

LATVIA

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1. State of the law and practice

1.1. Brief overview of the existing legislation

The current primary competition rules are set out in the Latvian Competition Law, effective as of 1 January 2002 (hereinafter – “Competition Law”). Before then, competition matters were regulated by the Competition Law of 1997. Due to the short history of competition law in Latvia, Latvian case law dealing with competition matters is still relatively slim.

1.2. Process of “criminalization” of competition law

In general, infringement of the Competition Law is not a criminal offence under Latvian criminal law. However, criminal or quasi-criminal sanctions may be imposed on an executive for a failure to comply with a decision of the Competition Council. Depending on the gravity of the infringement, measured by reference to recidivism and consumer harm, sanctions applied for the above offence are imprisonment for up to two years, community service or a fine of a maximum of 100 times the minimum monthly salary (currently LVL 200 (USD 388)), with or without restrictions on engaging in commercial activities for between two and five years. Pecuniary sanctions can also be imposed on a non-compliant company. So far, the above criminal sanctions have not been applied in Latvia.

1.3. Private enforcement

According to the Competition Law any person that has suffered losses due to the infringement of the Competition Law is entitled to claim compensation of losses and statutory interest from the guilty market participant. Thus, in addition to the fine imposed by the Competition Council for the breach of the Competition Law, the guilty market participant might be obliged to compensate losses caused to any third party as a result of anti-competitive conduct. The award of compensation is within the jurisdiction of the courts of general jurisdiction. So far, there have been no reports of awards of damages in claims for infringement of the competition rules. The right to claim damages covers compensation for actual loss, such as expenses, price differences, lost profits and other direct or indirect economic damage resulting from the anti-competitive conduct. Punitive or exemplary damages are not available under Latvian law. Similarly, class actions in their usual meaning are not possible in Latvia.

1.4. Relationship between national competition law regime and EU rules

The Competition Law and the secondary legislation are largely aligned with EU rules. Furthermore, in view of the significant similarity between Latvian and EU competition rules, when deciding cases in front of them, the Competition Council and Latvian courts rely extensively on the respective case-law of EU courts as well as on the guidance provided by the European Commission.

2. Competition Authority

2.1 Structure, human resources & budget

The Latvian Competition Council, the authority enforcing the competition rules in Latvia, was established in January 1998. The Competition Council consists of two members and a chair, all appointed for a five-year term by the Cabinet of Ministers upon recommendation of the minister of economics. The Competition Council members are State officials and are subject to the general rules regulating rights and obligations of the State officials. Decisions of the Competition Council are taken by an absolute majority vote. The day-to-day work of the Competition Council is carried out by the Executive Office, managed by the office director. The work of the Office is organised in five departments (1st analytical department, 2nd analytical department, legal department, prohibited agreements department and IT division). At the time of writing, the Competition Council employs 34 staff.

The total budget of the Competition Council for year 2013 is LVL 563 077 (c.a. USD 1 070 488).

2.2 Place in the public administration

The Competition Council is a direct administrative institution under the supervision of the Ministry of Economics and implements State policy on the matters of development and protection of competition. According to Article 8(6) of the Competition Council, neither Cabinet of the Ministers, nor the Minister of Economics or any other person shall be entitled to give directions to the members of the Competition Council regarding cases to be investigated or decisions to be taken. When issuing advance binding rulings, the Competition Council shall not co-ordinate them with the Ministry of Economics.

2.3. Scope of powers

The investigative powers of the Competition Council are rather broad.

The Competition Council has the right to request all necessary information, including confidential information, from any natural or legal persons, or state and municipal institutions, as well as to receive oral or written explanations from the relevant persons.

The Competition Council may conduct inspection visits, including dawn raids (visits without advance notice), to the market participants. During the inspections, the officials of the Competition Council may request oral or written explanations, review any documents and receive these documents or copies thereof.

The Competition Council has the right to seize relevant documents and property, including computers, etc.

Regarding entrance into vehicles, private residences and other moveable or immovable property of market participants and the inspection of property and documents contained therein, searches are conducted on the basis of a court decision and in the presence of the police. If there is a suspicion that the relevant documents may be located in third parties' moveable or immovable property, the Competition Council also has the right to inspect such property, subject to the court's decision.

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.

2.4. Statistics on activities for the last year

In 2012 the Competition Council adopted 51 decisions:

- abuse of dominant position – 15 decisions, in 4 of them infringement was established;
- abuse of dominant position in retail trade – 1 decision establishing infringement;
- prohibited agreements – 17 decisions, in 6 of them infringement was established;
- mergers – 11 decisions, in 8 cases merger was allowed, in 2 cases merger was allowed subject to certain conditions, in 1 case infringement was established (notification was not submitted in due time);
- infringements of the Latvian Administrative Offences Code – 8 decisions (in 7 cases fines were applied to undertakings that did not provide the information requested by the Competition Council or provided false data, in 1 case fine was applied for non-compliance with other requests of the Competition Council or its decisions).

