in-competition.htm>

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## Lithuania

### 1. Introduction

1. In the hierarchy of Lithuanian legal acts, the standard of the competition policy is laid out at the constitutional level. However, this standard is *freedom of fair competition* rather than *consumer welfare*. This Note overviews the legal framework of the constitutional principle of fair competition developed by the Lithuanian Constitutional Court. This Note also discusses the case law of administrative courts, which refers to the principle of freedom of fair competition while reviewing the decisions of the Lithuanian competition authority. The Note also highlights the change of direction at the EU level when it comes to the standard of competition policy. While the principle of fair competition was at the heart of competition policy in Lithuania ever since the declaration of independence, it seems that in recent years, fair competition as a principle of competition policy also grown in importance in the EU.

### 2. Fairness as the principle of competition policy in the EU and the constitutional foundations of the standard of competition policy in Lithuania

2. Lately, in the competition policy discourse in the EU, there is a new trend which gains prominence. Namely, the notions of ‘fairness’ and ‘fair competition’ are referred to on a regular basis. For example, in recent speeches the Executive Vice President of the European Commission Margrethe Vestager mentioned “commitment to *fair and open competition*”<sup>1</sup>, “*fair competition* that builds resilience”<sup>2</sup>. The clearest statement showing the change of attitude is seen in the speech of Margrethe Vestager on the principles of the competition policy<sup>3</sup>: “EU competition policy is able to pursue multiple goals, such as *fairness* and level-playing field, market integration, preserving competitive processes, consumer welfare, efficiency and innovation, and ultimately plurality and democracy”. As is seen, in this speech, fairness is mentioned as the first principle which is relevant for the competition policy, while consumer welfare is put as the fifth in the row. In the latest Statements of Objections, the charges brought forward by the European Commission include “*unfair* trading conditions in breach of Article 102 of the Treaty on the Functioning of the European Union”<sup>4</sup>, “*unfair* trading conditions on Facebook Marketplace’s

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<sup>1</sup> [Executive Vice President of the European Commission Margrethe Vestager speech at the Competition Day in Stockholm - 5 May 2023.](#)

<sup>2</sup> [Margrethe Vestager keynote speech at the Global Competition Law Conference: Competition policy for greater resilience and effective transition - 20 April 2023.](#)

<sup>3</sup> [Margrethe Vestager at the European Competition Law Tuesdays: A Principles Based approach to Competition Policy - 25 October 2022.](#)

<sup>4</sup> [Press release: Commission sends Statement of Objections to Apple clarifying concerns over App Store rules for music streaming providers - 28 February 2023.](#)

competitors”.<sup>5</sup> Finally, EU Digital Markets Act<sup>6</sup> which is the landmark of EU legislation and which “aims to complement the enforcement of competition law”<sup>7</sup> sets as its purpose contribution “to the proper functioning of the internal market by laying down rules to ensure contestability and *fairness* for the markets in the digital sector in general, and for business users and end users of core platform services provided by gatekeepers in particular”.

3. In the EU fairness as the objective of competition policy gained a particular prominence only recently. Meanwhile, in Lithuania it has been the centre of gravity of competition policy ever since the modern Constitution of Lithuania came into force in 1992, after Lithuania declared independence from the Soviet Union. Article 46 of the Lithuanian Constitution<sup>8</sup> establishes the Constitutional foundations of economic activity stipulating, among other things, that “The law shall prohibit monopolisation of production and the market and shall protect *freedom of fair competition*”. As was indicated in the above-mentioned speech of Margrethe Vestager, fairness is suggested as one of the principles of EU competition policy. In Lithuania as well, at the national level, freedom of fair competition is considered a constitutional legal principle which guides the legislature in establishing the law, the competition authority in enforcing it and the judiciary in interpreting the law and adjudicating cases. According to the Lithuanian Constitutional Court, the protection of fair competition is the main way to ensure the harmony of individual and public interests in the regulation of economic activity.<sup>9</sup>

4. What differs in EU and Lithuanian concepts is that the Lithuanian Constitution refers not just to fair competition as such but to the freedom of fair competition. In the constitutional jurisprudence, this freedom is considered a part of a broader freedom of individual economic activity<sup>10</sup>. However, the Constitutional Court clarified that both the freedom of individual economic activity and freedom of fair competition are not absolute and can be limited if there are reasonable grounds for the limitations. The Constitutional Court has also ruled that in order to ensure fair competition some restrictions are required. In the case<sup>11</sup> regarding the licensing requirements in trade of alcohol products, the Constitutional Court pointed out that “compliance with licensing conditions and its supervision is a necessary prerequisite for fair competition in the relevant market <...>”. According to the Court, restrictions established by licensing are required to ensure the quality of services or goods provided to consumers, and companies are obliged to respect these restrictions and comply with them.

5. In another case, the Constitutional Court, referring to the pharmaceutical activity, has emphasised that laws and other legal acts shall establish such legal framework of economic activity which would create the prerequisites for creating a wide network of

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<sup>5</sup> [Press release: Commission sends Statement of Objections to Meta over abusive practices benefiting Facebook Marketplace - 19 December 2022.](#)

<sup>6</sup> [Regulation \(EU\) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives \(EU\) 2019/1937 and \(EU\) 2020/1828 \(Digital Markets Act\).](#)

<sup>7</sup> Recital 10 of the Digital Markets Act.

<sup>8</sup> Available in English [here](#).

<sup>9</sup> Ruling of the Constitutional Court 06-10-1999, [case No. 12/98](#); Ruling of the Constitutional Court 18-10-2000, [case No. 29/98-16/99-3/2000](#).

