Latvia

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The competition legislation in Latvia is comparatively new. The current competition rules are set out in the Competition Law, effective as of 1 January 2002. 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 relatively slim.

The Latvian Competition Council, the authority enforcing the competition rules in Latvia, was established in January 1998. The Competition Council consists of four members and a chairman, all appointed for a five-year term by the Cabinet of Ministers upon recommendation of the minister of economics. Decisions of the Competition Council are taken by a simple majority vote. The day-to-day work of the Competition Council is carried out by the Competition Office, managed by the office director. The work of the Office is organised in six departments. At the time of writing, the Competition Council employs 53 staff.

2 What is the substantive law on cartels in the jurisdiction?

Article 11 of the Competition Law closely follows the wording of article 81 of the EC Treaty, 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 where by 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. 862 of the Cabinet of Ministers (effective 23 October 2004) 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).

The term 'cartel' in Latvia is commonly used to denote any horizontal agreements or concerted practices aimed at the prevention, restriction or distortion of competition, however, technically the notion (at least for the purposes of the leniency programme) is limited to the above-listed types of agreements.

Latvian competition law has preserved a notification system; therefore, a prima facie prohibited agreement may benefit from exemption if notified to the Competition Council prior to an investigation being commenced and provided that the Competition Council determines that the agreement:

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

There have been very few prohibited agreements which have been notified to the Competition Council for exemption and none of them has involved agreements which 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 1/2003 requires national competition authorities when applying national competition law to agree-

ments 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 81(1) of the Treaty or which fulfil the conditions of article 81(3). So far, there is no relevant case law demonstrating how the requirement for individual exemption to be obtained under Latvian Competition Law is affected by the requirement under Council Regulation 1/2003 not to prohibit agreements and concerted practices fulfilling conditions of article 81(3).

Latvian law does not provide criminal liability for breach of cartel provisions. Liability is either administrative or civil.

3 Are there any industry-specific offences and defences?

There are no industry-specific offences or defences.

4 Does the law apply to individuals or corporations or both?

The provisions of the Competition Law apply to any market participant. A market participant is defined broadly as any person (including a foreign person) carrying out or intending to carry out economic activities in the territory of Latvia or whose activities affect or are capable of affecting competition in the territory of Latvia.

5 Does the regime extend to conduct that takes place outside the jurisdiction?

The definition of a market participant under Latvian law also covers foreign persons and activities performed outside of Latvia if such activities affect or are capable of affecting competition in the territory of Latvia.

6 Are there any proposals for change to the regime?

At the time of writing, extensive amendments to the Competition Law are in process. The proposed amendments cover issues relating to the competence of the Competition Council and certain procedural issues, as well as introducing a number of substantial amendments to the basic provisions of the Competition Law.

It is proposed to amend the definition of a dominant position by removing the market share threshold of 40 per cent per cent as a prerequisite for finding a dominant position. The most criticised proposal would introduce a definition of 'substantial influence on the retail market'. The amendment is a result of the growing tension in dealings between local food producers and retail chains. 'Substantial influence' would be defined as the economic position of a retail market participant or several retail market participants acting together on the basis of franchise agreements or horizontal cooperation agreements if its or their retail market share is at least 25 per cent. The market participants holding substantial influence on the retail market shall be prohibited from abusing such a position in any manner. At the same time, the standard of conduct to be imposed on the retail market participants holding substantial influence is not entirely clear.

One of the merger notification thresholds has been decreased from 40 per cent of the combined market share of the parties to the merger to 35 per cent of the combined market share. The amendments contain long-awaited provisions setting forth the possibility of submitting a short-form merger notification in cases of conglomerate mergers and in cases where the combined market share of the parties involved does not exceed 15 per cent.

The amendments will provide a possibility for market participants to evaluate for themselves the availability of an exemption from the prohibition of agreements and concerted practices on the basis of efficiency considerations, at the same time preserving possibility of applying for individual exemption.

Investigation

7 What are the typical steps in an investigation?

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.

