Latvia

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LEGISLATION AND JURISDICTION

1. **What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?**

The merger control provisions are included in the Competition Law, effective as of 1 January 2002 and the Cabinet of Ministers Regulation No 800 of 29 September 2008 '*Procedure of filing and examination of full-form and short-form notification of a concentration between market participants'*.

During the last few years plans to merge the Competition Council with the utilities regulator have been on the agenda of the government. However, so far no decisions have been taken. If the reform takes place, it may affect procedures for filing and review of mergers and duration of merger assessment.

At the time of writing, there are no other proposals for legislative or regulatory changes that will affect the current merger control rules.

2. **What are the relevant enforcement authorities, and what are their contact details?**

The Competition Council is an authority charged with monitoring compliance with the merger control rules, including examination of the concentration notifications submitted, granting regulatory approvals and imposition of penalties for failure to notify.

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3. **What types of transactions are potentially caught by the relevant legislation?**

Under the Competition Law a concentration is deemed to arise where:

- two or more previously independent market participants merge;
- one market participant is merged into another market participant;
- one or more individuals already controlling at least one market participant, or one or more market participants either: (i) acquire all or part of the assets or rights to use those assets; or (ii) acquire direct or indirect decisive influence over one or more other market participants;

- one individual or two or more individuals jointly either: (i) acquire all or part of the assets of two or more market participants or rights to use those assets; or (ii) acquire direct or indirect decisive influence over two or more other market participants.

As follows from the above, under the Competition Law both asset and share deals are covered. The concept of decisive influence is broadly similar to that of the concept of control under the EC Merger Regulation. In the Competition Law the decisive influence is defined as the ability, directly or indirectly, to:

- control (permanently or on a case-by-case basis) decision making in the management institutions of the market participant through shareholding or otherwise,

- appoint sufficient number of members of the supervisory or management institutions of the market participant to gain the majority vote in that institution.

4. **Are joint ventures caught, and if so, in what circumstances?**

Merger control rules apply to joint ventures as well. The Competition Council in its decisions has explained that joint ventures are subject to merger control only if they are 'full function' joint ventures within the meaning of the EC Merger Regulation. The jurisdictional thresholds are the same as in other cases of concentrations. The turnover of the joint venture itself (and, if applicable, its group) and that of the jointly controlling parties (and, if applicable, their groups) is taken into account.

5. **What are the jurisdictional thresholds?**

Jurisdictional merger control criteria are as follows:

- the combined turnover of all undertakings concerned is at least Ls 25 million (€ 35.6 million), or

the combined market share of all undertakings concerned exceeds 40 per cent; and

- there are three or more merging parties, or

- there are two merging parties and the turnover of each exceeds Ls 1.5 million (€ 2.1 million).

The thresholds are defined by reference to turnover in Latvia and it includes revenues in all product markets. The turnover of the previous financial year is considered.

Only the turnover of the purchaser and the target, but not the seller, is taken into account. However, if the purchaser belongs to a corporate group, the net turnover of the whole group is taken into account. Group is defined by reference to the decisive influence.

The turnover threshold can be satisfied by only one party – the purchaser or the target – if there are three or more parties to the merger. The Competition Council has interpreted the law to mean that even the acquisition of a dormant Latvian company (ie a company without turnover) is necessarily a concentration.

The market share threshold can be satisfied even if the parties do not have overlapping activities and there is no distinction drawn between the target or the acquirer satisfying the threshold. Again, if there are two parties to the merger and the turnover of one does not exceed Ls 1.5 million (€ 2.1 million), merger control provisions do not apply even if the combined market share exceeds 40 per cent.

The combined turnover in Latvia is calculated by adding the net turnover of the purchaser (and, if applicable, its group) and the net turnover of the target. Discounts and turnover taxes are excluded. Turnover within a group is also excluded. When assets are acquired, only the turnover that can be attributed to them is included. The turnover of companies subject to joint control is attributed to the controlling entity in proportion to the shareholding.

