GETTING THE DEAL THROUGH

GCR
GLOBAL COMPETITION REVIEW

Dominance

in 39 jurisdictions worldwide

2012

Contributing editors: Thomas Janssens and Thomas Wessely

Published by
Getting the Deal Through
in association with:

Amarchand & Mangaldas & Suresh A Shroff & Co
Baker & McKenzie
bnt attorneys-at-law
DLA Piper Norway DA
Dryllerakis & Associates
ELIG Attorneys-at-Law
Elvinger, Hoss & Prussen
Freshfields Bruckhaus Deringer
Gilbert + Tobin
Lachenal & Le Fort
Larreátegui, Meythaler & Zambrano Abogados
Magalhães, Nery E Dias Advocacia
Markiewicz & Sroczyński GP
Marques Mendes & Associados
Mboya Wangong'u & Waiyaki Advocates
Merilampi Attorneys Ltd
Nielsen Nørager Law Firm LLP
Posse, Herrera & Ruiz SA
Raidla Lejins & Norcous
Sayenko Kharenko
Shin & Kim
SimmonsCooper Partners
Stikeman Elliott LLP
Ţuca Zbârcea & Asociaţii
Urenda, Rencoret, Orrego y Dörr
Valdes Abascal y Brito Anderson SC

GETTING THE DEAL THROUGH

Dominance 2012

Contributing editor
Thomas Janssens and
Thomas Wessely
Freshfields Bruckhaus Deringer

Business development managers
Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers
Ellie Notley
Alice Hazard

Marketing assistants
William Bentley
Zosia Demkowicz

Marketing Manager (subscriptions)
Rachel Nurse
Subscriptions@GettingTheDealThrough.com

Assistant editor
Adam Myers

Editorial assistant
Lydia Gerges

Senior production editor
Jonathan Cowie

Chief subeditor
Jonathan Allen

Subeditors
Davet Hyland
Caroline Rawson
Sarah Morgan

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Dominance 2012
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

ISSN 1746-5508

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law Business Research

CONTENTS

Latvia

Dace Silava-Tomsone and Sandija Novicka

Raidla Lejins & Norcous

General

1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

The behaviour of dominant firms is regulated by the Competition Law (CL), effective as of 1 January 2002. The secondary legislation comprises regulations issued by the Cabinet of Ministers.

Article 13(1) of the CL, which is nearly a carbon copy of article 102 of the Treaty on the Functioning of the European Union (TFEU), prohibits abuse of a dominant position in any manner in the territory of Latvia.

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

The CL empowers the Competition Council (CC) to prohibit a merger as a result of which a dominant position is created or strengthened, or competition is substantially lessened. Also, the CL prohibits and declares null and void agreements between market participants, the purpose or effect of which is hindrance, restriction or distortion of competition in the territory of Latvia, including agreements regarding:

- any form of direct or indirect fixing of prices or tariffs or guidelines for their formation, as well as regarding exchange of information relating to prices or provisions regarding sale;
- restriction or control of the volume of production or sales, markets, technical development or investment;
- division of markets by territory, customers, suppliers or other conditions;
- provisions that make the conclusion, amendment or termination of a transaction with a third person subject to 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 unequal provisions in equivalent transactions with third parties, creating 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 the entry of a potential market participant into the market is made more burdensome.

The above list is not exhaustive and aims to highlight only the gravest violations of the competition rules. Each agreement has to be assessed on its own merits and against the background of possible effects on competition.

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

The object of the CL is defined as the protection, maintenance and development of free, fair and equal competition in the interests of the public in all economic sectors and restriction of market concentration.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms? Is your national law relating to the unilateral conduct of firms stricter than article 102 TFEU (formerly article 82 EC Treaty)?

At the beginning of 2008, the concept of dominance in retail trade was introduced in the CL. According to article 13(2), a market participant or several market participants are in a dominant position in retail trade if, taking into account the purchasing power of such participants for a sufficient length of time and the dependency of the suppliers on such participants in the relevant market, they have the capacity to directly or indirectly apply or impose upon the suppliers unfair and unjustified trading provisions, conditions or payments and may hinder, restrict or distort competition in any relevant market in Latvia.

