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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Sustainability and Competition – Note by Lithuania

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This document reproduces a written contribution from Lithuania submitted for Item 1 of the 134th OECD Competition Committee meeting on 1-3 December 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/sustainability-and-competition.htm>

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1. Introduction

1. The issue of sustainability in the context of competition policy is a broad and important topic which merits serious exploration which we support and are willing to contribute. However, in terms of enforcement there are no specific examples yet which would directly address the issue. Therefore, this Note is limited to the consideration of one case of the Competition Council of the Republic of Lithuania (the Competition Council) which reveals certain risks related to the sustainability in the broad sense.

2. Good Health and Well-Being is among 17 [Sustainable Development Goals](#) (SDGs). In one of the cases of the Competition Council parties put forward an argument that their anti-competitive agreement contributed to better public health protection and therefore must be exempted from the prohibition. However, analysis of information provided by the parties which was conducted by the Competition Council showed that there was no evidence proving the alleged improvement of health. Hence, the Competition Council concluded that the exemption was not applicable and parties to the agreement committed the infringement of competition law.

2. Agreement to restrict the production of strong beer as an alleged measure to improve public health protection

3. In 2013 the Competition Council started an *ex officio* investigation into the conduct of the Lithuanian Guild of Breweries. The Competition Council found that the Lithuanian Guild of Breweries had adopted Brewers' Code of Ethics which provided that members of the Lithuanian Guild of Breweries would not produce very strong beer having more than certain percentage of alcohol.¹ In 2014, an infringement decision has been adopted, finding an infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and its national equivalent.²

4. The analysis of the Competition Council showed that this agreed provision of the Code of Ethics distorted competition by limiting production of certain type of beer and restricting consumer choice. In this way undertakings removed the uncertainty regarding actions of their competitors and eliminated competition of breweries in the segment of the market consisting of very strong types of beer.³

5. Parties pointed out that the agreement did not restrict competition since its aim was to contribute to the national policy objective of fighting excessive consumption of alcohol. Parties claimed that national legislation encouraged self-regulation of undertakings including initiatives to ensure moderate consumption of alcohol. Furthermore, parties stated that even if their agreement was restrictive of competition, it should have been exempted from prohibition because it promoted technical and economic progress and also satisfied other conditions of Article 101(3) of the TFEU. Undertakings argued that technical and economic progress should be understood broadly to include protection of

¹ 9,5 %, 9 %, 8,5 %, 7,5 % – the exact percentage was not the same in different periods of time.

² Decision of the Competition Council on Guild of Breweries, 4 March 2014, No. 2S-1/2014.

³ Decision of the Competition Council on Guild of Breweries, 4 March 2014, No. 2S-1/2014, paragraphs 188, 189.

public health. To support their claims, breweries relied on European Commission's CECED case⁴ where the European Commission took into account environmental considerations in assessment of anti-competitive agreement between producers of washing machines. According to the parties, their agreement was beneficial for the people who consumed alcohol without moderation as well as for the society as a whole. Undertakings argued that the society had benefited from the reduction of material and immaterial costs caused by excessive consumption of alcohol.

6. The Competition Council considered the arguments of undertakings to be insufficient to claim exemption. On the basis of the case law of the Court of Justice of the European Union the Competition Council held that contribution to promoting technical or economic progress is not identified with all the advantages which the undertakings participating in the agreement derive from it as regards their activities, but with appreciable objective advantages of such a kind as to compensate for the resulting disadvantages for competition.⁵ When applying the exemption provided for in Article 101(3) of the TFEU, the burden of proof that conditions of the exemption are satisfied falls on undertakings willing to benefit from the exemption. Parties submitted evidence indicating that consumption of alcohol in general causes negative consequences. The Competition Council concluded that no information was provided which would demonstrate causal link between the agreement in question (restriction of production of certain types of beer) and alleged benefits.⁶ On the contrary, the Competition Council in the course of investigation collected communication showing that the restriction was driven by insufficient profitability of very strong beer production rather than by willingness to contribute to better public health. For example, one undertaking in its email pointed out that the production of beer containing more than 7,5 % of alcohol was a loss-making activity because of the excise duty; there was also other communication to the same effect, among other things, indicating that such an agreement would not just be more profitable, but also a great message for the purposes of public relations.⁷ Thus, evidence showed that protection of public health was not the real purpose of the agreement but only a veil covering intention to collectively refrain from the less profitable business.

7. Obvious anti-competitive nature of the agreement in question (limitation of supply), absence of evidence proving pro-competitive effects and discovery of facts showing that the real intention of breweries was the discontinuation of the less profitable activity in a joint manner, allowed the Competition Council to conclude that the agreement restricted competition by object within the meaning of Article 101(1) TFEU and could not be exempted from the prohibition pursuant to Article 101(3) TFEU.

3. Comparison between Lithuanian case on agreement of breweries and European Commission's case on agreement between producers of washing machines (CECED)

8. At first sight, it may seem that Lithuanian breweries' case is similar to the European Commission's CECED case.⁸ In both cases agreement consisted of restriction to produce

⁴ Commission Decision of 24 January 1999 in Case IV.F.1/36.718. CECED.

⁵ Judgment of CJEU of 6 October 2009, C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others*, ECLI:EU:C:2009:610, paragraph 92.

⁶ Decision of the Competition Council on Guild of Breweries, 4 March 2014, No. 2S-1/2014, paragraph 218.

⁷ Decision of the Competition Council on Guild of Breweries, 4 March 2014, No. 2S-1/2014, paragraph 190.

⁸ Commission Decision of 24 January 1999 in Case IV.F.1/36.718. CECED.

certain types of products (inefficient washing machines in European Commission's case and very strong beer in Competition Council's case). Furthermore, in both cases parties claimed that their agreements were pro-competitive in terms of Article 101(3). However, the principal difference lays in the fact that in CECED the benefit was of economic nature, was clearly defined and comprised two elements: 1) individual economic benefit for consumers stemmed from savings on electricity bills (savings allowed recoupment of increased costs of upgraded more expensive machines within 9 to 40 months)⁹; 2) collective environmental economic benefits (European Commission estimated that economic benefits to society brought by the savings in marginal damage from avoided carbon dioxide emissions was more than seven times greater than the increased purchase costs of more energy-efficient machines)¹⁰. Basing itself on this assessment the European Commission concluded that the agreement was 'likely to contribute significantly to technical and economic progress whilst allowing users a fair share of the benefits'.¹¹

9. In contrast, in Competition Council's case: 1) the alleged benefit was not translated into economic estimation (parties alleged that they aimed at protecting public health but the monetary value was not attributed to this objective); 2) the alleged benefit was not clearly caused by the agreement (no evidence that agreement would reduce consumption of alcohol); 3) communication of the parties revealed that their real intention was to increase profit rather than to protect public health which explains lack of analysis of potential benefits of the agreement to public health.

10. To sum up, Competition Council's case on Guild of Breweries demonstrated that it should be carefully analysed whether alleged sustainability concern is real and whether alleged benefit is based on clear evidence.

⁹ Commission Decision of 24 January 1999 in Case IV.F.1/36.718. CECED, paragraph 52.

¹⁰ Commission Decision of 24 January 1999 in Case IV.F.1/36.718. CECED, paragraph 56.

¹¹ Commission Decision of 24 January 1999 in Case IV.F.1/36.718. CECED, paragraph 57.