The Competition Law does not deal with how turnover should be allocated to Latvia, but according to the implementing Cabinet of Ministers Regulation only sales of goods and services in and to Latvia must be included, ie sales from Latvia to another jurisdiction are not taken into account.

Entities which are not present in Latvia are not considered to be parties to a concentration which may be controlled under the Competition Law. However, this approach is based on a non-evident interpretation, and the Competition Council might reconsider if a large local undertaking intended to merge with obvious potential market entrants.

The market share threshold is applied by reference to the whole of the relevant market, which is not necessarily geographically limited to Latvia.

Presence is defined by reference to residence, incorporation or turnover. Therefore, direct sales into Latvia are sufficient to constitute 'local presence'.

When calculating turnover, exchange rates of the Latvian Central Bank are used. They are available at *www.bank.lv/eng/main/all*. The €/Ls exchange rate is pegged at 0.702804.

6. **Are these thresholds subject to regular adjustment?**

The turnover thresholds are set in absolute, rather than relative terms, therefore any changes may be achieved only by means of legislation.

7. **Are there any sector-specific thresholds?**

Jurisdictional thresholds are the same for all sectors. Rules of turnover calculation are different in the banking and insurance sector.

8. **In the event the relevant thresholds are met, is a filing mandatory or voluntary?**

The filing is compulsory.

9. **Can a notification be avoided even where the thresholds are met, based on a 'lack of effects' argument?**

No, once a transaction qualifies for merger control, there are no exceptions from the general requirement to file. In 2008 the Competition Council imposed a fine of Ls 11,760 (€ 16,800) on Latvian company that acquired 100 per cent shares in a dormant limited liability company that had no turnover or assets, except for the land lease agreement giving rights to construct on the land plot a trade centre. The Competition Council was not ready to accept any 'lack of effects' arguments.

10. **Are there special rules by which a notification of a 'foreign-to-foreign' transaction can be avoided even where the thresholds are met?**

No, once a transaction qualifies for merger control, there are no exceptions from the general regime. In 2008 the Competition Council imposed a fine of Ls 2,600 (€ 3,700) on a company registered in Estonia which, as a result of amendments to the shareholders agreement concluded with a company registered in Luxembourg, acquired sole decisive influence (previously joint control) over an Estonian company and indirect sole decisive influence over a Latvian company.

11. **Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?**

No, the Competition Council has no jurisdiction to initiate a review of a transaction for merger control purposes if the transaction does not meet the thresholds for a notification.

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

12. **Is there a specified deadline by which a notification must be made?**

Notification must be submitted 'before concentration', ie before the transfer of control becomes effective. The obligation is considered to have been fulfilled only when the full-form notification or, if permissible, short-form notification has been duly filed.

Fines up to Ls 1,000 (€ 1,400) per day may be imposed for failure to notify and for late notification. The starting date of the period subject to the fine is the effective date of the merger, ie closing.

13. **Can a notification be made prior to signing a definitive agreement?**

Filing can be made as soon as the parties are able to provide information describing the intended structure of the transaction in sufficient detail for merger control assessment to take place. In practice where filing takes place prior to a binding agreement being entered, the intended structure of the transaction normally would be reflected in some kind of document executed by the merging parties (ie, letter of intent or heads of terms) rather than simply outlined. The respective document or documents must be enclosed with the notification.

14. **Who is responsible for notifying?**

The filing obligation rests on: (i) the person acquiring sole or joint control over an undertaking or assets, regardless of whether the target is a legal person and whether it will cease to exist; or (ii) all the parties that are to merge into a new legal entity.

It is possible but not customary to notify jointly.

15. **What are the filing fees, if any?**

There is no filing fee.

16. **Where a notification is necessary, is approval needed before the transaction is closed/implemented (is there a waiting period or a suspension requirement)?**

Closing is possible after notification but before clearance, yet at the parties' own risk. An eventual prohibition or conditional clearance would retroactively render the closing illegal and trigger a fine. Therefore, if the transaction is completed before the clearance is received, there is a risk that the market participants will be obliged to carry out de-merger and will be subject to a fine for a merger in violation of the decision of the Competition Council.