The total amount of the fines applied for the infringements of the Competition Law in 2012 were LVL 253 725,01 (c.a. USD 482 366).

16 out of the 51 decision adopted in 2012 were appealed to the court.

3. Merger Review

The merger control provisions are included in the Competition Law 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'.

3.1. Forms of concentrations

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. Acquisition of assets or rights to use assets shall be deemed to constitute a concentration if such transaction increases market share of the acquirer on any relevant market;
- 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.

Only long lasting changes of control are covered.

3.2. Events triggering the notification obligation and relevant notification thresholds

Jurisdictional merger control criteria are as follows:

- the combined turnover of all market participants concerned is at least LVL 25 million (USD 48.4 million), or the combined market share of all market participants 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 LVL 1.5 million (USD 2.9 million).

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

Only the turnover of the purchaser and the target (and undertakings controlled by it), 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 concentration. The Competition Council has interpreted

the law to mean that even the acquisition of a dormant Latvian company (i.e. 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 LVL 1.5 million (USD 2.9 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, i.e. sales from Latvia to another jurisdiction are not taken into account.

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'.

3.3. Exemptions from the filing obligation

The Competition Law excludes certain transactions from the applicability of the merger control regime irrespective of whether the turnover thresholds are met. The exception applies to credit institutions and insurance companies acquiring shares in another enterprise with a view to transferring them, provided that:

- (i) they do not exercise voting rights in respect of those shares, and
- (ii) disposal of the shares takes place within one year of the date of acquisition.

Merger notification is not required also when insolvency administrator or liquidator acquires control over insolvent entity or entity subject to liquidation.

3.4. Scope of information required for the filing

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' 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.

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, e.g. 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, e.g. market studies in English. Such exceptions, however, should be agreed in each individual case.

3.5. Procedure and timetable for the review of a concentration

The Latvian merger control regime requires mandatory clearance of mergers that meet the jurisdictional threshold.

There are no specific provisions under the law as to the timing of submission of the notification apart from the requirement to notify prior to the transaction taking place. Often notifications are submitted upon signing of the binding sale-purchase agreement with the closing subject to clearance. It is also possible to notify the transaction on the basis of the letter of intent, however, under such circumstances it must be sufficiently detailed to provide information on the intended structure of the deal.

Duty to notify is on the party acquiring the control or the parties acquiring joint control. There is no filing fee.

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%.

After the receipt of a duly completed full or short-form merger notification the Competition Council has one month to review the notification and adopt a decision either to clear or prohibit the merger. It can also adopt a decision to commence additional (2nd stage) investigation of the merger. If the Competition Council fails to react within 45 days, the merger is deemed to have been cleared.

Additional investigation may last up to four months from the date the full notification has been submitted or up to three months from that date if the short-form application has been filed. At

the end of this period a decision is taken to clear or prohibit the merger. A failure to adopt a decision within these deadlines means that the merger is deemed to have been cleared. In-depth (2nd stage) investigation is likely when the market share of the undertakings concerned is large. However, on occasion an in-depth investigation can take place also if the Competition Council is short of resources to process the filing within a month.

The rules on merger control in the Latvian Competition Act and the system is broadly similar to that of the EC Merger Regulation. As a result, the decisions of the Latvian Competition Council are often based on the decisions of the European Commission, Court of First Instance and European Court of Justice.

The Competition Council may prohibit a merger if it creates or strengthens dominant position or if it may result in substantial lessening of competition in any relevant market.

3.6. Substantive test for the assessment of a concentration.

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.

3.7. Decisions issued in the course of the review

After having examined a notification of a concentration, the Competition Council has the power (i) to grant unconditional merger clearance, (ii) to clear a merger subject to certain conditions in order to prevent the creation or strengthening of a dominant position or a substantial restriction of competition in a relevant market, or (iii) to block a merger and, where applicable, to impose obligations on the undertakings or controlling persons concerned to perform actions restoring the previous situation or to eliminate the consequences of the concentration, where a merger will establish or strengthen a dominant position or result in a substantial restriction of competition in a relevant market.

As mentioned in point (ii) above, where a concentration raises competition concerns that it could result in the creation or strengthening of a dominant position or a substantial restriction of competition, the Competition Council may grant conditional merger clearance by imposing certain obligations and conditions.