Any market participant who is in a dominant position in retail trade shall be prohibited from abusing such dominant position in the territory of Latvia. A dominant position in a retail market is considered to be abused by the following behaviour:

- applying or forcing unfair or unreasonable conditions in respect of return of goods, except in the case of return of goods of inferior quality, or the return of goods the supply of which, or the increase of the volumes of supply of which, were initiated by the supplier itself;
- applying or forcing unfair or unreasonable payments or discounts for supply of goods in respect of placement of goods in retail premises, including shelving payments and payments for marketing events, except if those payments are objectively justified by introducing a new product unknown to consumers into the market;
- 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 that requires a special appraisal;
- applying or forcing unfair or unreasonable payments for supplies of goods to a new retail location;
- applying or forcing unfair or unreasonably long payment settlement periods for supplied goods (payment settlement period for foodstuffs exceeding 30 days from the supply date shall be unfair and unreasonably long, if the validity term of the respective goods is no longer than 20 days); or
- applying or forcing unfair or unreasonable sanctions in respect of violation of the terms of a transaction.

Furthermore, the CL contains a general prohibition against unfair competition practices, equally applicable to all market participants. The law prohibits activities that may result in the violation of laws or fair commercial usages and in the hindrance, restriction or distortion of competition. The list of unfair competition practices includes:

- use or imitation of a legally used name, distinguishing marks or other features of another market participant if such use may be misleading as regards the identity of the market participant;
- imitation of the name, external appearance, labelling or packaging of goods produced or sold by another market participant, or use of trademarks, if such imitation or use may be misleading as regards the origin of the goods;
- dissemination of false, incomplete or distorted information regarding other market participants or their employees, as well as economic significance, quality, form of production, characteristics, quantity, usefulness, prices, their formation and other provisions in respect of the goods produced or sold by such a market participant, if it may cause losses to such other market participant;
- obtaining, use or distribution of information that contains the commercial secrets of another market participant without the consent of such participant; and
- coercion of employees of another market participant with threats or bribery to create advantages for one's own economic activity, thereby causing losses to the market participant.

5 Sector-specific control

Is dominance regulated according to sector?

Except for certain provisions applying to the financial sector, no other industries are specifically regulated by the CL.

Certain sector-specific provisions governing activities of the public utilities and other service providers are contained in special laws. For example, the Energy Law expressly prohibits operators of the energy systems to abuse their position by undertaking activities not directly related to fulfilment of their tasks, imposes the obligation to ensure transmission capacities to autonomous producers of energy. Another example is the Electronic Communications Law, which provides that an electronic communications merchant with a significant influence in access and interconnection markets can be made subject to obligations of transparency, equal treatment, provision of access to electronic network, and so on.

Public utilities are supervised by the Public Utilities Commission. One of its tasks is promotion of competition in the regulated sectors.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

Potential violations of the provisions of the CL in the regulated sectors shall be investigated in light of sector-specific legislation and requirements.

For example, during 2003 and 2004 the CC received a number of complaints about potential abuse of a dominant position in the telecoms sector via the imposition of unfair methods for calculating tariffs for interconnections and applying discriminating provisions to new operators. The CC was unable to address the situation, however, because the Electronic Communications Law provides that the contents of the agreements on interconnections and the procedures for their negotiation are subject to the authority of the Public Utilities Commission.

Meanwhile, the CC, in a case regarding alleged abuse of a dominant position by AS Latvenergo (a major Latvian electricity generation company), has ruled that even if the abuse has allegedly resulted due to incorrect application of the rules regulating calculation of tariffs for connection, it does not preclude the CC from investigating the case and assessing whether the dominant position has been abused by the regulated undertaking. This approach has been confirmed by the court of first instance. In 2009 in a case regarding abuse of a dominant position by SIA Alpha Express controlling railway structure qualifying as an essential facility, the CC has ruled that the prices set by SIA Alpha Express have been abusive regardless of the fact that they have been established in accordance with the regulations approved by the Public Utilities Commission.

7 Enforcement record

How frequently is the legislation used in practice?

The CC annually reviews between 10 and 20 cases dealing with alleged abuse of dominant position and finds violations in two to five cases. Nevertheless, the limited number of abuse of dominance cases has not yet created a sufficient basis for dominant companies to evaluate their standard of conduct against the local precedents.

The competitors of dominant undertakings are well aware of the provisions of the CL and do not hesitate to resort to them in cases when abuse is perceived. On the other hand, dominant undertakings are generally well aware of the increased degree of scrutiny their position may invoke.

8 Economics

What is the role of economics in the application of the dominance provisions?