In practice, dawn raids have not been used particularly often as a means of conducting investigations. Most often, the Competition Council has provided 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 a cartel 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. The Competition Council is required to provide notice to the parties that the necessary facts have been established. In practice, the notice comprises of a relatively extensive account of the facts and preliminary conclusions made. The final decision will be largely based on the text of the notice. 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.

8 What investigative powers do the authorities have?

The investigative powers of the Competition Council in cartel investigations 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.

Regarding entrance into vehicles, private residences and other moveable or immoveable 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 immoveable property, the Competition Council also has the right to inspect such property, subject to the court's decision.

The Competition Council may fine market participants for failure to comply with its requests for information, documents, explanations, access to premises and other property.

Although not explicitly stated in the Competition Law, the duty to cooperate during the investigation is limited by the right to remain silent, ie, not to incriminate oneself. However, the privilege against self-incrimination does not cover handing over the documents which the company must produce to the officials upon their request. Such documents have to be produced even if they contain information establishing the company's participation in illegal activities.

International cooperation

9 Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

The Competition Council regularly cooperates at an international level with other competition authorities.

The Competition Council is entitled and has a duty to apply EU Competition Law and thus closely cooperates and shares competences with the EU Commission, DG Competition and the competition authorities of the other member states. The Competition Council participates in the European Competition Network (ECN), which is a formal cooperation forum for European competition authorities and the European Commission. The ECN enables the authorities to share information on pending cases, to allocate enforcement work and to coordinate their investigations, eg, in international cartel cases. Competition authorities increasingly aim to coordinate their investigations and conduct simultaneous dawn raids in various countries so as to maintain the surprise element of inspections.

In addition to the ECN, the Competition Council occasionally informally contacts neighbouring competition authorities to coordinate their approach.

Latvian Competition Council is also a member of the International Competition Network and cooperates with the OECD.

10 How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

The EU Competition Law is directly applicable in Latvia and the Commission and the Competition Council apply these rules in close cooperation. The Competition Council is entitled to initiate proceedings for breaches of the EU competition rules and is obliged to assist the Commission in its investigations. The Latvian courts are also entitled to establish violations of EU Competition rules and decide on granting the EU Commission authority to carry out investigations in the territory of Latvia. If the Latvian court establishes a violation of the EU competition rules, it is required to provide the EU Commission with a copy of the decision within seven days after the issue of full decision.

The Competition Council and the police shall assist the EU Commission when carrying out cartel investigation proceedings in Latvia.

Adjudication

11 How is a cartel matter adjudicated?

The national authority responsible for the enforcement of the Competition Law and EU competition rules in Latvia is the Competition Council, operating under supervision of the Ministry of Economics. The Competition Council performs investigations and also makes the final 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.

12 What is the appeal process?

All decisions of the Competition Council, excluding certain interim procedural decisions, may be appealed in the District Administrative Court within a term of one month from the effective date of the decision. Decisions by the District Administrative Court may be appealed in the Administrative Regional Court and in limited circumstances to the administrative department of the senate of the Supreme Court.

Decisions of the courts of general jurisdiction granting permissions to exercise certain investigative activities can be appealed to the relevant regional court of general jurisdiction.

13 With which party is the burden of proof?

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.

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.

Sanctions

14 What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

Cartel activity is not a criminal offence under Latvian criminal law. However, criminal sanctions may be imposed for repeated failure to comply with the legal requirements of the Competition Council if the conduct is committed repeatedly within a period of one year or if substantial harm is caused to the legitimate interests of the state or consumers. The sanctions applied for the above offence are: (i) imprisonment for up to two years; (ii) community service; or (iii) a fine of a maximum of 100 times the minimum monthly salary (currently 120 Latvian lats or approximately €170), with or without restrictions on engaging in commercial activities for between two and five years.

So far, the above criminal sanctions have not been applied in Latvia.

15 What civil or administrative sanctions are there for cartel activity?

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 500 Latvian lats (approximately €700).

16 Are private damage claims or class actions possible?

The Competition Act expressly provides for the obligation of a market participant who deliberately or negligently violates the competition rules to compensate damages caused by the infringement. The award of compensation is within the jurisdiction of the courts of general jurisdiction. So far, there are no publicly available decisions on 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 prohibited restriction of competition. A claim for damages is subject to a general 10-year limitation period which commences on the date on which the person became aware, or should have become aware, of the damage. Punitive or exemplary damages are not available under Latvian law. Similarly, class actions in their usual meaning are not possible in Latvia.