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

3.8. Appeal process

Decisions of the Competition Council may be appealed in the Regional Administrative Court within a term of one month from the effective date of the decision. Decisions of the Regional Administrative Court may be appealed in the Supreme Court.

3.9. Consequences of the breach of the filing obligation

Fine up to LVL 1000 (USD 1940) 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, i.e., closing. Only the party which was bound to submit notification is liable for the fine.

The fines imposed by the Competition Council have ranged from LVL 10 (USD 19) to LVL 250 (USD 484) per day. So far the highest fine of LVL 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. The Competition Council is entitled to start investigations in respect of un-notified mergers.

The Competition Council may order de-merger, divestment or other remedies as it sees fit in respect of mergers carried out without the approval of the Competition Council.

In addition, the Latvian Administrative Offences Code provides for a fine of up to LVL 500 (USD 969) for natural persons and up to LVL 10 000 (USD 19 380) 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.

3.10. Special rules

Specific rules for the calculation of turnover apply to mergers in certain sectors (.e.g. credit institutions, insurance companies).

4. Anticompetitive Agreements

4.1. Definition of the “agreement”

The notion of the 'agreement' is interpreted in the Latvian practice very broadly and includes agreements between undertakings, decisions by associations, and concerted practices. In general, both the Competition Council and Latvian courts, when interpreting the notion of the 'agreement', rely extensively on the jurisprudence of EU courts.

4.2. Rules applicable to cartels and other horizontal agreements

Article 11 of the Competition Law closely follows the wording of Article 101 of the Treaty of the Functioning of the European Union, declaring as prohibited agreements between undertakings having as their object or effect the prevention, restriction or distortion of effective competition. Article 11 of the Competition Law includes a non-exhaustive list of practices that are prohibited:

- any form of direct or indirect fixing of prices or tariffs, or agreement on the principles of their formation, as well as the exchange of information relating to prices or sales terms;
- restrictions or controls on the volume of production or sales, markets, technical development or investment;
- the allocation of markets by territory, customers, suppliers or other conditions;
- provisions that make the conclusion, amendment or termination of a transaction with a third party subject to the acceptance of obligations which, according to commercial practice, are not relevant to the particular transaction;
- participation or non-participation in tenders or auctions, or regarding provisions for participation (or non-participation), except for cases when competitors have publicly announced their joint tender and the purpose of such tender is not to hinder, restrict or distort competition;
- applying discriminatory conditions to equivalent transactions with third parties, thus creating a competitive disadvantage for such third parties; and
- action (or failure to act) as a result of which another market participant is forced to leave a relevant market or whereby the entry of a potential market participant into the market is made more burdensome.

The prohibition applies to both vertical and horizontal agreements.

The term 'cartel' is not defined under the Competition Law; however, Regulation No. 798 of the Cabinet of Ministers (effective as of 3 October 2008) contains a definition of 'horizontal cartel agreements'. They are defined as agreements between the competitors aimed at the prevention, restriction or distortion of competition between themselves, including agreements on any form of direct or indirect fixing of prices or tariffs or agreement on principles of their formation, as well as the exchange of information relating to prices or sales terms, restrictions or controls on the volume of production or sales, markets, technical development or investment, allocation of markets by territory, customers, suppliers or other conditions, participation or non-participation in tenders or auctions or regarding provisions for participation (or non-participation).

4.3 Rules applicable to vertical agreements

Please see Section 4.2 above.

4.4. Exemptions from the general prohibition (individual exemptions, block exemptions)

The prohibited agreements are allowed if they meet four cumulative conditions:

- contribute to improving the production or distribution of goods or promote economic progress;
- allow consumers a fair share of the resulting benefit;
- do not impose on the respective market participants restrictions that are not indispensable for the attainment of these objectives; and
- do not allow the participants to eliminate competition in respect of a substantial part of the products in question.

Latvian competition law has preserved a notification system. Therefore, a prima facie prohibited agreement may be notified to the Competition Council prior to entering the agreement or prior to the agreement becoming effective and provided an investigation has not been commenced. The Competition Council shall provide unconditional or conditional exemption to the agreements that satisfy the above efficiency requirements.

The burden of proof is shifting in between the parties. The undertakings notifying agreement shall prove the facts upon which exemption is sought. The administrative authority shall prove the facts upon which it bases its decision. The market participant has a duty to prove the facts upon which it relies to challenge the decision of the Competition Council.

So far very few prohibited agreements have been notified to the Competition Council for exemption and none of them has involved agreements that would qualify as horizontal cartel agreements. As a matter of practice, it seems highly unlikely that any horizontal cartel agreement could qualify for such an exemption.