<sup>10</sup> Ruling of the Constitutional Court 31-05-2006, [case No. 42/03](#).

<sup>11</sup> Ruling of the Constitutional Court 21-01-2008, [case No. 02/06-23/06-37/06-50/06-31/07](#).

pharmacies, so that pharmacies would have enough high-quality, effective and safe pharmaceuticals, the system of supply of pharmaceuticals would work smoothly etc.<sup>12</sup> Legal framework shall enable competition among economic entities, according to the requirements clearly defined in the legal acts. If excessive restrictions are imposed on pharmacies and, as a result, the number of competing economic entities is reduced, consumers could suffer damage due to the possible increase of prices.

6. Another case of the Constitutional Court shows that the principle of freedom of fair competition obliges state and municipal institutions to organise a public tender when selecting economic entities for the provision of certain services, such as waste management.<sup>13</sup>

7. In yet another case, the Constitutional Court pointed out that the state, when regulating economic activities, which are considered to be in the public interest, shall combine various constitutional values, ensuring that the regulated economic activities serve the general well-being of the nation<sup>14</sup>. The Lithuanian Competition Council relies on this clarification of the Constitutional Court in its advocacy activities when it identifies a restriction of freedom of fair competition imposed by the draft legislation but there are reasonable grounds to believe that this restriction may be justified by another public interest objective. In such cases, the Competition Council provides its opinion that the identified restriction of competition possibly may be justified by another objective but leaves the balancing exercise for the policy makers which alone are entitled to weigh the interest of fair competition against other constitutional objectives.

8. One of the notable examples of such advocacy is related to the restriction of economic activities in the beginning of the COVID crisis. In Lithuania, in the beginning of the pandemic in 2020, only large supermarkets were allowed to sell non-food products in physical stores. Smaller retailers were prohibited from doing so. In this context, Lithuanian competition authority has acknowledged that these discriminatory restrictions were imposed to preserve public health during pandemic<sup>15</sup>. However, Lithuanian competition agency also noted that any restrictions of competition should be proportionate and should not go further than necessary both in terms of their scope and of their duration. Otherwise, privileged undertakings could, in the long term, obtain market power and later benefit from it by charging higher prices. Here, the competition authority played its role in drawing the attention of policy makers towards possible risks of their decisions. However, acting in their capacities competition authorities are not in a position to assess whether certain policy objective outweighs risks to competition or not. This is the prerogative of a political body, in this example – of the Lithuanian Cabinet of Ministers. Of course, eventually the restrictions were abolished but it is unclear as to what was the influence of the Competition Council's opinion on this outcome and its timing.

9. As it is seen from the above-mentioned overview, the fact that the freedom of fair competition is the constitutional principle in Lithuania, means that it serves not only as a standard for enforcement of competition law but also as an important factor in general policy making.

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<sup>12</sup> Ruling of the Constitutional Court 14-03-2002, [case No. 23/2000](#).

<sup>13</sup> Ruling of the Constitutional Court 05-03-2015 No. KT9-N5/2015, [case No. 44/2011](#).

<sup>14</sup> Ruling of the Constitutional Court 30-05-2017 No. KT6-N5/2017, [case No. 8/2016](#).

<sup>15</sup> Larger premises of supermarkets allowed to maintain safe distance between customers and limit spreading of the virus.

### 3. Application of the standard of fair competition in antitrust public enforcement

10. The concept of fair competition is also frequently referred to by the Lithuanian Supreme Administrative Court when it reviews decisions of the Lithuanian Competition Council.

11. For example, in one case, the Supreme Administrative Court pointed out that while the principle of freedom of fair competition is established in the Constitution, its implementation is laid out in the Law on Competition which is enforced by the Lithuanian Competition Council.<sup>16</sup>

12. The Supreme Administrative Court also expressed the position that the constitutional concept of fair competition presupposes that companies act freely on the market and compete with each other on equal grounds, adopting autonomous decisions and not depending on each other. Therefore, it is strictly prohibited to influence the conduct of competitors or to disclose to competitors intentions or sensitive information when this results in abnormal competitive conditions on the market.<sup>17</sup>

13. According to the Supreme Administrative Court, free price competition is one of the main forms of fair competition<sup>18</sup>. Meanwhile, price fixing directly intervenes and hinders the formation of the results of competitive processes, which directly affect the welfare of consumers.

14. As it is seen from this case law of administrative courts, at the level of particular antitrust cases, there is no particular distinction of the standard of fair competition, when compared to alternative standards of effective competitive process and consumer welfare. So, at least at the current stage, when it comes to antitrust enforcement, the choice between these standards seems to be more a matter of terminology than of real practical difference. However, Lithuanian legal system would be well-equipped to embrace the changes if at the supranational level of EU, the standard of fair competition would be further developed, for example, to include novel theories of harm, based exclusively on consideration of fairness.

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<sup>16</sup> Decision of the Supreme administrative Court of Lithuania 05-10-2015, [case No. eA-2143-502/2015](#); Decision of the Supreme administrative Court of Lithuania 13-06-2017 case No. [A-2013-624/2017](#).

<sup>17</sup> Decision of the Supreme administrative Court of Lithuania 26-01-2012, [case Nr. A858-269/2012](#); Decision of the Supreme administrative Court of Lithuania 18-04-2012, [case No. A858-1704/2012](#); Decision of the Supreme administrative Court of Lithuania 18-04-2012 [case No. A858-290/2012](#).

<sup>18</sup> Decision of the Supreme administrative Court of Lithuania 18-04-2012, [case No. A858-1704/2012](#); Decision of the Supreme administrative Court of Lithuania 18-04-2012 [case No. A858-290/2012](#).