17 What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated?

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. During 2006 the Competition Council has imposed fines on the members of five cartels. During 2007 the activity of the Competition Council in the area of fighting cartels has slightly decreased. It imposed fines on the members of two cartels (tenderers who were acting in concert during public procurement procedures). In two other cases the Latvian Architects Society and the Latvian Association of Civil Engineers were obliged to change their internal regulations (code of ethics and decisions on minimum hourly rates). Prior to 2006, there were very few cartel cases investigated.

As stated above, participants to cartel agreements may become subject to an administrative fine of up to 10 per cent of their net turnover for the previous financial year and the law does not set a maximum amount of fine. When determining the amount of fine, the Competition Council has to consider the gravity and duration of the infringement. According to Regulation No. 862 of the Cabinet of Ministers, all infringements are divided into three groups (minor infringements, serious infringements and very serious infringements). According to this regulation, horizontal cartel agreements qualify as very serious infringements. For very serious infringements, fines shall be calculated from 1.5 to 7 per cent of the net turnover for the previous financial year for each cartel participant.

Furthermore, the regulation contains a list of mitigating and aggravating circumstances. If the infringement lasts for more than one year, the fine shall be increased by up to 0.5 per cent. If the infringement lasts for more than five years, the fine shall be increased by between 0.5 and 1 per cent. Mitigating and aggravating circumstances are then taken into account to determine the final amount of the fine.

The highest fines applied by the Competition Council to members of cartels so far constitute 1.5 per cent of the net turnover for the previous financial year. The lowest fine applied is 500 Latvian lats (approximately €700).

Sentencing

18 Do sentencing guidelines exist?

Regulation No. 862 of the Cabinet of Ministers contains guidelines that shall be taken into account by the Competition Council when determining fines for cartel activities.

19 Are sentencing guidelines binding on the adjudicator?

The guidelines set forth in the aforementioned Regulation No. 862 are binding.

Leniency or immunity programmes

20 Is there a leniency or immunity programme?

As of 23 October 2004, Regulation No. 862 introduced the leniency programme, ie, the possibility of receiving immunity or reduction of fines for those participants of a horizontal cartel agreement that have cooperated with the Competition Council. This regulation in general mirrors the leniency policy applied by the European Commission, although the fine reduction percentages differ. The policy is described in more detail under question 21.

At the time of writing, no undertaking operating in Latvia has resorted to the possibilities afforded by leniency programme.

21 What are the basic elements of a leniency or immunity programme?

The leniency programme has three basic elements: (i) full immunity; (ii) a reduction of the fine of between 50 and 90 per cent; and (iii) a reduction of the fine of between 30 and 49 per cent. If the fine is reduced, the minimum fine shall not be less than 500 Latvian lats (approximately €700).

22 What is the importance of being 'first-in' to cooperate?

Full immunity is available only to the 'first-in' to cooperate and provides for a full release from the fines to be imposed. To qualify for full immunity, the market participant should meet all of the following criteria:

- the market participant is the first one to notify the existence of the cartel and at the time of notification the Competition Council does not possess information allowing it to initiate an investigation or establish an infringement;
- the market participant has supplied the Competition Council with all the information and evidence at its disposal;
- the information or evidence is sufficient to initiate an investigation or to establish an infringement;
- the market participant actively cooperates with the Competition Council during the entire investigation; and
- the market participant has not been an instigator of the cartel or leading participant of it.