17. **If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?**

There is a prohibition on closing before submission of notification but not before clearance. Since there is no formal standstill obligation after filing, there are no express provisions allowing an application for derogation. Consequently, closing prior to clearance is subject only to self-assessment by the parties.

18. **Are any other exceptions (carve-outs, etc) available to allow parties to close/implement prior to approval?**

As indicated under questions 16 and 17 above, there is a prohibition on closing before submission of notification but not before clearance. Closing prior to clearance is subject only to self-assessment of the parties.

There are no exceptions from the general regime for public bids.

From a strictly legal point of view, carve-out of the Latvian part of the transaction from the global transaction is not possible.

19. **What are the possible sanctions for failing to notify a transaction?**

Fine up to Ls 1,000 (€ 1,400) per day may be imposed for failure to notify and for late notification. The starting date of the period subject to the fine is the effective date of the merger, ie closing. Only the party which was bound to submit notification is liable for the fine.

So far the fines imposed by the Competition Council have ranged from Ls 10 (€ 14) to Ls 250 (€ 350) per day. So far the highest fine of Ls 250 per day was applied in a case where a market participant demonstrated manifest disregard of the merger control regime by failing to notify even after the Competition Council opened an investigation on the implemented merger, and up until the date the Competition Council took decision to allow the merger. In practice, the amounts of fines calculated on the basis of determined rate per day are often reduced by the Competition Council under the considerations of reasonableness.

The Competition Council may order de-merger, divestment or other remedies as it sees fit.

Due to reduced budget and staff, the ability of the Competition Council to monitor transactions subject to notification is limited and largely dependent on the activities of competitors and information disclosed in the mass media.

20. **What are the possible sanctions for implementing a transaction prior to receiving approval (so-called 'gun-jumping')?**

The Competition Law does not provide for an obligatory suspension of completion before clearance. Under the Competition Law a daily fine of Ls 1,000 (€ 1,400) can be imposed on market participants that have merged in violation of the negative or conditional clearance decision of the Competition Council. Therefore, if the transaction is completed before the clearance is received, there is a risk that the market participants will be obliged to carry out a de-merger and will be subject to a fine for merger in violation of the decision of the Competition Council.

So far no fines have been applied for 'gun-jumping'. In the case of 'gun-jumping' the new market participant or the acquirer of the control can be fined.

Due to reduced budget and staff, the ability of the Competition Council to monitor cases of the 'gun-jumping' is limited.

21. **What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?**

Under the Competition Law a daily fine of Ls 1,000 (€ 1,400) can be imposed on market participants that have merged in violation of the negative or conditional clearance decision of the Competition Council.

In addition, the Latvian Administrative Offences Code provides for a fine of up to Ls 500 (€ 711) for natural persons and up to Ls 10 000 (€ 14,228) for legal persons if they refuse to comply with a decision of the Competition Council.

Criminal law provides for imprisonment of up to two years, forced labour, fine and prohibition on doing business for a refusal to comply with the requests of the Competition Council if this offence has been committed repeatedly within one year or has caused significant damage to the interests of the state or consumers. Until now no case has been prosecuted under this provision.

So far there has been only one case in which the Competition Council has applied a fine for failure to comply with its decision in a merger case. At the beginning of 2009 the Competition Council conditionally cleared the merger of two companies owning several pharmacies in Latvia imposing a prohibition on acquiring companies operating pharmacies in specific territories in Latvia. In breach of the prohibition one of the merger participants acquired a company owning pharmacies in the restricted territory. A fine of Ls 75 (€ 100) per day was imposed.

Under the Competition Law the fine for the violation of the decision of the Competition Council can be imposed on the newly formed market participant or the acquirer of the control.

