

Latvia

Līga Hartmane and Martins Gailis

Klavins & Slaidins LAWIN

Competition law

In Latvia competition policy is determined and regulated by the Competition Law, which in its current wording took effect on 1 January 2002.

The Competition Law applies to all market participants in Latvia and to all types of registered and unregistered associations of market participants operating in Latvia. The Competition Law also applies to bodies of the state administration, municipalities and local government institutions, but only in those cases where they act as market participants in private legal relations.

The definition of market participants includes foreign undertakings, which perform or intend to perform business activity in the territory of Latvia or which have or may have an impact on competition in the territory of Latvia. In determining potential or actual impact on competition, one must consider whether the foreign undertaking has sufficient assets to enter the relevant market in the territory of Latvia and offer goods for sale or render services to customers within a short time period and without making significant investments.

The Competition Law has been amended once. These amendments entered into force on 1 May 2004, the same date as Latvia's accession to the European Union. Basically, these amendments grant the Latvian Competition Council the right to apply EU competition law. The amendments also provide for substantial additional rights of the Competition Council to carry out investigations, prescribe procedures for review of cases and extend the term within which the Competition Council must adopt its decisions. The Competition Law contains the main legislation on competition law regulation and enforcement. The Latvian antitrust rules serve the following four primary objectives:

- regulation of restricted agreements and practices;
- the prohibition of the abuse of a dominant position;
- control of mergers and acquisitions; and
- the prohibition of unfair competition.

The Competition Law only establishes the general rules regarding agreements and practices that may restrict competition. More detailed procedures for the application of various provisions of the Competition Law were left to be provided by supplemental regulations issued by the Cabinet of Ministers. But there remain gaps in the Latvian competition regime because the Cabinet of Ministers has not yet adopted all of the regulations required.

The competent authority

The relevant authority is the Competition Council. The Council carries out certain tasks connected with the protection and development of competition including review of relevant notifications, determination and termination of possible violations of the competition rules, and removal of any provisions restricting competition in current and draft legislation.

The main duties of the Competition Council are:

- to monitor the observance of the prohibitions against abuse of dominance, unfair competition and prohibited agreements by market participants;

- to examine submitted notifications regarding market participant agreements and take decisions in respect of them;
- to restrict market concentration by taking decisions in relation to mergers of market participants; and
- to cooperate, within the scope of its competence, with relevant foreign institutions.

The interpretation of the Competition Law by the Competition Council closely relates to the practices adopted by the Commission of the European Union and the case law of the European Community courts.

Activities restricting competition

Prohibited agreements

Under the Competition Law, agreements between market participants which have as their purpose or effect the hindrance, restriction or distortion of competition in Latvia are prohibited and null and void from the moment of being entered into. Examples of prohibited agreements include agreements involving:

- direct or indirect fixing of prices and tariffs in any manner, or provisions for the formation of prices and tariffs, as well as the exchange of information relating to prices or provisions regarding sale;
- restriction or control of the scope of production or sales, markets, technical development, or investment;
- division of markets, taking into account territory, customers, suppliers, or other conditions;
- provisions in accordance with which the conclusion, amendment or termination of a transaction with a third party is made dependent on whether the third party accepts obligations which, according to commercial usage, are not relevant to the transaction in question;
- participation or non-participation in competitions or auctions or coordination of terms of participation in such events, except where the competitors have publicly announced their joint tender and the purpose of such a tender is not to hinder, restrict or distort competition;
- differential treatment in equivalent transactions with third parties; and
- conduct which has the object or effect of compelling the exit of an undertaking from the relevant market, or preventing its market entry.

The list above is specifically mentioned in the Competition Law, but the Law provides that this list is not exhaustive.

The said agreements are permitted if the market participants have received the permission of the Competition Council. The Competition Council may permit, or permit upon certain conditions these agreements by taking a relevant decision to that effect if it determines that the agreement promotes improvements in the production or sale of goods or economic progress and thereby benefits consumers. In addition, the Council must determine that such agreements do not impose on the market participants concerned restrictions that are not necessary for the achievement of these objectives and do

not afford the possibility of eliminating competition in a substantial part of the relevant market. This permit can only be granted if the parties to the agreement notify the Competition Council prior to the implementation of the agreement.

The Competition Law also states that the Cabinet of Ministers issues regulations and controlling agreements that are exempted from the prohibition on agreements if they comply with the specific requirements prescribed in these regulations, regarding which the Competition Council need not be notified if they do not significantly affect competition. At the time of writing, the Cabinet of Ministers has adopted four regulations: one regarding exemption of vertical agreements from the prohibition imposed by the Competition Law; a second regarding exemption of particular horizontal agreements from the prohibition imposed by the Competition Law; a third regarding exemption of agreements in the field of inland railway transportation and road transport; and a fourth covering agreements involving maritime traffic. All other agreements which may be prohibited by the Competition Law currently require an individual exemption from the Competition Council.