Decisions of the CC are mostly based on factual and legal analysis of the market data, information obtained from the market participants and earlier EU precedents. Although the staff of the CC partly comprises economists, so far complex economic analysis or economic expert witness opinions are usually not part of the proceedings.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

The dominance provisions apply to any market participant. A market participant is defined as any party (including foreign parties) that carries out or intends to carry out commercial activities in Latvia or whose activities affect or may affect competition in Latvia.

According to the case law of the CC, the CL is applicable in respect of state or municipal institutions when they act as market participants in commercial transactions. If state or municipal institutions act within the scope of their public functions, the CL does not apply.

In 2009 the CC reviewed a case involving Riga Free Port Authority. The CC determined that the Riga Free Port Authority breached article 13(1) of the CL by imposing unreasonable technical and administrative requirements for the companies willing to provide towboat services in Riga Free Port. The complaint was submitted by SIA PKL whose market share in towboat services in Riga Free Port was 100 per cent until the Riga Free Port Authority also started to render these services. As a result of the activities of the Riga Free Port Authority the market share of SIA PKL dropped to 24 per cent.

All requirements regarding the towboat services were set by the orders of the Riga Free Port master, who is a public official employed by the Riga Free Port Authority. The CC came to the conclusion that the technical and administrative requirements set by the Riga Free Port master were not objectively justified either by safety reasons or other objective circumstances. Furthermore, the CC established that these requirements were set by the master of Riga Free Port immediately after the Riga Free Port Authority acquired its own towboats and started to offer towboat services in the port.

In line with its previous approach, the CC stated that the activities of the Riga Free Port Authority which related to safety in the port would be seen as being within the realm of its public functions. However, in this case it noted that all the circumstances related to

the orders of the master of Riga Free Port clearly evidence that these orders were aimed at restricting the commercial activities of the authority's competitor and that the master acted in the commercial interests of his employer – the Riga Free Port Authority.

As a result, the CC imposed a fine on the Riga Free Port Authority of 45,000 lats. The Riga Free Port Authority was also obliged to immediately cease activities restricting competition in towboat services in Riga Free Port and to transfer its business of towboat services to a third person. The decision of the CC was upheld by the court.

An unexplained discrepancy between this court practice and the CC's previous case law has been introduced with the decision of 3 March 2011 of the CC in the *Rebes sistemas/Stendes nami* case. In this case the CC decided that the execution by a public entity of functions entrusted to it by law is not subject to the CL. Rebes sistemas SIA and Stendes nami SIA were the two companies providing centralised heating services in the town of Sabile. Both companies leased boilers and heat transmission infrastructure from the municipality of Talsi. In order to reduce heating costs in pursuit of social policy goals, the municipality decided to reduce substantially the rent charged from Stendes nami. Subsequently a similar reduction was sought by Rebes sistemas, but the municipality did not answer, that is, it constructively refused the reduction request. Having failed to secure reduced rental costs, Rebes sistemas could no longer carry on the business and operation of the heat supply infrastructure was taken over by the municipality itself. After this change, the tariff was reduced significantly as rent could now be excluded from the costs. Rebes sistemas complained to the CC about abuse of the municipality's dominant position.

The CC declined to open an investigation and examine the complaint on its merits. Although the authority easily conceded that in the market of heat supply infrastructure leases the municipality was engaged in an economic activity, that it was an undertaking within the meaning of the CL and that it enjoyed dominant position, the decisive fact was that, in accordance with the Act on Municipalities, the organisation of heat supply is a public law function of a municipality. The CC established that the CC is not competent to examine the actions of the municipality because they have been performed in the framework of municipalities' independent functions.

10 Definition of dominance

How is dominance defined?

According to the CL, 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.

11 Market definition

What is the test for market definition?

The CL contains definitions of relevant product and geographical markets.

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 CC issued Guidelines on Determining of the Relevant Market and Evaluation of the Competition Conditions. In August 2008 the CC issued Guidelines on Application of Article 13(2) of the CL dealing with the application of a dominant position in retail trade. Among other things, the Guidelines explain the relevant market definition for the purposes of article 13(2) of the CL. Neither guidelines have a binding effect. EU case law and the guidelines of the European Commission may also be used as reference by the CC and market participants.

In general, the market definition does not differ for merger control purposes.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

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 CL, one may expect that the CC will pay particular attention to companies having a market share above 40 per cent.

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

The CL does not address collective dominance as a separate issue. However, the definition of a dominant position refers to the 'economic position of a market participant or several market participants'. In 2005, the CC analysed the issue of collective dominance in a decision dealing with the review of application by NIKO-LOTO alleging collective dominance held by Latvijas Krajbanka and Latvijas Hipoteku un Zemes Banka in the market of services of managing accounts of privatisation certificates held by legal entities. The CC, with reference to EU case law, concluded that there was no economic relationship between the two banks on the basis of which the banks would present themselves as a collective entity in the market of servicing transactions with privatisation certificates.