22. **What are the different phases of a review? Is there any way to speed up the review process?**

There may be two phases of merger filing review. The maximum duration of a Phase I investigation is one month from filing. If Phase I is completed by a decision to commence Phase II, the latter must be completed within (i) four months from the date of submission of the full-form application, or (ii) three months from the date of submission of the short-form application.

It is important to note that the commencement of a Phase II investigation does not necessarily indicate a potentially problematic transaction. Often a Phase II investigation is commenced only due to shortage of resources at the authority to advance the review or due to delay in collection of information or obtaining of feedback from third parties.

The review timetable cannot be extended or frozen. If within a term of 45 days from the date of the notification, the notifying party has not received a decision from the Competition Council to clear or prohibit the merger or open a Phase II investigation, the merger shall be considered cleared. Failure by the Competition Council to issue a decision within the Phase II deadlines results in an automatic unconditional clearance. If the notification contains incomplete, incorrect or misleading information, the Competition Council may consider that it has not been submitted, thus resetting the timetable.

General administrative law permits a petition asking the Competition Council to review the case within a shortened timetable. The request and the Competition Council's response must be reasoned. The response can be appealed to a court, however, in practical terms a decision of the court is unlikely to be obtained prior to the expiry of review deadlines.

Generally speaking, the Competition Council lets the parties know that it considers the merger to be a 'problematic merger' quite late in the proceedings, usually at the very end of the Phase II investigation. Upon such notification, at the initiative of the notifying party a meeting with the representatives of the authority may be held during which the Competition Council explains its position and requests the notifying party's suggestions for a remedy.

23. **Is there a possibility for a 'simplified' procedure or shorter notification form and, if so, under what conditions would this apply?**

Short-form notification can be submitted if the parties to a merger: (i) are not active on the same relevant market or on upstream or downstream markets related to one another; or (ii) their combined market share in the relevant market does not exceed 15 per cent.

The maximum duration of a Phase II investigation is three months (instead of four months) from the date of submission of the short-form application.

24. **What types of data and what level of detail is required for a notification?**

'Cabinet of Ministers Regulation No. 200 of 29 September 2008 on the procedure for filing and examination of full-form and short-form notification of concentration between market participants' contains a list of information that shall be included in the notification. In general, the notification shall contain the information broadly similar to Form CO of the EC Merger Regulation. Besides the information on the participants to the merger, the information on the size of the markets, on competitors, customers, suppliers and entry barriers must also be provided. Also the legal, financial and economic aspects of the transaction and its impact on the competition must be described.

25. **In which language(s) may notifications be submitted?**

The notification must be in Latvian.

26. **Which documents must be submitted along with a notification?**

The notification must be accompanied by: (i) power(s) of attorney specifically authorising a person to represent one or all parties to the merger for the purposes of submitting the notification and participating in the investigation; (ii) articles of association of each party to the merger; (iii) copies of financial statements for each party's most recent financial year; (iv) attestation of truthfulness covering all submitted material; and (v) document(s) demonstrating the parties' mutual intent to negotiate or conclude an agreement which would qualify as a concentration subject to merger control.

Market-related documents may be enclosed at the parties' discretion.

Public documents, eg notarised powers of attorney, must be legalised.

All foreign language documents must be translated into Latvian, and the translations must be attested by a sworn translator. In practice, translations of the relevant extracts of extensive documents such as transaction documentation might suffice. Likewise, in certain cases the Competition Council might accept, eg market studies in English. Such exceptions, however, should be agreed in each individual case.

27. **What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?**

If incomplete information is provided in the notification, it is deemed not to have been submitted.

If incomplete or misleading information is submitted in response to the Competition Council's questions, *inter alia*, during investigation, or if misleading information has been included in the notification, the Latvian Administrative Offences Code provides for a fine of up to Ls 500 (€ 700) for natural persons and up to Ls 10,000 (€ 14,000) for legal persons.

There is no publicly available information regarding fines applied for submission of incomplete or misleading information in merger cases.