If the Competition Council determines that there is a violation of the agreement prohibition in the activities of market participants, it shall take a decision regarding the determination of a violation, legal obligations and imposition of a fine.

Fines can be imposed on the market participants of up to 5 per cent of their net turnover for the previous financial year each, but not less than 250 lats. The Competition Council may impose fines on competitors of up to 10 per cent of their net turnover for the previous financial year, but not less than 500 lats each.

Abuse of dominance

Any market participant who is in a dominant position is prohibited from abusing this dominance in the territory of Latvia. According to the Competition Law, abuse of a dominant position can consist of:

- a refusal to enter into transactions with other market participants, or amending the provisions of the transaction without an objectively justifiable reason;
- restriction of the amount of the production or sale of goods, of the market or of technical development to the detriment of consumers without an objectively justifiable reason;
- 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;
- the direct or indirect imposition of unfair purchase or selling prices or other unfair trading provisions; or
- the application of unequal provisions in equivalent contracts with other market participants, creating for them, in terms of competition, disadvantageous conditions.

The above list is not exhaustive. The Competition Law states that an undertaking is dominant in a particular market if it:

- has at least a 40 per cent market share; and
- has the capacity to significantly hinder, restrict or distort competition in any specific market for a sufficient length of time by acting with full or partial independence from competitors, clients or consumers.

In order to assess the second, the Competition Council takes into consideration such factors as financial strength, relation to other undertakings, access to suppliers and markets, as well as entry barriers.

If the Competition Council determines that there is abuse of a dominant position in the activities of the market participants, it

shall take a decision regarding determination of a violation, legal obligations and imposition of a fine. Fines can be imposed on the market participants of up to 5 per cent of their net turnover for the previous financial year each, but not less than 250 lats. If the legally imposed obligations are not complied with then the Competition Council may decide to increase the imposed fine up to 10 per cent of their net turnover for the previous financial year, but not less than 500 lats.

Mergers, acquisitions and joint ventures

A merger is defined as any of the following:

- the merger of two or more independent market participants in order to become one market participant (concentration);
- one market participant taking over another market participant; or
- circumstances when one or several market participants acquire all or any part of the assets of another market participant or the rights to use them, or acquire a decisive influence (control) over another market participant or other market participants.

Decisive influence is defined as the ability of any person, directly or indirectly, to:

- control the decision-making of the supervisory bodies of a market participant; and
- appoint a sufficient number of members to the supervisory body of the market participant so that majority support in any vote is assured.

In accordance with the Competition Law, the establishment of joint ventures (where after merger the market participant is subject to joint decisive influence) is also subject to merger control. Joint decisive influence is deemed to occur in cases where two or more market participants can exercise their control over another market participant but only jointly. Such a situation can arise where a company is jointly controlled by two parent companies that can each block any major decisions concerning the controlled company. Major decisions are decisions that relate to strategic decisions on the business policy of the controlled company. Thus, if either of the two parent companies can veto decisions, on, for instance, the budget, business plan, major investments or the appointment of senior management of the company, then the parent companies are considered to have joint control.

Filing thresholds

A merger must be notified to the Competition Council for review where:

- the total turnover of merger participants has in the last financial year exceeded 25 million lats; or
- the total market share in the relevant market of the market participants engaged in the merger exceeds 40 per cent.

The second threshold has been interpreted by the Competition Council to be satisfied even where only one of the market participants involved in the merger has a market share in a relevant market exceeding 40 per cent and the other party to the merger is not present on that relevant market. Provided the thresholds are met, the merger filing is mandatory.

Calculation of thresholds

Turnover of the market participant is calculated by adding the income from the business activity of the market participant in the previous financial year, sale of goods and supply of services, and deducting from this sum, sales discounts and other discounts, value added tax and other taxes which are directly related to the sale.

Specific regulations for calculation of the turnover are stated by the Cabinet of Ministers in the Regulations on the Procedure for Submission and Review of Merger Notifications of the Market Participants. The total turnover of the market participants which intend to merge is calculated within the Latvian jurisdiction only.

With regard to market share threshold, the Competition Council has interpreted the criterion narrowly, whereas a merger must be notified whenever the market share in the relevant market of any of the market participants involved in the merger exceeds 40 per cent.