In 2007 the CC closed an investigation into alleged abuse of collective dominance against three companies engaged in fuel retail sale – Latvija Statoil, Neste Latvija and Lukoil Baltija R. The CC stated that the three companies held a collective dominant position; however, no abuse of the collective dominant position was found. The joint market share of the parties involved during the period investigated was 49.98 per cent. In its argument the CC referred to a number of EU cases, namely *Italian Flat Glass*, *Airtours* and *Gencor/Lonrho*. The CC stated that several legally independent entities may hold a collective dominant position if there is an economic relationship between them thus creating a 'joint unit' in respect of certain activities undertaken by such entities against competitors, clients or consumers and stated that the essence of the collective dominant position are parallel activities within the framework of oligopoly, that is, tacit collusion or tacit coordination.

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

The CL general provisions on dominance do not distinguish between the various roles of dominant undertakings. Dominance provisions apply to any dominant market participant acting in an abusive way (see question 15).

The provisions of the CL governing dominance in retail trade are specifically designated to regulate activities of those purchasers that have substantial purchasing power in retail trade (see question 4).

So far article 13(2) of the CL has only been applied in a few cases. In July 2010, the CC adopted a decision by which it established that SIA MAXIMA Latvija is in a dominant position in the retail trade of

daily consumer goods. The investigation in the case was closed as the CC concluded that MAXIMA Latvija has not abused its dominant position in retail trade. A few months later (ie, on 13 January 2011), in another case initiated by one of the suppliers of MAXIMA Latvija the CC concluded that MAXIMA Latvija has imposed unfairly long payment terms for the goods delivered by one of its suppliers and, thus, has abused its dominant position in retail trade. In November 2010 the CC concluded that RIMI Latvia SIA has also abused its dominant position in retail trade.

The decisions shed some light on the interpretation of the definition of dominant position in retail trade which, in short, states that an undertaking is dominant in retail, if, having regard to its purchasing power and the dependence of suppliers, it has an ability to apply or impose on suppliers unfair or unreasonable terms and conditions.

The decisions clarify that purchasing power exists simply on account of the size of an undertaking. According to the CC, MAXIMA Latvija and RIMI Latvia enjoy purchasing power because of the large number of shops they operate, as well as due to their significant turnover and relatively high efficiency. The two major retail chains are considered to be substantial and irreplaceable partners for the suppliers in view of their turnovers, market shares, coverage and spread of their retail shops No analysis is provided on whether the retailers may in fact be disciplined by upstream or downstream competition.

The decisions are less explicit in respect of the criterion of dependency of suppliers. In the decision dealing with MAXIMA Latvija, the arguments advanced by the CC lead us to believe that dependency of suppliers must be established in the context of the entire relevant supply market (similarly as in cases of 'traditional' dominance). However, in the *RIMI Latvia* case the CC established dependency of Valmieras piens based on the characteristics of the particular supplier only. Therefore it remains to be seen how dependency will be assessed in the future.

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

An open list of categories of abusive conduct 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 CL 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.

However, for some period of time the court practice cast doubts regarding the orthodox interpretation of the CL. Thus, in judgment of the Administrative Department of the Supreme Court Senate of 11 February 2010 in case No. SKA–43/2010 (*Livanu Kudras Fabrika/Latvijas Valsts mezi*), the Supreme Court indicated that abuse of dominant position may be established only if a harmful effect has been detected. This position coincides with the judgment of the Regional Administrative Court of 28 December 2009 in case No. A42537406 (AGA).

In 2006, the CC had fined SIA AGA for abuse of dominant position by means of exploitative and discriminatory pricing in the market of medical oxygen. AGA appealed and submitted in the application to the court, inter alia, that 'the actions of the applicant do not have the consequences envisaged by the provisions of the Competition Law' which prohibits the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

The Regional Administrative Court agreed. It ruled that '[t]he said provision unequivocally implies that to punish an undertaking for an infringement of this provision of the Competition Law, it is not sufficient to establish the application of dissimilar terms and conditions (prices), but also the effect on the competitiveness of the other undertaking must be demonstrated'. Since the 'Competition Council has not […] established that the prices set by the applicant disadvantaged the competitive conditions of medical institutions', the decision was annulled. The court expressly rejected the CC's opinion that the establishment and assessment of negative effects is not necessary to prove an infringement.

