Competition in Latvia: Latvian Courts Rediscover the “Object and Effect” Distinction

On February 3, 2014, the Supreme Court of Latvia decided case No. SKA-3/2014 [Rimi Latvia et al.] putting an end to a long and at times exasperating argument between Latvian competition law practitioners and the judiciary regarding the “object or effect” distinction under Latvian Competition Law.

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In essence, the dispute concerned the approach taken by the Competition Council, which found all types of agreements listed under Article 11(1) of the Competition Law (Latvian equivalent of Art. 101(1) TFEU) as anti-competitive per se, thus essentially negating the requirement to evaluate whether a particular agreement was anti-competitive by “object or effect”. This approach was convenient for the Competition Council, as it eliminated any need for in-depth analysis, and allowed the Council to label any arrangement as anti-competitive regardless of the factual background. And the approach found unexpected and strong support in the courts. The Supreme Court, in 2009, delivered a judgment in case No. SKA-234 stating that all types of agreements listed under Article 11(1) of the Competition Law are to be regarded as agreements whose object is anti-competitive and usually result in hindrance, restriction, or distortion of competition.

This passage became widely cited in subsequent judgments. In reaction to the Supreme Court's decision, the shocked members of the competition law community

engaged in heated debate on an academic level, and tried, by referring to EU law, decisions of the EC, and judgments of the European Courts, to persuade the Latvian courts to return to a proper interpretation of Article 11(1) and to acknowledge that the sample list of agreements contained in Article 11(1) does not necessarily mean that every such agreement restricts competition 'by object'. Interestingly, the position of the Competition Council in this debate was somewhat evasive, as it undoubtedly realized that the Supreme Court was mistaken, however on a number of occasions it was all too convenient for the Council to rely on this misconception.

The case which finally has allowed the Supreme Court to change its position on this basic competition law concept involved the terms of trade center lease agreements under which the lessees, companies belonging to a large retail chain, restricted the ability of the lessor to lease premises to competitors of the retail chain. The Competition Council ruled that such agreements are restrictive per se. The Supreme Court stated that the content, aim, and the current and intended economic and legal context of the agreement must be taken into account in order to evaluate whether the agreement has an anti-competitive object. The Supreme Court also admitted that its statement in the judgment of 2009 must be adjusted in the light of the above.

Despite formally changing its interpretation of the law, the Supreme Court refused to revoke the decision of the Competition Council in the case before it – essentially allowing its former position to stand. In other words, the Supreme Court considered that the failure of the Competition Council to evaluate the market shares of the parties in the market of trade centers lease was not material and blamed the appealing parties for failing to provide more specific data.

The Supreme Court also stated that the fact that an undertaking is penalized for a type of violation which does not have precedents should not have any bearing on the amount of penalty imposed, because if adjusting a penalty on this account would "endanger effective implementation of competition policy and trivialize the liability of undertaking's management." According to the Supreme Court, undertakings have ample possibilities to clarify their legal position, including individual exemptions, private legal advice, and even public advice, issued in response to a specific request, that later binds the authority. The last item marks yet another expanding battleground: namely, the scope of Competition Council's obligation to issue ex–ante advice that the authority cannot retract to the disadvantage of the recipient.General administrative law clearly provides private entities this path to legal certainty, yet the Latvian competition authority occasionally has been reluctant to issue such ex–ante advice.

The meandering journey of court practice demonstrates that Latvian judges are struggling hard to apply basic concepts of competition law. This may be the true reason behind the striking statistics of the success rate of the Latvian Competition Council: for at least the last four years the Competition Council has not lost a single case in the final instance. The website of the authority identifies only 6 revoked decisions in the past 12 years.

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