Council Regulation No. 1/2003 requires national competition authorities, when applying national competition law to agreements or concerted practices, to ensure that the application of national competition law does not lead to the prohibition of agreements or concerted practices that may affect trade between member states but that do not restrict competition within the meaning of Article 101(1) TFEU or that fulfill the conditions of Article 101(3).

4.5. Investigation and procedure

The Competition Council performs investigations and also makes the final administrative decision in cases.

The national courts are also entitled to establish infringements of the Competition Law and EU competition rules, although so far no cartel cases have been decided by national courts under the private enforcement procedure.

The Competition Council may initiate cartel investigation proceedings on its own initiative or on the basis of an application by a private party or information from a public entity. Proceedings may also be initiated based on cooperation with foreign authorities or as a result of a tip-off from a foreign competition authority.

Dawn raids are becoming an increasingly popular means of conducting investigations. Still, it is not uncommon for the Competition Council to provide a prior notice to the undertaking subject to investigation of the planned visit to review documents and conduct interviews.

The final decision in an investigation must be taken by the Competition Council within six months from the date when the investigation proceedings were initiated. The investigation may be prolonged by a decision of the Competition Council if, due to objective justifications, additional time is required for the completion of the investigation. In this case, the investigation should be completed within one year of the date of the initiation of proceedings. If the completion of an investigation requires long-term study, the Competition Council may extend the time limit for another year. Thus, the maximum period of investigation may not exceed two years from its date of initiation.

The number of provisions under the law dealing with the investigation process is rather limited, leaving the Competition Council relatively wide discretion. The Competition Council is required, after obtaining all the data necessary for taking a decision, to invite the parties subject to investigation to review the file and provide their comments. The Competition Council is required to provide notice to the parties that the necessary facts have been established. In practice, the notice comprises a relatively extensive account of the facts and preliminary conclusions made, however, it does not include any indications in respect of the level of fines which the Competition Council intends to apply in case of finding infringement. The parties to the investigation have the right to review the file, express their opinion and submit additional information within a term of 10 days from the date of notification. No hearings are held allowing parties to defend their position orally, although it is possible to request a meeting with the representatives of the Competition Council to discuss the case.

In cases where the EU competition rules are applied, prior to taking the final decision, the draft decision of the Competition Council has to be referred to the European Commission for comments.

According to administrative procedure law, the administrative authority shall prove the facts upon which it bases its decision. If the decision of the Competition Council is appealed, the Competition Council may only refer to those grounds that have been stated in its decision. No additional evidence may be provided in court. Recent court practice suggest that also the market participants might be precluded from filing to the court evidence or reasoning not provided during the administrative stage of the case.

The market participant has a duty to prove the facts upon which it relies to challenge the decision of the Competition Council. According to the principle of objective investigation, the administrative court itself shall collect evidence if the evidence submitted by the parties is not sufficient.

All decisions of the Competition Council, excluding certain interim procedural decisions, may be appealed in the Administrative Regional Court within a term of one month from the effective date of the decision. Decisions by the Administrative Regional Court may be appealed on points of law to the Administrative Department of the Senate of the Supreme Court.

Decisions of the district court of general jurisdiction granting permissions to exercise certain investigative activities can be appealed to the presiding judge of the court.

4.6. Sanctions and remedies

When determining the fine amount, the Competition Council has to consider the gravity and duration of the infringement. According to Regulation No. 796 of the Cabinet of Ministers (effective as of 3 October 2008), all infringements are divided into three groups (minor infringements, serious infringements and very serious infringements). Horizontal cartel agreements shall qualify as the gravest violation of the Competition Law. The maximum amount of fine can reach 10 per cent of the net turnover for the previous financial year and it shall not be less than LVL 500 (USD 969). The law does not set a maximum amount of fine.

Mitigating and aggravating circumstances are then taken into account to determine the final amount of the fine. Furthermore, the regulation contains a list of mitigating and aggravating circumstances.

See Sections 1.2. and 1.3. above on “criminalization” and private enforcement.

4.7. Leniency program

The leniency programme was first introduced in October 2004. Currently, the framework of the leniency programme is set forth in Regulation No. 796 as of 3 October 2008. Regulation No. 796 in general mirrors the leniency policy applied by the European Commission. The leniency programme is available only to participants of cartel agreements. At the time of writing, there have been no reports of an undertaking operating in Latvia resorting to the possibilities afforded by the leniency programme.

The leniency programme offers: full immunity, a reduction of the fine of between 30 and 50 per cent and a reduction of the fine of between 20 and 30 per cent.