The most recent court practice of 2011 indicates that the Senate of the Supreme Court has decided to depart from its recent case law and maintain the orthodox interpretation of the CL. In the *AGA* case, when examining the appeal filed by the CC, the Senate of the Supreme Court ruled that according to article 13 of the CL harmful effects are not a necessary precondition for establishing an abuse of dominant position. Similar conclusions were made by the Senate of the Supreme Court in its judgment of 7 February 2011 in case No. A42556907 (*Latvijas Valsts radio un televizijas centrs*).

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse covers both exploitative and exclusionary practices (see question 15).

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

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.

18 Defences

What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?

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 defences 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. For example, in 2009,

when reviewing alleged abuse of dominant position by Latvijas Valsts mezi (a state company to which the management and protection of the state-owned (public) forests are entrusted), the CC stated that Latvijas Valsts mezi is entitled to grant bigger discounts to its business partners that have long-term agreements with Latvijas Valsts mezi because the long-term contract costs are lower and it allows Latvijas Valsts mezi to plan its future activities. The CC also stated that Latvijas Valsts mezi shall implement the state policy goals by promoting customer supply chains, framing assortments by specifications and quality requirements.

In the judgment of the Regional Administrative Court of 17 December 2009 in case No. A42569106 (*Amberholdings Liepaja and Authority of Liepaja Special Economic Zone*) the court has interpreted the notion of abuse in dominance law as referring to malicious intent. In 2006, the CC had fined the Authority of Liepaja Special Economic Zone for abuse of dominant position because the latter had prescribed unjustified admissibility requirements for undertakings wishing to provide tugboat services in the port of Liepaja. The authority appealed, and the court in the judgment, apparently on its own motion, addressed the meaning of the notion of abuse in the CL's provision prohibiting 'abuse of dominant position'.

The court quoted a dictionary of legal terminology, published in 1998, which explains that 'abuse' – a word which in Latvian does indeed carry connotations of intent – 'is characterised by a person's intentional dangerous conduct which harms the legally protected interests and rights of a natural or legal person'. On the basis of this description, the court concluded that 'only intentional activities of an undertaking can be recognised as abusive'.

Having analysed the admissibility requirements for undertakings wishing to provide tugboat services in the port of Liepaja, criticised by the CC, the court concluded that 'there is no evidence in the case that would warrant a finding that the Authority of [Liepaja Special Economic Zone] had abused its legal monopoly as regards the management of the port of Liepaja thereby maliciously affecting competition in the downstream market of tugboat services in the port of Liepaja'. As a result, the decision was annulled in so far as it concerned abuse of dominant position.

This judgment was revoked by the Senate of the Supreme Court. Although it did not expressly reject the argument of the Regional Administrative Court regarding intent as a precondition for establishing abuse of dominant position, it stated that the use of advantages conferred by a dominant position without objective justification is abusive.

Specific forms of abuse

19 Price and non-price discrimination

The CL expressly provides that the abuse of dominant position may involve direct or indirect imposition or application of unfair purchase or selling prices or other trade conditions, as well as applying unequal provisions in equivalent transactions with third parties, creating competitive disadvantage for such third parties.

For example, the CC determined that Rimaida, being in a dominant position in the market for distribution of the film *Terminator 3: Rise of the Machines*, imposed unfair (in particular circumstances, discriminating) sales prices on a number of market participants, thus creating a competitive disadvantage. Although the CC noted that the abuse of dominant position is normally considered a grave violation of the CL, it imposed only the minimum penalty on the company in view of the fact that unfair prices were applied in connection with distribution of one film only and did not result in substantial adverse consequences in the relevant markets.

In 2008, the CC fined Latvian national copyright management society AKKA/LAA. The CC determined that the fee imposed by AKKA/LAA for public playback of music in shops and similar places was different in various cities of Latvia. The CC considered that such differentiation was unfair as AKKA/LAA was unable to show objective and clear justification for the application of substantially different fees depending on the place where the respective undertaking was located.

20 Exploitative prices or terms of supply

Direct or indirect imposition or application of unfair (including exploitative) purchase or selling prices or other trade conditions is expressly prohibited under the CL.