Foreign transactions

Foreign-to-foreign transactions must be notified if the thresholds are exceeded and the participants of the merger are engaged in business in Latvia. The test of 'entrepreneurship' is used to determine whether the merger participant, its controlled entities, agents or representatives are conducting business activities in Latvia. According to the definition of a market participant contained in the Competition Law, market participants are any persons (also foreign persons) who perform or intend to perform business activity in the territory of Latvia or whose activities have or may have an impact on competition in the territory of Latvia.

Mergers and acquisitions outside Latvian jurisdiction of foreign entities that have subsidiaries in Latvia are not exempted from notification to the Competition Council, provided that at least two parties to the merger are considered market participants in Latvia within the meaning of the Competition Law.

Exempted transactions

The obligation to notify does not apply in the case of credit institutions or insurance companies whose main activity includes transactions with securities at their own expense or at the expense of others, have time-limited ownership rights to the securities of the market participants which they have acquired for further sale, if the said credit institutions or insurance companies do not exercise the voting rights created by the said securities in order to influence the competing activity of the relevant market participants; or they exercise the voting rights created by the said securities only in order to prepare investment of the market participant, its shares, assets or the relevant securities, and this investment is made within one year of acquisition of the voting rights. The Council may extend this term upon application of the respective credit institution or insurance company, if it proves that the relevant investment was impossible during the year.

The obligation to notify similarly does not apply where in the context of insolvency or liquidation of the market participant, the liquidator or administrator obtains decisive influence over it.

Responsibility for filing and filing fees

The notification must be submitted jointly by all parties to a transaction, or by a person who has their written authorisation. If a decisive influence is acquired, the notification must be submitted by the acquirer of such influence or by the acquirers of joint decisive influence.

At present, there is no filing fee for submission of a merger notification.

Timing of filing

The filing must be made prior to completion of the transaction, and there is no mandatory suspension obligation.

If, however, the Competition Council adopts a resolution to prohibit the merger or authorise it in part, and the merger has already taken place, it will be considered as performed contrary to the decision of the Competition Council. According to the Competition Law, if a merger of market participants has occurred which is

contrary to a decision of the Competition Council, the Competition Council may adopt a decision regarding the imposition of a fine on the new market participant or on the acquirer of control of up to 1,000 lats for each day that the infringement continues, beginning from the day when the illegal activity started. The payment of a fine does not release the market participants from the obligation to comply with the provisions of the Competition Law and with the decisions of the Competition Council.

Closing before clearance is permissible where the final decision is to permit the merger. If, however, the transaction is finalised after the notification but prior to the decision of the Competition Council where the decision is to prohibit or permit with binding conditions, the notifying parties would be penalised for an unlawful merger. Therefore, the transaction may be finalised before the final decision of the Competition Council but one must consider the potential risk factor that the Competition Council might take a negative or conditional decision.

The Competition Law does not require that a binding agreement be executed before the merger notification is submitted. The law requires that notification be submitted before the activity which alters the state of the market. Therefore, the merger notification can be submitted on the basis of a letter of intent or memorandum of understanding.

Preliminary meetings and correspondence with the representatives of the Competition Council are possible in order to clarify whether in the specific case it is necessary to give notification of the intended merger.

Timing of review process

In order to examine a proposed concentration, the Competition Law provides for a two-phase procedure.

After receipt of notification, the Competition Council evaluates whether the notification and information contained therein is complete. It is noteworthy that in cases where the Competition Council considers the information contained in the notification to be incomplete, the date on which the notifying party submits the required additional information will be deemed to be the date of submission of a complete notification.

After receipt of a complete notification (according to the regulations set by the Cabinet of Ministers) the Competition Council will within 30 days adopt one of the following decisions to:

- prohibit the merger;
- permit the merger on certain conditions;
- permit the merger; or
- commence an in-depth investigation.

If the Competition Council has decided to commence an in-depth investigation, its final decision shall be adopted within four months from the date of submission of the complete notification.

Substantive review

The Competition Council may prohibit mergers which create or strengthen a dominant position or reduce competition in any relevant market in order to ensure effective competition in the Latvian economy. A 'dominant position' is defined as the economic position of a market participant if its market share in the relevant market exceeds 40 per cent and it has the option of significantly preventing, restricting or distorting competition in the relevant market by acting in full or partial independence from competitors, customers or purchasers.

The Competition Council may permit such mergers, at the same time determining binding conditions for the relevant market participants.

Cases in which after the merger the market participant will be

subject to joint control (joint venture) and where the consequences or the purpose of establishment of the market participant subject to joint control are or could be coordination of competitive activity of the market participants acquiring the joint control, are evaluated also taking into account article 11 of the Competition Law (prohibited agreements between the market participants).

