COMPETITION LAW NEWS

Dear reader,

In this Latvian competition law newsletter prepared by EU & Competition practice group of law office RAIDLA LEJINS & NORCOUS you will find an update on recent developments which we have selected for their noteworthiness.

We will be happy to answer your specific questions or to assist in dealing with a particular competition law issue.

With kind regards -


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In this issue:

Court decisions

Decisions of the Competition Council

Court decisions

Concentration in the form of an asset deal has taken place if the acquirer exercises control over the target undertaking

tiesas.lv [LAT only]

The Senate has explained that a concentration in the form of an asset deal has taken place if, inter alia, the acquirer has exercised control over the target undertaking's activities.

The Senate had to address the issue in a recent pharmacy merger case. The Regional Administrative Court had decided that the merger had not taken place despite the acquirer having taken over all the assets and accounting records of four pharmacies. The acquirer also provided instructions to the managers of the pharmacies, and the pharmacies were operating continuously for several months prior to the transaction being partially unwound. The judgment of the Regional Administrative Court was based on an interpretation of the provision of the Competition Act which stipulates that „[a]cquisition of assets […] shall be considered merger, if the acquisition of assets […] increase the market share […] of the acquirer […]". The Regional Administrative Court considered that the acquirer had no right to distribute the medicines prior to re-registration of the licences for operation of the pharmacies on the name of the acquirer and, consequently, could not increase its share on the relevant market. Therefore, in the opinion of the Regional Administrative Court, no merger had taken place.

So far the Competition Council has refused to employ the concepts of "undertaking" and "transfer of control" in the context of concentrations. Instead, it has developed an alternative theory of "increase of the acquirer's market share" to distinguish between ordinary asset purchase transactions and transfers of undertakings. This definition eventually was introduced in the Competition Act.

The present case shows that the definition created by the Competition Council is not sufficiently clear. In cases where the seller formally continues its commercial activity, although the acquirer already exercises actual control over the undertaking (e.g., so called gun-jumping situations), the reference to increase of the market share is a somewhat misleading criterion.

The Senate has thus resorted to the traditional EU competition law concept of "control over an undertaking" to deal with this situation.

Top

The first judgment regarding abuse of dominant position in retail

tiesas.lv [LAT only]

The Administrative Regional Court has decided the first appeal against Competition Council's decision establishing an abuse of dominant position in retail and imposing a fine on a retailer – in this case, SIA RIMI Latvia (RIMI; we wrote about Competition Council's decision in our newsletter of 16 February 2011).

The Competition Council had characterised discounts granted by AS Valmieras piens to Supernetto, a chain of hard discounter stores belonging to RIMI group, as unreasonable payments for placement of goods in retail premises. The Administrative Regional Court ruled in favour of the retailer, revoking the decision in full. In this relatively short judgment the Administrative Regional Court has arrived at several significant conclusions.

The court agreed with an economist engaged by RIMI that lower milk supply price, being expressed as a discount from the standard price, is an unwieldy formulation of the actual deal and that in fact there simply exist two purchase prices – one for RIMI shops and the other one for Supernetto hard discounters. The court also agreed with RIMI's submission that the retailer has to be free to negotiate the purchase price not only for the supermarkets and hypermarkets, but also for the hard discounter stores. The court rejected the view of the Competition Council that the only way to arrive at a lower price in the hard discounter stores should be optimization of costs of the retailer and reduction of its profit. Instead, the court indicated that lower supply price is an essential precondition for the retailer to be able to offer a product to the consumers at a significantly lower price.

It will be interesting to observe whether the perfectly logical conclusion that the economic substance is not affected by form in which the price is spelled out (i.e., discount from the standard price is just another way to express the final price), will be applied also in other cases on abuse of dominant position which do not involve hard discounters. Since the date of the now annulled decision the Competition Act has been supplemented with a provision which expressly qualifies "forcing of discounts" as a form of abuse of dominant position in retail. This provision long has been criticized as a form of price regulation. It appears that the Regional Administrative Court at least in the present RIMI case has not supported interference by the state into the freedom of contract.

The court noted in its judgment that restrictions of completion are justified if they serve a public interest. Therefore, when investigating potential abuse of dominant position in retail, a detailed analysis of the circumstances must be carried out by the authority to determine whether there are legitimate interests of consumers which must be protected. According to the court, the Competition Council had failed to do that in the present case. In the opinion of the court, in this case the reproached provisions had had a positive impact on consumers' interests ensuring lower prices of certain products in Supernetto shops as compared with the prices at other supermarkets.

Thus, already the very first court case on abuse of dominant position in retail has highlighted the tensions inherent in this notion: the assumption that protecting certain suppliers is in the interests of consumers, and that control of prices in the absence of buyer's market power does not amount to price regulation.

