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The Interaction between Competition and Democracy – Note by Lithuania

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1. Introduction

1. This Note overviews the Lithuanian experience related to competition enforcement and regulation of economic activities in the light of democratic principles. The Note touches upon the nature of competition law and its democratic “roots”. It also describes how antitrust enforcement can contribute to the preservation of democratic institutes and their proper use. Finally, the Note discusses how democratic legislative process may influence competition.

2. In the view of the Lithuanian Competition Council, democratic legislation leads to more pro-competitive regulation. Moreover, the nature of competition law determines that it is one of the safeguards of democracy.

2. The democratic nature of competition law

3. The Constitution of the Republic of Lithuania states that the national economic system is based on private ownership, freedom of individual economic activity and initiative, as well as the necessity to protect freedom of fair competition by law¹.

4. The Constitutional Court of the Republic of Lithuania stated in its jurisprudence² that *the constitutional guarantee of the protection of fair competition obliges state and municipal institutions to ensure the freedom of fair competition by legal measures; such measures – prohibition of anti-competitive agreements and abuse of dominant position, merger control and related prohibitions, prohibition of unfair competition, control of the rules of fair competition established by laws, liability for infringements*.

5. The above-described provisions and jurisprudence support the proposition that the competition law institutes, such as the prohibition of anti-competitive agreements and abuse of dominant position, derive from the constitutional principles of freedom of individual economic activity and initiative and freedom of fair competition. Therefore, in the Competition Council’s view, it is reasonable to state that the competition rules and their enforcement belong to one of the constitutional pillars of democracy in Lithuania. In some cases, discussions have emerged about how the agency’s decisions or enforcement actions align with other democratic principles, as described in the following parts of this Note.

¹ Article 46

Lithuania’s economy shall be based on the right of private ownership, freedom of individual economic activity and 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 monopolisation of production and the market and shall protect freedom of fair competition.

The State shall defend the interests of the consumer.

² Decision of 6 October 1999 of The Constitutional Court of the Republic of Lithuania.

3. Lobbying and freedom of association v. freedom of fair competition: The Pharmacies Case

6. In 2022, the Competition Council adopted a decision³ establishing that the Lithuanian Pharmacies Association (the LPA) and 8 pharmaceutical companies entered into anti-competitive agreement and infringed national and European Union competition law, when they agreed on the wholesale and retail mark-ups of reimbursable medicines subsequently approved by the Lithuanian Ministry of Health⁴. The agreement was qualified by the Competition Council as indirect price fixing, i. e. competition law infringement “by object”.

7. In 2017, the Ministry decided to assess retail and wholesale mark-ups for reimbursable medicines. The Ministry informed the LPA that a working group would be shortly formed to evaluate the existing mark-ups and requested the LPA to submit economically based proposals for their adjustment. Later the Ministry requested for calculations supporting the necessity of a change in the mark-ups and data on the mark-ups required for the undertakings to operate in an economically rational manner. The LPA, with the consent of its members (the pharmacies) and member-affiliated companies (the wholesalers), submitted to the Ministry jointly set wholesale and retail mark-ups for reimbursable medicines and presented them to the Ministry as allegedly necessary to cover their operating costs. However, the Competition Council found that the proposed mark-ups were not only intended to cover the operating costs of the undertakings concerned, but were designed to ensure additional profits for all competing groups of companies.

8. In December 2017, the Ministry, the LPA and the wholesalers’ association entered into a Cooperation Agreement. Under the agreement, wholesalers and pharmacies committed to recalculating, in a fair manner, the prices of non-reimbursable medicines following a value added tax reduction and to provide the Ministry with price information for non-reimbursable medicines for a six-month period. In return, the Ministry agreed to review and adjust the mark-ups for reimbursable medicines. The Minister of Health subsequently issued order approving the new mark-ups for reimbursable medicines, which had been negotiated with the LPA.

9. The LPA, its members and member-affiliated companies appealed the Competition Council’s decision. In the appeal the LPA and undertakings argue that by adopting the described decision the Competition Council undermined their freedom of association and right to participate in the legislation process, lobby and represent their interests.

10. The Competition Council, on the contrary, is convinced that the freedom of association and right to lobby does not eliminate the undertakings’ obligation to adhere to the competition rules. Moreover, the right to participate in the legislative process does not result in the permission to manipulate this process by submitting to the decision-making institutions the economic data distorted by competitors’ agreement. Therefore, in the Competition Council’s view, the described decision preserves the mentioned democratic rights “untainted”. The case is still pending before the courts.

11. Following the mentioned decision, the Competition Council also renewed the guidelines for business associations and included the chapter dedicated to competitors’ and

³ The Competition Council resolution of 9 December 2022, No. 1S-132 (2022). Available online: https://kt.gov.lt/uploads/docs/docs/5491_5e8421360b4f3b61c6678178fecf3a46.pdf.

⁴ The mentioned mark-ups became mandatory to every undertaking selling reimbursable medicines in Lithuania on wholesale and (or) retail level.

their associations' behaviour in the legislative process and cooperation with public authorities. The guidelines were published for the public consultation and their final version is being completed.

4. Inspections and suspected undertakings' rights: the necessity of balanced approach

12. The application of democratic principles is highly relevant in the area of inspections carried out by the competition agency.