Based on Regulation No. 796 of the Latvian Cabinet of Ministers, full immunity may be granted if:

- the undertaking is the first to apply to the Competition Council for full immunity providing in the written application the following information as far as available:
 - names and addresses of the members of the cartel;
 - description of the cartel: aim, relevant markets affected, principles of operation, size of the relevant markets affected, duration of the cartel; and
 - evidence at the disposal of applicant and other related information, which is sufficient for the Competition Council to initiate an investigation;
- at the moment of initiation of an investigation the Competition Council does not possess sufficient evidence to initiate an investigation or to find an infringement;
- the undertaking has not (prior to submission of its application) concealed, destroyed or falsified evidence related to the cartel;

- the undertaking upon its own initiative or based on the request of the Competition Council has provided all available evidence and information, has truly, actively and continuously cooperated with the Competition Council throughout the proceedings, and is neither the instigator nor has coerced other participants to take part in the cartel;
- the undertaking has immediately ceased participation in the cartel, unless the Competition Council has ordered otherwise; and
- the undertaking has not disclosed to third parties the fact of the application for leniency or cooperation with the Competition Council.

In addition, the application for full immunity must be accompanied by a written statement certifying that the applicant has complied and will comply with the above requirements for full immunity. Formally, verbal applications are not possible.

A cartel member that is not entitled to a full immunity may apply for reduction of fines if it:

- has not (prior to submission of application) concealed, destroyed or falsified evidence related to the cartel;
- upon its initiative or based on the request of the Competition Council, has provided all available evidence and information and has truly, actively and continuously cooperated with the Competition Council throughout the proceedings;
- has immediately ceased participation in the cartel, unless the Competition Council has ordered otherwise; and
- has not disclosed to third parties the fact of the application for leniency or cooperation with the Competition Council.

In addition, the application must be accompanied by a written statement certifying that the applicant has complied and will comply with the above requirements for a reduction of fines.

The following reduction of fines will be granted:

- a 30 to 50 per cent reduction is available for the first to provide information; and
- a 20 to 30 per cent reduction is available to any subsequent parties.

If the fine is reduced, the minimum fine shall not be less than LVL 500 (USD 969).

4.8. Precedent cases

In line with the approach announced by DG Competition, the Competition Council has announced the fight against cartels to be one of its top priorities. Since 2006, the Competition Council has been fining on average three to four cartels per year, majority of them being bid-rigging cases. In February 2013 the Competition Council has created a special unit for detection of cartels.

At the end of 2009 the Competition Council adopted a decision by which SIA Samsung Electronics Baltics and four major wholesalers were found to be guilty for resale price

maintenance, market partitioning and facilitation of horizontal price-fixing (decision in case No. P/08/06/18 on violation of the provisions of Article 11, items 1 and 3 of the Competition Law and Article 81(1) of the EC Treaty, by SIA Samsung Electronics Baltics et al of 30 October 2009). The decision was adopted following a dawn raid carried out by the Competition Council almost simultaneously in the offices of all major wholesalers of Samsung TV sets. The fines imposed on the members of the alleged cartel are the highest fines that so far have been applied by the Competition Council. SIA Samsung Electronics Baltics was fined LVL 4 099 942,75 (USD 7 945 625) (3.4 per cent of net turnover in 2008). The decision was appealed to the court by all five undertakings subject to the fine. Three undertakings entered settlement agreements with the Competition Council by which the fines were substantially reduced (the settlement agreements are administrative agreements that can be entered into in litigation stage of the case to close the case; by the settlement agreement the Competition Council can reduce the fine and/or change the imposed obligations). The appeals of the remaining two undertakings were rejected and the decision of the Competition Council was upheld by the court.

At the beginning of 2011 the Competition Council by its decision of 3 May 2011 (case No P/09/05/4) has joined the growing number of competition authorities which have fined banks for agreeing on multilateral interchange fees (MIF). In Latvia, fines totalling almost LVL 5.5 million (approx. USD 10.6 million) have been imposed on 22 banks. The multilateral agreements concluded by the banks in 2002 have been characterized by the Competition Council as distortions of competition and therefore illegal. According to the Competition Council, the principal negative effect of MIF was appearance of a “floor” beneath merchant service charges. The authority did not attach much weight to evidence that in an appreciable number of cases the banks had in fact set merchant service charges below MIF. Merchants were said to have included the costs into prices, thus mediating consumer harm. The Competition Council was equally unimpressed by demonstration that in the absence of domestic MIF the generally higher regional cross-border MIF would have been applicable, and that costs of handling banknotes and coins well exceed the costs of electronic payment processing. Of note is the fact that the Competition Council did not qualify MIF arrangement as a cartel although it stated that the arrangement comprises restriction of competition by object and calculated fines within the bracket set for cartels and market partitioning. The majority of the fined banks have appealed the decision of the Competition Council and judicial review is pending.