28. **To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?**

Normally the officials of the Competition Council are always ready to meet with the market participants to discuss competition law issues relevant to them. Pre-notification consultations are customary in cases when there are doubts whether the transaction meets the jurisdictional thresholds.

29. **Where pre-notification consultations are possible, what measures does the relevant authority take to ensure that such discussions are treated confidentially?**

According to the Competition Law the officials of the Competition Council are not allowed to disclose information obtained when performing their official duties, unless it is authorised by the

Chairperson of the Competition Council. Confidential information can be disclosed only in cases specifically listed in the law. Normally the fact of the pre-notification consultations is not disclosed to the public by the Competition Council. However, the market participants are advised to explicitly state to the Competition Council that the fact of the pre-notification consultations and the information shared during the meeting is confidential.

30. **At what point and in what forum does the relevant authority make public the fact that a notification has been made?**

The fact and date of notification, as well as the identities of the parties are disclosed on the Competition Council's website *www.kp.gov.lv* within three days from receipt of the notification.

31. **Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?**

The final decision is made public by means of publication in an official journal and posting on the authority's website. The parties to the notification must indicate which information is confidential. Confidential information is omitted from the publication.

There are no clear guidelines for publication of press releases. Normally press releases on most important decisions of the Competition Council appear on the website of the authority and are distributed to the mass media.

SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES

32. **What is the substantive test for assessing the legality of a notified transaction?**

The substantive test is either: (i) creation or strengthening of dominant position; or (ii) substantial lessening of competition. A positive finding under any of the two tests may result in prohibition.

33. **What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal (eg, vertical or conglomerate) effects, and are any other theories of harm analysed (eg, coordination in the case of joint ventures)?**

In general non-horizontal mergers are considered less likely to harm competition. The Competition Council in *SIA Latvijas Mobilais Telefons* decision of 5 April 2006 (case No. 1767/05/10/8) stated that vertical merger can pose a risk to competition only if at least one of the merger participants holds a dominant position in the relevant market or the merger can cause or facilitate foreclosure on any relevant market. Mergers resulting in joint ventures are assessed under the standard substantive test. Creation of a joint venture will be subject to a more detailed assessment if any of the parent companies is active in related upstream or downstream markets.

34. **Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?**

Non-competition factors are not relevant, although the implementing Cabinet of Ministers Regulation does contain so far unapplied and uninterpreted words saying that 'social gain' may be taken into account in the substantive assessment. Decisions of the Competition Council do not seem to reveal any particular pattern of implicit reliance on non-competition factors.

35. **Are economic efficiencies considered as a mitigating factor in the substantive assessment?**

Although economic efficiencies achieved as a result of the merger (especially if consumers benefit from it) are accepted by the Competition Council as one of the factors that can counterbalance lessening of competition, so far, complex economic analysis or economic expert witness opinions are usually not part of the proceedings.

36. **Does the relevant authority typically cooperate/share information with authorities in other jurisdictions?**

The Competition Council regularly cooperates at an international level with other competition authorities. According to the Competition Law, upon request from the competition authorities of other member states, the Competition Council is entitled to carry out investigative activities in relation to Latvian market participants.

The Competition Council participates in the €opean Competition Network (ECN), which is a formal cooperation forum for €opean competition authorities and the €opean Commission. In addition to the ECN, the Competition Council occasionally informally contacts neighbouring competition authorities in Lithuania and Estonia to coordinate their approach.

37. **To what extent are third parties involved in the review process?**

Third parties' views are always invited if a Phase II investigation is commenced. Given that the fact of notification must be disclosed publicly, third parties' observations may already be received during Phase I. An invitation to submit observations is published on the Competition Council's website, but it may also proactively approach customers, competitors, trade associations and consumer organisations in order to solicit their views.

The Competition Council's decisions in merger cases can be appealed to a court, except for the decision to begin an investigation and to commence a Phase II investigation, within one month after the notification of the decision. An appeal can be brought not only by the parties to the merger, but also by any third party whose rights or legitimate interests are infringed by the decision.