Top

Decisions of the Competition Council

Clearance for merger of major Latvian TV channels

Latvijas Vestnesis, 30.05.2012., No 84 (4687) [LAT only]
kp.gov.lv [LAT only]

The Competition Council has cleared one of the most complicated merger cases lately, the so called TV3/LNT merger. The transaction was cleared subject to seemingly burdensome, however, hardly controllable conditions.

The Swedish entertainment and broadcasting group MTG Broadcasting AB (MTG) applied to acquire 100% of AS Latvijas neatkariga televizija (LNT) shares. Prior to the merger MTG already owned SIA TV3 Latvia which broadcasts the TV3, 3+ and TV6 channels. LNT owns broadcasting rights of LNT, TV5 and LMK channels.

The intended merger affects competition on several relevant markets. As a result of the merger MTG has obtained control over two of four Latvian free-to-air TV channels with a combined market share of 67.08% measured on the basis of viewing time. The only remaining competitor of these channels is the public TV with its two channels, LTV1 and LTV7. Moreover, the Competition Council concluded that no new entries are expected in the free-to-air TV market.

The market share of the merged undertaking on the TV advertising market exceeds 60%. The Competition Council considered that the concentration may significantly impact the scope of offering and prices: the prices of the commercial air time of TV channels owned by LNT group are likely to be lifted to the level of prices of MTG group's channels and, eventually, the industry would experience an overall price increase.

According to the Competition Council, on the wholesale market of non-specialized programs for pay-TV, i.e., on the market where the pay-TV service providers purchase the retranslation rights, the merger would result in increased dependency of pay-TV operators from the MTG group. The Competition Council forecast that such dependency would result in MTG group forcing upon pay-TV operators package deals including all the channels of the merged undertaking.

Despite the serious risks identified on several relevant markets, the Competition Council decided to clear the merger subject to conditions. The decision seems to be motivated by concerns of the authority about potential bankruptcy of LNT and its exit from the market which would result in LNT freeing room for MTG by way of „natural selection". Nevertheless, the decision contains almost no reasoning to support such conclusion. General references to the negative equity of LNT and the negative effect of the financial crisis on its operations, as well as a recognition of the need for additional financing to meet long-term and short-term obligations can hardly serve the purpose.

Interestingly, the Competition Council indicated in the decision that there is no information about any competing tenderers for LNT shares, although immediately after the first public announcements regarding the intended merger one of the indirect owners and managers of LNT publicly named the company which had submitted an alternative share purchase offer. The fact that MTG's offer was chosen, seen in context with the market shares of the merged companies, suggests that MTG group was willing to pay a premium for gaining market power on the Baltic electronic media market.

The Competition Council stated that the "failing firm defence in this case cannot be applied unequivocally […], since a complete exit of LNT assets from the market in the nearest future has not been clearly proved". Having briefly addressed potential efficiencies of the transaction (expected cost savings, promises to improve quality of content), the Competition Council drew a conclusion that the positive effects of the transaction would partially outweigh the negative ones.

The clearance is subject to numerous conditions: requirement for LNT and TV3 channels to stay in free-to-air broadcasting until 31 December 2013, prohibition of tying programs created by MTG group and LNT group, prohibition to increase prices of commercial air time by more than the inflation rate, requirement to maintain separate and independent news services for LNT and TV3 channels and not to reduce news airtime, to fill at least 21% of airtime with local (Latvian) content, etc. The conditions are applicable until 31 December 2017. The Competition Council has reserved the right, effective until the said date, to order a full or partial split of the merged undertaking, if market situation so requires.

Both the Competition Council and the merged parties have described the clearance conditions as severe. However, it seems that arriving at the conditional clearance was the least difficult of the Competition Council's tasks. Controlling compliance with the conditions swiftly accepted by MTG group is likely to prove far trickier.

Top

Fine on a wholesaler for resale price maintenance

Latvijas Vestnesis, 29.06.2012., No 102 (4705) [LAT only]
kp.gov.lv [LAT only]

The Competition Council has imposed a fine of 31 403 LVL [approx. 45 000 EUR] on a wholesaler of nutrition of domestic animals for incorporation in the supply agreements concluded with wholesalers and retailers provisions imposing an obligation to adhere to minimum price level set by the wholesaler. In view of the fact that the restrictive provisions were proposed by the wholesaler, and in the interest of procedural efficiency, the Competition Council decided not to initiate investigation against the 682 undertakings which had entered into the agreements containing resale price maintenance provisions.

The punished wholesaler explained during the investigation that the resale price maintenance provisions have been included in the contracts in order to prevent "dumping" among the wholesalers and to ensure "profitable operation of retailers". Several contract parties, when questioned by the Competition Council, explained that they have always fulfilled the resale price maintenance provisions. One of undertakings tried to convince the Competition Council that the provisions of the agreement do not cause any restrictions to its activities since "our retail margin is always higher".

The present case demonstrates that many undertakings in Latvia still are unfamiliar with competition law, fail to recognize illegal agreements and during investigations render explanations which serve as eloquent evidence of violations.