Thus, in 2006 the CC took a decision to impose a penalty of 117,128 lats on AGA, which held a dominant position in the market for compressed bottled medical oxygen, when it imposed a substantial price increase on its products and such an increase was not justified by any cost considerations. The CC determined that the profit of the company from the sales of various volumes of the product ranged from 84 per cent to 1,005 per cent and did not accept the argument that the price increase was related to new legislative requirements due to EU accession, necessity to improve production facilities or losses of the business. Simultaneously, it was found that the prices imposed were discriminatory towards some market participants with difference in price amounting to up to 281 per cent.

21 Rebate schemes

Pricing practices that have a foreclosing effect on competitors and potential competitors of a dominant undertaking are prohibited. The case law of the CC, however, shows that the schemes involving rebates are not unlawful per se, even if instituted by dominant undertakings.

For example, when the CC reviewed the discount policy of the Latvian Post Office (an entity in a dominant position), the CC confirmed that volume-based discounts are lawful and should not be considered as discriminatory. It also confirmed that discounts that are granted in relation to customer service or cooperation may be permissible (in the relevant case the customers that sent large volumes of mail did their own sorting and were granted a discount for those activities).

In 2006 the CC found a violation of article 82 of the EC Treaty (post Lisbon, article 102 TFEU) in the rebates applied by Airport Riga. The rebate system introduced by Airport Riga provided for volume rebates on the airport fees during various periods from 0 to 80 per cent, depending on the number of passengers carried from Riga. The CC concluded that the rebate system introduced was not justified by volume-based efficiencies and as such was discriminatory.

22 Predatory pricing

Under the CL there are no express provisions dealing with predatory pricing. However, the list of abusive conduct as provided under the law is not exhaustive. Predatory pricing by definition (as a practice aimed at hindrance, restriction or distortion of competition) would qualify as an abuse of dominant position.

The *Statoil/Neste/Lukoil* collective dominance case reviewed by the CC (see question 13) involved alleged predatory pricing. In that case no abuse was found because the periods during which the price reductions took place were too short (a few days). Due to similar considerations, in 2010 the CC closed the case on alleged infringement of the CL by SIA Cemex by issuing it a warning not to engage in conduct which in the long run could be characterised as abuse of dominant position.

The investigation was initiated in 2008 upon complaints by SIA Eksim Trans, SIA Baltijas Betonmix, SIA Betons 97 and the Association of Latvian Producers of Construction Materials that Cemex had reduced the price of ready-mixed concrete in order to eliminate competitors.

In the course of the investigation the CC concluded that the duration of Cemex's low price policy – one year – in the market for ready-mixed concrete was not sufficient to affect the competitiveness of efficient competitors. Considering the economic power of other undertakings on the ready-mixed concrete market and their conduct in circumstances of recession and decline in the size of the market, the CC decided that it had no grounds to find an infringement in Cemex's policy of pricing ready-mixed concrete below production and transport costs.

However, the CC noted that Cemex holds a dominant position on the wholesale market of grey concrete in Latvia and that it is possible to leverage the ensuing market power to strengthen the position on the market of ready-mixed concrete. According to the CC, the vertical integration of Cemex – which produces cement to trade on the wholesale market of cement that is an input for ready-mixed concrete, and also trades on the market of ready-mixed concrete in Latvia – gives it an advantage on the market of ready-mixed concrete. Cemex was said to be able to charge low prices for ready-mixed concrete and to cover the loss by cross-subsidisation from the market of cement on which it is dominant.

Therefore, in the decision the CC warned Cemex that 'in the long run by charging ready-mixed concrete prices below production and transport costs (ie, variable production costs and the portion of fixed costs specifically attributable to the production and sale of ready-mixed concrete), or lastingly below full cost in order to limit competition', Cemex may find itself in breach of the prohibition on abuse of dominant position.

23 Price squeezes

There are no express provisions in the CL regarding price squeezes. However, the abuse of dominant position may involve direct or indirect imposition or application of unfair purchase or selling prices or other trade conditions. Price squeezes are likely to qualify under this provision.

24 Refusals to deal and access to essential facilities

The CL provides that abuse of dominant position may take a form of refusal to enter into transactions with other market participants or amending the provisions of a transaction without an objectively justifiable reason.

Thus, the CC determined that Liepajas Siltums, holding a dominant position in the market of supplying heat in the city of Liepaja and holding an exclusive right to seal hot water meters under the law, refused to enter into an agreement with the participant of the market of supply and sealing of hot water meters without an objectively justifiable reason. Liepajas Siltums was ordered to enter in an agreement.

