

Latvia

Dace Silava-Tomsone

Lejins, Torgans & Partners

General

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

The behaviour of dominant firms is regulated by the Competition Law of the Republic of Latvia (the Competition Law), effective as of 1 January 2002. The secondary legislation in the area of competition law comprises regulations issued by the Latvian Cabinet of Ministers.

Article 13 of the Competition Law, which is nearly a carbon copy of article 82 of the EC Treaty, prohibits abuse of a dominant position in any manner in the territory of Latvia.

- 2 Does the law cover conduct through which a non-dominant company becomes (or attempts to become) dominant?

The Competition Law empowers the Competition Council to prohibit a merger as a result of which a dominant position is created or strengthened or competition is substantially lessened. Also, the Competition Law 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 which 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 is aimed 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 Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

The object of the Competition Law 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 Are there any rules applying to the unilateral conduct of non-dominant firms? EU countries only: Is your national law relating to the unilateral conduct of firms stricter than article 82?

The Competition Law does not impose any stricter provisions for unilateral conduct than article 82.

Currently, there are no specific provisions applying to unilateral conduct of non-dominant firms, however, draft legislative amendments have been produced introducing a definition of “substantial influence” which proposes to cover unilateral conduct of non-dominant firms.

The Competition Law, however, contains a general prohibition against unfair competition practices equally applicable to all market participants. The law prohibits activities which 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 which 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 Is there a sector-specific control of dominance?

Save for certain provisions applying to the financial sector, no other industries are specifically regulated by the Competition Law.

Certain sector-specific provisions governing activities of the public utilities and other service providers are contained in special laws, such as the Energy Law, Electronic Communications Law, Postal Law, etc. 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, etc.

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

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

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

For example, during 2003 and 2004 the Competition Council 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 Competition Council 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.

7 How frequently is the legislation used in practice and what is its practical impact?

The Competition Council annually reviews between 10 to 20 cases dealing with alleged abuse of dominant position and finds violations in 3 to 5 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. But, the competitors of dominant undertakings are well aware of the provisions of the Competition Law 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 What is the role of economics in the application of the dominance provisions?

Decisions of the Competition Council 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 Competition Council partly comprises economists,

so far complex economic analysis or economic expert witness opinions usually are not the part of the proceedings.

Scope of application

9 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) which carries out or intends to carry out commercial activities in the Republic of Latvia.

According to the case law of the Competition Council, the Competition Law is applicable in respect to 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 Competition Law does not apply.

Dominance

10 How is dominance (or its equivalent concept under national law) defined?

Unlike the EU, the Competition Law defines a dominant position not only with reference to market power, but also with respect to a quantitative criterion of a specific market share of the market participant.

According to the Competition Law, a dominant position is defined as an economic (commercial) position in a relevant market of a market participant or several market participants if the market share of such participant or the participants in this relevant market is at least 40 per cent and if such participant or such 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. Under the most recent draft amendments to the Competition Council it is proposed to remove a quantitative criterion as a pre-condition for finding dominant position.

11 What is the test for market definition?

The Competition Law contains definitions of relevant product and geographic markets.

The relevant product market is defined as a specific product market which also includes all those products which may substitute a specific product in a particular geographic market, taking into consideration the factor of substitution of supply and demand and specific characteristics of the product and its use.

The relevant geographic 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.

No other formal guidance is currently in force in respect of market definition. EU case law and the guidelines of the European Commission may be used as reference by the Competition Council and market participants.

The market definition does not differ for merger control purposes.

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

Under the Competition Law, dominant position is defined as a combination of high market share (above 40 per cent) and market power. Consequently, if the market share of a company is above 40 per cent, its market power has to be analysed to determine whether the company is dominant.

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

The Competition Law does not address collective dominance as a separate issue. However, the definition of dominant position refers to the 'economic position of a market participant or several market participants'. In 2005 the Competition Council analysed the issue of collective dominance in decision dealing with the review of application by SIA 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. In a particular case the Competition Council, 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.

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

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

Abuse in general

15 How is abuse defined?

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

16 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 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 What defences may be raised to allegations of abuse of dominance?

The market participant may prove that it does not hold a dominant position in any particular given relevant market by supplying alternative market share data or providing information which 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 which result in the setting of a particular price for the products.

Specific forms of abuse

19 Price and non-price discrimination

The Competition Law 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 Competition Council determined that SIA Rimaida, being in a dominant position in the market of distributing the video film *Terminator 3: Rise of the Machines*, imposed unfair (in particular circumstances discriminating) sales prices on a number of market participants, thus creating competitive disadvantage. Although the Competition Council noted that the abuse of dominant position is normally considered a grave violation of the Competition Law, 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.

20 Exploitative prices, terms or conditions 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 Competition Law.

Thus, the Competition Council took a decision in 2006 to impose a penalty of LVL117,128 (approximately €170,000) on AGA SIA, which held a dominant position in the market for compressed bottled medical oxygen, when it imposed a substantial price increase on its products although such an increase was not justified by any cost considerations. The Competition Council determined that the profit of the company from the sales of

various volumes of the product ranged from 84 per cent to 1005 per cent and did not accept the argument that the price increase was related to new legislative requirements due to EU accession, necessary 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 Competition Council, however, shows that the schemes involving rebates are not unlawful per se, even if instituted by dominant undertakings.

The Competition Council has reviewed the discount policy of an entity in a dominant position, the Latvian Post Office. The Competition Council confirmed that volume-based discounts are lawful and should not be considered as discriminatory. It also confirmed that discounts which are granted in relation to customers' 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).