Decisions of the Competition Council increasingly show that it is determined to impose higher fines on the participants of cartel agreements. Until 2008, the highest fine applied by the Competition Council to members of cartels constituted 1.5 per cent of the net turnover for the previous financial year. In 2008, a fine in the amount of 4 per cent of the net turnover for the previous financial year was applied to one of the cartel members (decision in case No. P/08/10/4 on violation of the provisions of article 11, item 5 of the Competition Law, by SIA GSK Auto et al of 17 September 2008).

5. Unilateral Conduct

5.1. Assessment of dominance

Article 13(1) of the Competition Law, which is nearly a carbon copy of Article 102 of the

Treaty on the Functioning of the European Union, prohibits abuse of a dominant position in any manner in the territory of Latvia.

5.1.1. Relevant market definition

The relevant product market is defined as a specific product market, which also includes products that may be substitutes to a specific product in a particular geographical market, taking into consideration the factor of substitution of supply and demand and specific characteristics of the product and its use.

The relevant geographical market is a geographical territory in which competition conditions in a relevant product market are sufficiently homogeneous for all market participants, and therefore this territory can be distinguished from the other territories.

In November 2006 the Competition Council issued informal Guidelines on Determining of the Relevant Market and Evaluation of the Competition Conditions. EU case law and the guidelines of the European Commission may also be used as reference by the Competition Council and market participants. In general, the market definition does not differ for merger control purposes.

5.1.2. Criteria for dominance

According to the Competition Law, a dominant position is defined as an economic (commercial) position in a relevant market of a market participant or several market participants if such participant or participants have the capacity to significantly hinder, restrict or distort competition in any relevant market for a sufficient length of time by acting with full or partial independence from competitors, clients or consumers.

The current definition of a dominant position refers only to market power. Consequently, there is no formal market-share threshold above which a company will be presumed to be dominant. However, in line with the earlier wording of the Competition Law, one may expect that the Competition Council will pay particular attention to companies having a market share above 40 per cent.

5.2. Abuse of a dominant position

An open list of categories of abusive conduct specified in the Competition Law includes:

- refusal to enter into transactions with other market participants, or amending the provisions of a transaction without an objectively justifiable reason;
- restriction of the amount of production or sale of goods, the market or technical development to the detriment of consumers without an objectively justifiable reason;
- imposition of provisions according to which the entering into, amendment or termination of transactions with other market participants makes such participants dependent on them, or that make these market participants accept such additional obligations as, by their nature and commercial use, have no connection with the particular transaction;
- direct or indirect imposition or application of unfair purchase or selling prices or other unfair trading provisions; and

- application of unequal provisions in equivalent transactions with other market participants, creating for them, in terms of competition, disadvantageous conditions.

The Competition Law follows a form-based approach to identifying anti-competitive conduct. Lack of a negative effect or elimination of negative effect by the undertaking that has committed an abuse of dominant position in certain circumstances may serve as grounds for a decrease of penalties to be imposed.

There is no requirement to demonstrate that dominance and abuse occurs in the same market. For example, abuse may occur when the undertaking dominant in one relevant market leverages its economic power to gain position in another market. Likewise, there is no requirement to demonstrate economic benefit of the dominant market participant to prove the abuse.

5.3. Investigation and procedure

The Competition Council monitors the compliance of dominant market participants with the competition rules. Violations of the Competition Law may also be found by the courts.

The Competition Council collects information necessary for adopting a decision on the matter. As a general rule, the persons involved must provide the information requested by the Competition Council within seven days of the relevant request.

The Competition Council's investigative powers are quite broad (see Section 2.3 above).

According to administrative procedure law, the administrative authority shall prove the facts upon which it bases its decision. If the decision of the Competition Council is appealed, the Competition Council may only refer to those grounds that have been stated in its decision. No additional evidence may be provided in court. Recent court practice suggest that also the market participants might be precluded from filing to the court evidence or reasoning not provided during the administrative stage of the case.

The market participant has a duty to prove the facts upon which it relies to challenge the decision of the Competition Council. The market participant may prove that it does not hold a dominant position in any particular relevant market by providing information that shows that it does not possess an ability to act independently of its competitors, clients or consumers for a sufficiently long period of time. If the dominant position of the market participant is demonstrated and certain of its activities are claimed to be abusive, various factual defenses may be raised, such as an objectively justified reason for refusal to enter into a transaction with any particular market participant, or economic circumstances that result in the setting of a particular price for the products.