23 What is the importance of going second? Is there an 'immunity plus' or 'amnesty plus' option?

The market participant may apply for a reduction of fine if the

Update and trends

As noted above, 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. However, during 2007 the activity of the Competition Council in enforcement of anti-cartel provisions has decreased compared to its activities in 2006. Although on a number of occasions the Competition Council has commenced investigations on its own initiative, as well as following applications by the private entities and state institutions, according to publicly available information at the time of writing dawn raids have been carried out only in two cases. Decreased activity in this area may be explained by limited human resources of the Competition Council and increased workload on the side of merger filings, which have more than doubled compared to 2006. At the same time, from the public announcements of Competition Council it can be seen that the representatives of the Competition Council are attending various international events in order to strengthen their expertise in the area of cartel enforcement.

information provided by such market participant is substantial for finding the infringement and the market participant has actively cooperated with the Competition Council during the investigation:

- a 50 to 90 per cent reduction is available to the first to provide information (provided it has not been an instigator of the cartel or a leading participant of the cartel); and
- a 30 to 49 per cent reduction is available to any subsequent parties.

The penalty cannot be reduced in return for information on a different, previously unknown infringement. According to Regulation No. 862, the penalty can be reduced only for the infringement regarding which the party submits evidence.

24 What is the best time to approach the authorities when seeking leniency or immunity?

If the market participant has decided to cooperate with the Competition Council, it is advisable to do so as promptly as possible to be in a position to derive the benefits of being the 'first in'. However, the market participant should assess whether it can comply with the criteria set forth in the regulation to benefit from full or partial immunity.

25 What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

The Latvian laws do not afford special confidentiality guarantees to the leniency applicant or to any other cooperating party. In general, market participants who have decided to cooperate have to take into account that the rights of access to the file afforded to the market participants under investigation, the publication of a decision and eventual court proceedings can result in the identification of the leniency applicant.

26 What is needed to be a successful leniency or immunity applicant?

There are no special standards. However, the applicant has to make sure that all the criteria set in Regulation No. 862 for full immunity or partial reduction of fine are met.

27 Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

The Latvian laws do not provide for such authority. A market participant wishing to take advantage of the leniency programme shall file a leniency application with the Competition Council (see question 30). On the basis of the application the Competition Council must decide whether it complies with all the criteria described in questions 22 and 23.

28 What is the effect of leniency or immunity granted to a corporate defendant on its employees?

The provisions of the Competition Law apply to undertakings only. Thus, penalties under the Competition Law may not be imposed on individuals in their capacity as employees of the undertaking. Leniency granted does not affect the liability of the management towards shareholders under corporate law or of employees towards the company.

29 What guarantee of leniency or immunity exists if a party cooperates?

Once a leniency application (see question 30) is filed with the Competition Council, the Council will examine it and will notify the applicant of whether the motion is accepted or rejected. The market participant will benefit from the leniency programme only if it complies with all the criteria described in questions 22 and 23. This, inter alia, means that the market participant has to actively cooperate with the Competition Council during the whole process of investigation.

30 What are the practical steps in dealing with the enforcement agency?

A market participant wishing to take advantage of the leniency programme shall file a leniency application with the Competition Council, stating the grounds for granting full immunity from fines or a reduction of the fine. The application should be accompanied by evidence supporting the applicant's compliance with requirements of the leniency programme. The application can be submitted either by the market participant itself or by counsel acting on behalf of the market participant.

31 Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

At the time of writing, there are no proposed leniency/immunity policy assessments or policy reviews.

Defending a case

32 May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

Generally, there are no strict rules regarding the representation of employees and corporations. The main concern is normally general conflicts of interest, if any exist. The fact that there is no employee liability under the Latvian Competition Law should be taken into account. The necessity of a legal advice for employees should be determined on a case-by-case basis.

33 May counsel represent multiple corporate defendants?

Yes, unless such counsel has a conflict of interest.

34 May a corporation pay the legal costs of and penalties imposed on its employees?

The law does not prohibit a market participant from covering the legal costs of its employee, however, such costs will be treated as unrelated to business for accounting purposes. If the employee is sued by the corporation for exceeding his or her powers, there will be no grounds to cover his or her legal costs.

Getting the fine down

35 What is the optimal way in which to get the fine down?

The amount of the fine in Latvia is determined by the Competition Council and, if appealed, may be reduced by the court. To obtain the leniency treatment, as stated in the question 30, the market participant should submit an application to the Competition Council and satisfy all the criteria required by law. When determining the amount of the fine, the Competition Council should take into account mitigating and aggravating circumstances. Therefore, the existence of mitigating circumstances and the provision of evidence of such may reduce the amount of the fine.

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