In case third parties fail to reply to formal requests for information by the Competition Council they may be fined under the Latvian Administrative Offences Code which provides for a fine of up to Ls 500 (€ 700) for natural persons and up to Ls 10,000 (€ 14,000) for legal persons.

38. **Is it possible for the parties to propose remedies for potential competition issues?**

There are no statutory or regulatory rules on the remedy procedure, nor has the Competition Council published any guidance.

The parties are free to suggest possible remedies. However, the Competition Council is not bound by the suggestion, and the parties are not obliged to offer any remedies. The remedies imposed by the Competition Council are part of the decision by which the merger is cleared and, thus, are binding on the parties.

In principle, remedies can be proposed at any stage of the procedure.

Remedies will be accepted if the Competition Council can be persuaded that the suggested remedies are relevant, adequate and sufficient to eliminate the competition concerns of the merger identified by the Competition Council.

39. **What types of remedies are likely to be accepted by the authority (eg, divestment remedies, other structural remedies, behavioural remedies, etc)?**

The Competition Council may accept both behavioural and structural remedies, but, in practice, it is more welcoming towards behavioural remedies.

40. **What power does the relevant authority have to enforce a prohibition decision?**

Under the Competition Law a daily fine of LS 1,000 (€ 1,400) can be imposed on market participants that have merged in violation of the decision of the Competition Council.

In addition, the Latvian Administrative Offences Code provides for a fine of up to Ls 500 (€ 711) for natural persons and up to Ls 10 000 (€ 14,228) for legal persons if they refuse to comply with a decision of the Competition Council.

Criminal law provides for imprisonment of up to two years, forced labour, fine and prohibition on doing business for a refusal to comply with the requests of the Competition Council if this offence has been committed repeatedly within one year or has caused significant damage to the interests of the state or consumers.

JUDICIAL REVIEW

41. **Is it possible to challenge decisions approving or prohibiting transactions? If so, before which court or tribunal?**

The Competition Council's decisions in merger cases can be appealed to a court, except for the decision to begin an investigation and to commence a Phase II investigation, within one month after the notification of the decision.

Appeals are heard in the first instance by the Regional Administrative Court. Decisions of the Regional Administrative Court can be appealed on points of law to the Administrative Departments of the Senate of the Supreme Court.

42. **What is the typical duration of a review on appeal?**

Litigation in the first instance might take up to one year. In total the litigation might last two to three years.

43. **Have there been any successful appeals?**

According to publicly available information there has been one case in which the Competition Council decision under which the transaction was prohibited has been revoked by the court. The first instance court ruled that the decision of the Competition Council contained contradictory evidence and conclusions regarding the impact of the transaction on competition in the relevant market. Furthermore the court ruled that the Competition Council had failed to analyse and

demonstrate why the merger could not be cleared subject to remedies. The arguments of the first instance court were also upheld by the appellate court.

STATISTICS

44. **Approximately how many notifications does the authority receive per year?**

Before the economic crisis the Competition Council received between 30 and 80 notifications per year. After the crisis the number of notified transactions dramatically decreased. In 2009 there were 12 merger filings while in 2010 only six notifications were filed.

45. **Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?**

During the last five years the Competition Council has issued three prohibition decisions (one in 2007 and two in 2008).

46. **Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?**

So far remedies have been ordered in only about 20 cases. On average, it represents roughly 10 - 15 per cent of all merger cases. However, the most recent practice of the Competition Council demonstrates that it is increasingly inclined to impose remedies. Thus, in 2010 remedies were ordered in three out of six notified transactions.

47. **How frequently has the authority imposed fines in the past five years?**

During the past five years the Competition Council has applied fines in 13 cases (in 2006 – three cases; in 2007 – three cases; in 2008 - five cases; in 2009 – one case; in 2010 – one case). In 12 cases the fine was applied for failure to notify the merger before it took place. In one case fines were applied both for an unnotified merger and for the violation of the remedies ordered by the Competition Council when clearing the merger.