According to the principle of objective investigation, the administrative court itself shall collect evidence if the evidence submitted by the parties is not sufficient. As a result, during the hearing the court may order the parties to file additional evidence or request information from other persons.

All decisions of the Competition Council, excluding certain interim procedural decisions, may be appealed in the Administrative Regional Court within a term of one month from the effective date of the decision. Decisions by the Administrative Regional Court may be appealed on points of law to the Administrative Department of the Senate of the Supreme Court.

5.4. Sanctions and remedies

Abusive practices are prohibited. Upon finding the abuse of a dominant position, the Competition Council adopts a decision regarding the establishment of the infringement, imposition of the legal obligation (for example, to cease illegal activities or to undertake certain activities) and imposition of a fine.

The abuse of a dominant position may be punished by a fine of up to 5 per cent of the net turnover of a market participant for the previous financial year, but no less than LVL 250 (USD 484). If the market participant fails to fulfill the imposed legal obligation, the Competition Council may increase the fine up to 10 per cent of the net turnover of the market participant for the previous financial year, but not less than LVL 500 (USD 969).

Powers to impose a legal obligation have for the most part involved decisions to order suspension of illegal activities. In some cases more forward-looking behavioral remedies have been ordered. For example, the Competition Council may order the company to prepare a methodology of price determination and price calculation or to ensure maintenance of separate accounting for the specific segment of its business.

Structural remedies are not expressly provided for under the Competition Law and have not been imposed in dominance cases so far; however, presumably 'imposition of the legal obligation' may also involve provision of structural remedies.

Since the beginning of 2009 the Competition Council has started to actively use a possibility to close investigations subject to written commitments of the undertakings investigated, for example, a commitment to apply proportionate and non-discriminatory rebates and payment terms.

According to the Competition Law, any person that has suffered losses due to the infringement of the Competition Law is entitled to claim compensation of losses and statutory interest from the guilty market participant. At the request of the claimant, the court may determine the amount of damages at its discretion, deriving from strict civil law principles requiring detailed substantiation of the actual amount of damages.

An award of compensation is within the jurisdiction of the courts of general jurisdiction and not the Competition Council. Therefore, an action for damages must be brought before the relevant court.

There are no reported decisions granting damages in claims for abuse of dominant position.

See Section 1.2. on "criminalization" of offences.

5.5. Precedent cases

As noted above, the Competition Council has frequently used a possibility to close investigations subject to written commitments of the undertakings investigated. Thus, in 2009 the Competition Council accepted the commitments offered by SIA Forum Cinemas being a dominant film distributor and also the operator of one of the biggest cinemas in Riga. The investigation was closed subject to written undertakings by SIA Forum Cinemas not to request from competitors information on the prices of tickets or unreasonably high bank guarantees, not to impose unjustified marketing requirements and an undertaking to implement structural measures aimed at discontinuation of cross-subsidization of activities on the markets of film distribution and demonstration.

In 2012 the Competition Council verified compliance of SIA Forum Cinemas with written undertakings. As a result, the Competition Council fined SIA Forum Cinemas for non-compliance with its written commitments made in 2009. Interestingly, although SIA Forum Cinemas had breached almost all of its written commitments, the Competition Council imposed a fine of mere 0.6 per cent of the net turnover only which is slightly above the minimum fine to be applied for abuse of dominant position. The fine was reduced by 50 per cent because SIA Forum Cinemas terminated prohibited actions during the investigation by the Competition Council.

In 2012 the Competition Council took a number of other noteworthy decisions in dominance cases. A decision issued against PSIA Udeka, a company owned by the municipality of Ventspils, demonstrates that abuse of government process may qualify as abuse of dominant position. The Competition Council established that under the regulations issued by the municipality of Ventspils PSIA Udeka, had exclusive rights to organise water supply in the municipality of Ventspils and to inspect installed water metering equipment. The regulations were issued on the basis of the Act on Municipalities according to which the organisation of water supply is a public law function of a municipality. PSIA Udeka withdraw the rights previously delegated rights to other undertakings to remove verification seals before change of equipment and the rights to verify newly installed equipment. Customers had to buy the services of removal of seals and verification of equipment from PSIA Udeka. Due to additional costs and inconvenience caused, many customers switched from their regular installation service providers to PSIA Udeka. As a result, several market participants were forced to exit the market.

The Competition Council established that the municipality of Ventspils exceeded its authority in adopting the respective regulations and, thus, intervened in private relations and distorted competition. The Competition Council had no competence to revoke regulations adopted by the municipality in violation of the competition rules but it imposed a fine on PSIA Udeka.