The practice of the CC suggests that it can be rather easily persuaded that a certain facility shall qualify as an essential facility. In 2009, in the *Alpha Ekspress* case the CC concluded that Alpha Ekspress, an undertaking that owns railway infrastructure in the territory of the Free Port of Riga, owns an essential facility in the absence of which the economic activity of SIA Vexiol Bungering, SIA Cargo Control and related companies is not possible. From the CC's decision it follows that economic feasibility of duplication of a facility seems to be the decisive criterion for recognising it as essential. The railway infrastructure of Alpha Ekspress was found to be an essential facility although there was information in the case file that some undertakings in the Free Port of Riga had actually built their own railways or planned to do so. This demonstrates that the CC appears to be concerned with short-term solutions rather than considerations of allocative efficiency in the long term.

25 Exclusive dealing, non-compete provisions and single branding

Exclusive dealing, non-compete provisions and single branding generally fall under provisions of the CL that prohibit agreements between market participants regarding the division of markets by territory, customers, suppliers or other conditions. Although not expressly stated, such activities may also qualify as an abuse of dominant position if undertaken by a dominant undertaking.

Regulations of the Cabinet of Ministers No. 797 of 29 September 2008 – On Exemptions from Prohibition of Vertical Agreements Provided under article 11 of the Competition Law – impose a market share cap of 30 per cent. Consequently, a vertical agreements block exemption is not available for market participants holding a dominant position if their market share exceeds 30 per cent. Such dominant undertakings are allowed to engage in exclusive dealing and single branding arrangements and impose non-compete provisions on the counterparties only if such practice can be objectively justified from a commercial point of view.

26 Tying and leveraging

Tying and leveraging by a dominant firm may be illegal under Latvian law. The CL provides that dominant undertakings are precluded from the 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 these market participants accept such additional obligations as, by their nature and commercial use, have no connection with the particular transaction.

Thus, the CC found abuse of dominant position in the activities of Hoetika-ATU. The company was in a dominant position in the market of removing household waste and offered customers discounts on this service on the condition that they use its disinfestation and disinfection services. Hoetika-ATU was ordered to discontinue the illegal practices.

In a high-profile case, Lattelekom was fined for abusing its dominant position by offering 'Comfort ISDN', a package that combined three different services: lease of digital office telephone switchboards, connection of two ISDN lines and voice telephony services in the public fixed-telecoms network. Lattelekom was in a dominant position in the voice telephony services market in the public fixed-telecoms network, and offered ISDN line subscription fee discounts and discounts on 'Comfort ISDN' service fees, constricting the market for the leasing of digital office telephone switchboards.

In 2008 Latvijas propana gaze was fined for abuse of dominant position in the market of leasing of gas equipment and in the market of supplying liquefied petroleum gas. According to the standard client agreements of Latvijas propana gaze, clients were not allowed to use gas equipment leased from Latvijas propana gaze with the liquefied petroleum gas supplied by other companies.

27 Limiting production, markets or technical development

The CL provides that abuse of dominant position may manifest as a restriction on the amount of production or sale of goods, the market or technical development to the detriment of consumers without an objectively justifiable reason.

28 Abuse of intellectual property rights

There are no express provisions under the CL regarding abuse of intellectual property rights. However, the list of abusive conduct as provided under the law is not exhaustive. Under certain circumstances misuse of intellectual property rights may qualify as abuse of dominant position.

29 Abuse of government process

There are no express provisions under the CL regarding abuse of government process. However, the list of abusive conducts as provided under the law is not exhaustive. Potentially, abuse of government process may qualify as abuse of dominant position.

30 'Structural abuses' – mergers and acquisitions as exclusionary practices

Creation or strengthening of a dominant position is covered by substantive merger control law: mergers resulting in the creation or strengthening of a dominant position may be prohibited. At the same time, structural operations of undertakings not falling within the scope of merger control could also be considered prohibited under abuse provisions.

31 Other types of abuse

A case-specific approach is taken by the CC when investigating circumstances of potential abuse. The list of examples of abusive conduct as provided under the law is by no means exhaustive. Any type of activity may be found to be abusive if it is determined that by practising it, the dominant undertaking abuses its special economic position.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

Abusive practices are prohibited. The CL empowers the CC to determine that the abuse of a dominant position has taken place and to impose a legal obligation on the market participant (for example, to cease illegal activities or to undertake certain activities).

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

The CC monitors the compliance of dominant market participants with the competition rules. Violations of the CL may also be found by the courts.