Unfair competition

Under the Competition Law, unfair competition is prohibited in Latvia. Any activities as the result of which regulatory enactments or fair commercial practices are violated and which have created or could create a hindrance, restriction or distortion of competition, are deemed to be unfair competition.

Unfair competition may also occur in the form of the following activities if as a result of such activities a hindrance, restriction or distortion of competition has been created or could have been created:

- the use or imitation of a legally used name, recognisable marks or other features of another market participant (whether existing, having ceased its activities or reorganised) 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;
- the dissemination of false, incomplete or distorted information regarding other market participants or their employees, as well as, in respect of the goods produced or sold by such market participants, the economic significance, quality, form of production, characteristics, quantity, usefulness, prices and their formation, and other provisions, which may cause losses to such other market participant;

- the use or distribution of information which includes the commercial secrets of another market participant, without the consent of such participant; or
- the coercion of employees of another market participant with threats or bribery in order to create advantages for one's own economic activity, thereby causing losses to the market participant.

If the Competition Council determines that there is unfair competition in the activities of the market participants, it shall take a decision regarding determination of a violation, legal obligations and imposition of a fine. Fines can be imposed on the market participants in an amount of up to 5 per cent of their net turnover for the previous financial year, but not less than 250 lats.

Recent developments

New amendments to the Competition Law have been proposed but have not yet been implemented. According to the latest available edition of the amendments of 16 March 2007, the definition of a dominant position will be amended to more closely resemble the definition of a dominant position as used under EC Competition Law. Furthermore, a curious new concept of 'significant influence' has been introduced, a concept which should be distinguished from the concept of dominance. This concept would apply to certain market participants that do not qualify as dominant in a given relevant retail market. The proposed amendments state that a market participant has significant influence in a relevant retail product market in Latvia where its market share exceeds 25 per cent. The concept of significant influence does not apply to the provision of services. Market participants who have significant influence in a relevant retail market are prohibited from abusing such significant influence. Five examples are provided in the draft amendments of such abuse:

Klavins & Slaidins LAWIN

Elizabetes, 15
Rīga LV-1010
Latvia
Tel: +371 781 4848
Fax: + 371 781 4849

Klavins & Slaidins LAWIN is one of the leading law firms in Latvia, with a reputation for a personal approach to client relationships and superior legal work that sets it apart from others. The two founding partners are Latvian-Americans, having been born and raised and with a legal education and training in the United States. K&S has lawyers admitted to practise in Latvia, Connecticut, California, New York and the UK.

K&S has been legal counsel for top foreign investors and has worked to complete many important and precedent-setting projects in Latvia.

In April 2004, on the eve of the accession of the Baltic States to the EU, Klavins & Slaidins established the LAWIN group together with Lepik & Luhaaar of Estonia and Lideika, Petrauskas, Valiunas ir partneriai of Lithuania. With more than 100 lawyers this group is one of the largest legal services providers in the Baltics, and is of the highest quality as it brings together top-rated firms from each of the three jurisdictions who have cooperated together informally for over 15 years.

K&S's general area of practice is business/commercial law. K&S emphasises work which is often outside general counsel for many clients, and prides itself on its transactional expertise in sophisticated areas of corporate and joint venture structuring; the acquisition, sale and lease of businesses and property; loan documentation; all manner of contracts; banking, securities, labour law, intellectual property and tax.

K&S has had extensive contacts with the Latvian Competition Council, in the areas of merger notification and filings, addressing asserted violations of competition law against our clients in Latvia, as well as litigation matters against the Council.

K&S maintains active international contacts through its membership of Lex Mundi, a network of leading law firms in jurisdictions throughout the world, as well as its membership of the International Bar Association.

Contacts: Liga Hartmane • e-mail: liga.hartmane@lawin.lv
Martins Gailis • e-mail: martins.gailis@lawin.lv

- imposition of unfair risk allocation among parties to an agreement;
- imposition or enforcement of unfair or unwarranted payments for the presence of the delivered goods in a retail outlet, unless these payments are justifiable in respect of promotion of new goods unknown to the consumers in the market;
- imposition or enforcement of unfair or unwarranted payments for the conclusion of an agreement, unless these payments are justifiable by the fact that the agreement is concluded with a new supplier, which requires special assessment;
- imposition or enforcement of unfair or unwarranted payments for delivery of the goods to a newly opened retail outlet;
- imposition or enforcement of unfair or unreasonably long settlement terms for the delivered goods.

The draft amendments to the Competition Law contain several other amendments, including revisions in merger notification procedures and merger notification thresholds, whereas the merger market share notification threshold has been reduced from 40 per cent to 35 per cent.