13. In the Competition Council's experience, large companies often file complaints regarding inspections conducted in their premises. They allege that the Competition Council infringed their privacy rights by seizing too much data or data not related to the investigation. In most cases the Competition Council successfully proves in court that its actions carried out during the inspections were in line with the legal requirements.

14. In one case the inspected undertaking argued that national regulation related to the competition law infringement investigations contradicted the human rights law. In 2023, the European Court of Human Rights (hereinafter – the ECHR) stated in its judgement⁵ that the national law and its judicial interpretation restricting the undertakings' ability to appeal the actions of the Competition Council's officials carried out during the inspection in separate legal proceedings immediately after these actions were carried out (the national courts held that a complaint could be filed after the investigation was completed) infringed the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms⁶.

15. The above-described Lithuanian experience leads to the conclusion that even if competition law and its various institutes derive from the democratic order enshrined in the Constitution, the regulation in the competition field (both material and procedural) must be balanced against other democratic goods, such as suspected undertakings' right to appeal.

5. Link between the democratic legislative process and freedom of fair competition

16. The Lithuanian Constitutional Court stated⁷ that the provision contained in Article 46(4) of the Constitution that the law protects the freedom of fair competition, inter alia, means the constitutional obligation for the law maker to establish legal regulation that prevents the monopolisation of production and market and guarantees the freedom of fair competition as well as establishes the means to protect it; the mentioned provision means

⁵ The ECHR judgement of 4 April 2023 in case of *UAB Kesko Senukai Lithuania v. Lithuania* (Application no. 19162/19). Available online: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-223928%22%5D%7D>.

⁶ The ECHR stated that the absence of an *ex post facto* judicial review of the manner in which the Competition Council's officials carried out the inspection of the applicant company's office meant that there were no adequate and effective safeguards against abuse and arbitrariness. Consequently, the interference with its right to respect for its home and correspondence could not be considered proportionate to the aim pursued or necessary in a democratic society, as required by Article 8 of the Convention.

⁷ Decisions of 9 April 2002, 17 March 2003 and 26 January 2004 of the Constitutional Court of the Republic of Lithuania.

that the indicated constitutional principle cannot be altered by state and municipal institutions' legal acts.

17. As an institution responsible for supervision of effective competition, the Competition Council not only carries out the competition law enforcement, but also participates in the legislative process seeking to ensure that the national legislation is pro-competitive. One crucial element to achieve this goal is ensuring the transparency and inclusion of different stakeholders, including the competition agency, in the legislative process and considering its expertise⁸.

18. For example, in 2024, the legislators initiated the regulation allowing the pharmacies to provide mobile services ("pharmacies on wheels"). The Ministry of Health suggested establishing territorial restriction for the provision of mentioned services, i. e. mobile services could only be provided in areas, where there is no operating pharmacy. The Competition Council provided to the Ministry a formal opinion on the initiative stating that such regulation would restrict competition and might discourage pharmacies to invest into provision of mobile services⁹. After evaluating the Competition Council's position, the Ministry of Health revoked its suggestion.

19. An example, when the Competition Council's expert opinion was unreasonably disregarded, concerns the municipalities' right to conclude in-house contracts with their undertakings. In 2023, the Lithuanian Parliament adopted legislation¹⁰ allowing the municipalities to enter into in-house contracts without conducting competitive procedure¹¹ for their award. The Competition Council warned the legislator that the mentioned regulation contradicts the principles set by the Organisation for Economic Co-operation and Development and jurisprudence of the Lithuanian Constitutional Court. In 2024, the Lithuanian Constitutional Court adopted a decision¹² stating that the mentioned regulation infringed the provisions of the Lithuanian Constitution.

20. The above-described examples demonstrate the importance of ensuring a democratic legislative process as it may help to avoid laws that are harmful to fair competition and freedom of private initiative.

6. Conclusions

21. As demonstrated in this Note, the competition law and enforcement are expressions of and instruments to protect the freedom of individual economic activity and initiative and fair competition, which are integral part of the Lithuanian constitutional democratic order.

⁸ In 2023, 58 % of the Competition Council's opinions provided in the legislative process regarding the impact on competition were taken into account by the legislators.

⁹ The Ministry of Justice and the LPA raised similar concerns.

¹⁰ The mentioned legislation established specific conditions, when in-house contracts may be concluded (the type of services, the necessity to use the municipality's premises for the provision of services, etc.).

¹¹ Before the new legislation was adopted, the municipalities had an obligation to conduct a competitive procedure. If they failed to do that, the Competition Council could declare that the municipalities privileged their undertakings, discriminated competing market participants and infringed Article 4 of the Law on Competition.

¹² Decision of 10 October of 2024 of the Constitutional Court of the Republic of Lithuania. Available online: <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta3060/content>.

For this reason, democratic principles and competition law and enforcement are closely related and affect each other in various ways: (i) the competition law enforcement may prevent the misuse of democratic freedoms; (ii) democratic principles determine how the competition enforcement rules must be shaped; (iii) transparent and inclusive legislation process may result in more pro-competitive, hence, more democratic regulation preserving the freedom of individual economic activity.