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

The CC's investigative powers are quite broad and include:

- requests for information – the CC has the right to request necessary information, including confidential information, from any natural or legal persons and state and municipal institutions, as well as to receive oral or written explanations from the relevant persons;
- inspection visits – the CC may conduct inspection visits, including visits without advance notice, to the market participants. During the inspections, the officials of the CC may request oral or written explanations, review any documents and receive copies thereof;
- seizure of relevant documents and property;
- entrance into vehicles, private residences and other moveable or immoveable property of the market participants and inspection of property and documents contained therein – the searches are conducted on the basis of the decision of a court and in the presence of the police. If there is a suspicion that the relevant documents are located in third parties' moveable or immoveable property, the CC also has the right to inspect such property, subject to the court's decision; and
- adopting a decision on administrative violation if a person fails to supply requested information or cooperate with the CC as prescribed by law.

34 Sanctions and remedies

What sanctions and remedies may they impose?

Upon finding the abuse of a dominant position, the CC adopts a decision regarding the establishment of the infringement, imposition of the legal obligation 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 250 lats. If the market participant fails to fulfil the imposed legal obligation, the CC 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 500 lats.

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 behavioural remedies have been ordered. Thus, in finding abuse of dominant position in the activities of AGA (see question 20), the CC ordered AGA to explain a methodology of price determination and price calculation, to ensure maintenance of separate accounting for the segment of medical gases business.

Structural remedies are not expressly provided for under the CL 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 CC has started to actively use a possibility to close investigations subject to written commitments of the undertakings investigated. Thus, in 2009 the CC accepted commitments in three cases involving allegations of abuse of dominant position. The commitments offered have included a commitment to apply proportionate and non-discriminatory rebates and payment terms (*SIA Preses Serviss*); a commitment 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-subsidisation of activities on the markets of film distribution and demonstration (*SIA Forum Cinemas*); and a commitment to offer rebates based on genuine cost savings only (*AS Latvenergo*).

35 Impact on contracts

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

The CL prohibits and declares null and void agreements between market participants, the purpose or effect of which is hindrance, restriction or distortion of competition in the territory of Latvia.

36 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

The CL expressly provides that any person that has suffered losses due to an infringement of the CL is entitled to claim compensation of losses and statutory interest from the guilty market participant. Thus,

in addition to the fine imposed by the CC for the breach of the CL, the guilty market participant may be obliged to compensate for losses caused to any third party as a result of abuse of a dominant position.

The CC or the court is entitled to impose a legal obligation on the market participant upon determination of violation of the CL. The case law of the CC shows that 'imposition of legal obligation' has been interpreted broadly to cover imposition on the market participants of various obligations, including an obligation to grant access and to enter into contracts for supply of goods and services.

For example, the merger of Telia Aktiebolag and Sonera Corporation was cleared by the CC subject to certain conditions in view of the fact that it resulted in the companies of the group obtaining a dominant position in a number of markets. Among others, the CC imposed an obligation on the market participant for a period of three years to ensure free and non-discriminatory access by any third party to its international telecoms infrastructure, taking into account the technical capacities.

37 Availability of damages

Do companies harmed by abusive practices have a claim for damages?

According to the CL, any person that has suffered losses due to the infringement of the CL 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 CC. Therefore, an action for damages must be brought before the relevant court.

Update and trends

Considering the severely limited funding currently available to the CC, it can be assumed that in the future the CC's investigations will also be carried out mainly on the basis of complaints received from market participants. The only exception may be investigations against big retailers for abuse of dominance in retail trade. For those investigations the CC is likely to commence under its own initiative due to the fact that suppliers are hesitant resorting to CC in fear of retaliation by retailers.

No significant shifts in the enforcement practice of the CC are expected.

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

38 Recent enforcement action

What is the most recent high-profile dominance case?

The most high-profile cases in 2010 and 2011 were related to abuse of a dominant position in retail trade. As noted above (see question 14), the two biggest retail chain operators in Latvia (MAXIMA Latvija and RIMI Latvia) were fined for abuse of dominant position in retail trade. Although the decisions provide some guidelines regarding the interpretation of the concept of dominant position in retail trade, the decisions have been appealed and it remains to be seen what the results of judicial review will be.

RAIDLA LEJINS & NORCOUS

Dace Silava-Tomsone dace.silava-tomsone@rln.lv
Sandija Novicka sandija.novicka@rln.lv

Valdemara 20
Riga 1010
Riga

Tel: +371 6724 0689
Fax: +371 6782 1524
www.rln.lv

DOMINANCE 2012 ISSN 1746-5508