The Competition Council took a decision finding a violation of Article 102 of the Treaty on the Functioning of the European Union in the activities of Airport Riga. The Competition Council established that Airport Riga charged from airline Air Baltic fees which were 82% higher than the fees charged from Ryanair for similar services. Remuneration for the services to Air Baltic was based on the number of the planes served, while for Ryanair a fixed fee per passenger was charged. The Competition Council stated that, although the airport has right to apply different methods for the calculation of service fees, the fees thus determined should

not be discriminatory.

Also, the Competition Council investigated level of fees imposed by Latvian performers' and phonogram producers' rights collective management society LaIPA. The Competition Council concluded that the fees for public performance of phonograms applied by LaIPA are not unfair because the fees payable by shops and other service providers are not excessive in comparison with the fees payable in other Baltic states. The information obtained by the Competition Council during the investigation showed that the fees charged by LaIPA are approximately two times higher than the fees charged in Lithuania and broadly similar to the fees charged in Estonia. The decision demonstrates that dominant undertakings operating in Latvia must regularly review the prices charged against the prices charged for the same products or services in Lithuania and Estonia. If the prices in Lithuania and Estonia are substantially lower than the ones charged in Latvia, dominant undertaking must be ready to explain such difference to the Competition Council.

5.6. Dominance in retail trade

At the beginning of 2008, the concept of dominance in retail trade was introduced in the Competition Law. An undertaking would be considered dominant in retail trade, if having regard to its purchasing power for a sufficiently long period of time and the dependence of the suppliers in the relevant market the undertaking has an ability to apply or force, directly or indirectly, on suppliers unfair or unreasonable terms and conditions or payments, and it may prevent, restrict or distort competition on any relevant market in Latvia.

A dominant position in a retail market is considered to be abused by the following behavior:

- applying or forcing unfair or unreasonable conditions in respect of return of goods, except for return of goods of inferior quality and return of goods supply of which or the increase of the volumes of supply of which were initiated by the supplier itself;
- by applying or forcing unfair or unreasonable payments in respect of placement of goods in retail premises, including shelving payments and payments for marketing events, except if those payments are justified by introducing in the market a new product not known to consumers;
- by applying or forcing unfair or unreasonable payments in order to enter into a contract unless these payments are justified on the grounds that the contract is entered into with a new supplier which as such requires a specific appraisal;
- by applying or forcing unfair or unreasonable payments for supplies of goods to a new retail location;
- by applying or forcing unfair or unreasonable payment settlement deadlines for the supplied goods; settlement period for foodstuffs with validity term of up to 20 days shall be considered unfair and unreasonably long if it exceeds 30 days from the delivery date;
- by applying or forcing unfair or unreasonable sanctions in respect of violation of the terms of a transaction.

As distinct from the existing concept of abuse of dominant position under the Latvian Competition Law, the list of abuses of dominant position in retail trade is an exhaustive list.

An undertaking in breach of prohibition of abuse of dominant position in retail trade may be

subject to a fine in the amount of up to 0.05% of its turnover for the previous financial year, in respect of its first offence, or in the amount of up to 0.2% of its turnover for any subsequent offence.

The concept of abuse of dominant position in retail trade is in addition to, and not *in lieu* of the general prohibition of abuse of dominant position. Therefore, where the relevant behavior would constitute both an abuse of dominant position in retail trade and breach of the general prohibition of abuse of dominant position, it will be prosecuted as a breach of the general prohibition of abuse of dominant position, and as such will be subject to more substantial penalties.

In 2012 the courts of first instance adjudicated first two cases dealing with the abuse of dominant position in retail trade. The Administrative Regional Court ruled in favour of RIMI Latvia in a dispute over the decision of the Competition Council which decision established that provisions on discounts to be granted for supplies to the hard discounters chain of RIMI - Supernetto - constituted abuse of dominant position in retail trade. In this relatively short judgment the Administrative Regional Court arrived at several significant conclusions. The court agreed with an economist engaged by RIMI Latvia 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.

The court noted in its judgment that restrictions of competition are justified if they serve a public interest. Therefore, when investigating potential abuse of dominant position in retail trade, 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.

In another dominant position in retail case (Maxima case) the Administrative Regional Court took a traditionally formalistic approach and considered justified the finding of the Competition Council that payment settlement term of 60 days is unreasonably long and constitutes abuse of dominant position in retail. This conclusion was not affected by the fact that the retailer was paying to the supplier a financing charge of 11% p.a. for the amounts outstanding for more than 30 days. Impact of the contractual provision on consumers' interests was not analyzed at all by the court in this case.

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