22 Predatory pricing

Under the Competition Law there are no express provisions dealing with predatory pricing. But, the list of abusive conducts 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.

23 Price squeezes

There are no express provisions under the Competition Law regarding price squeezes. But, 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 Competition Law 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 Competition Council determined that a/s Liepajas Siltums, holding a dominant position in the market of supplying heat in the city of Liepaja and holding under the law an exclusive right to seal hot water meters, without objectively justifiable reason had refused to enter an agreement with the participant of the market of supply and sealing of hot water meters. A/s Liepajas Siltums was ordered to enter an agreement.

25 Exclusive dealing, non-compete provisions and single branding

Exclusive dealing, non-compete provisions and single branding generally fall under provisions of the Competition Law 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.

The Regulations of the Cabinet of Ministers No. 434 of 27 April 2004 – 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, vertical agreements block exemption is not available for the market participants holding dominant position. 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 Competition Law 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.

The Competition Council found abuse of dominant position in the activities of a/s Hoetika-ATU. The company was in a dominant position in the market of removing household waste and offered customers discounts on this service on a condition that they use the disinfection and disinfection services of a/s Hoetika-ATU. A/s Hoetika-ATU was ordered to discontinue the illegal practices.

In a high-profile case, Lattelekom SIA was fined for abusing its dominant position by offering 'Comfort ISDN', a package which combined three different services: lease of digital office telephone switchboard, connection of two ISDN lines, and voice telephony services in the public fixed-telecoms network. Lattelekom SIA 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 leasing digital office telephone switchboards.

27 Limiting production, markets or technical development

The Competition Law provides that abuse of dominant position may occur as 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.

28 Abuse of intellectual property rights

There are no express provisions under the Competition Law regarding abuse of intellectual property rights. But, the list of abusive conducts 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 Competition Law regarding abuse of government process. But, 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, it is not excluded that 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 Competition Council 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**32** 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 Competition Law empowers the Competition Council to determine that the abuse of a dominant position has taken place and to impose a legal obligation on the market participant (eg, to cease illegal activities or to undertake certain activities).

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

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

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

The investigative powers of the Competition Council are quite broad and they include:

- Requests for information. The Competition Council 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 Competition Council may conduct inspection visits, including 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.
- Seizure of relevant documents and property.
- Entrance into vehicles, private residences and other moveable or immovable 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 may be located in third parties' moveable or immovable property, the Competition Council also has the right to inspect such property, subject to the court's decision.

- Adopting a decision on administrative violation if a person fails to supply requested information or cooperate with the Competition Council as prescribed by law.

34 Which sanctions and remedies can they impose?

Upon finding the abuse of a dominant position, the Competition Council adopts a decision regarding the establishment of the infringement, imposition of the legal obligation and imposition of a fine.

The abuse of a dominant position may be punished by a fine of up to five per cent of the net turnover of a market participant for the previous financial year, but not less than LVL250 (about €360). If the market participant fails to fulfil the imposed legal obligation, the Competition Council may increase the fine up to 10 per cent of the net turnover of the market participant for the previous financial year, but not less than LVL500 (about €720).

Powers to impose legal obligation so far for the most part have involved decisions to order suspension of illegal activities. In some cases more forward-looking behavioural remedies have been ordered. Thus, in case finding abuse of dominant position in the activities of AGA SIA (see question 20 above), the Competition Council ordered AGA SIA 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 Competition Law and have not been imposed in dominance cases so far; however, presumably 'imposition of the legal obligation' may also involve provision of structural remedies.

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

The Competition Law 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 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 Competition Law expressly provides for the obligation of any market participant who has violated provisions of the law prohibiting abuse of dominant position to cover the damages caused to the other market participant.

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

Thus, eg, the merger of Telia Aktiebolag and Sonera Corporation was cleared by the Latvian Competition Council subject to certain conditions in view of the fact that the merger resulted in the companies of the group obtaining a dominant position on a number of markets. Among others, the Competition Council 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 Do companies harmed by abusive practices have a claim for damages?

The Competition Law imposes an obligation on a market participant which deliberately or negligently violates the competition rules to compensate for damages which were caused by the infringement to another market participant or party to the agreement. Award of compensation is within the jurisdiction of the courts of general jurisdiction and not the Competition Council. Therefore, an action for damages must be brought before the relevant court.

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

Practice**38** What is the most recent high-profile dominance case?

Very few dominance cases have attracted substantial interest of wider public. The most recent high-profile dominance case is the case finding abuse of dominant position in the practices of the Riga international airport and imposing legal obligation to suspend application of the rebates of airport duties. The decision

has been appealed.

Outlook**39** Are changes to the legislation or other measures expected that will have an impact on this area in the near future?

During 2006, there has been a discussion on new draft amendments to the Competition Law proposing a number of substantial changes in the competition law regime.

Among other, it is proposed to introduce a definition of “substantial influence” to cover only retail traders with individual or combined market share in excess of 25 per cent or individual or combined turnover in excess of LVL70 million. Undertakings with substantial influence will be subject to certain limitations on unilateral behaviour.

Also, the abolition of a quantitative criterion of dominance is proposed by abolishing the requirement for 40 per cent of the market share. Instead, a market share of 40 per cent shall create a presumption of dominance. The proposed amendments are subject to hot public debate and at the moment timeline for their adoption is not clear.

Lejiņš, Torgāns & Partners

Contact: Dace Silava-Tomsone

e-mail: dace.silava-tomsone@lt-v.lv

Valdemara 20
1010 Riga
Latvia

Tel: +371 782 1525
Fax: +371 782 1524
Website: www.lt-v.lv