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The International Comparative Legal Guide to:

Merger Control 2008

A practical insight to cross-border merger control issues

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Competition Authority of Latvia responsible for applying the legal requirements of merger control is The Competition Council (*Konkurences padome*). The members of the Competition Council are appointed by the Latvian government (Cabinet of Ministers) and it is subordinate to the Ministry of Economics. There is no legal stipulation, which ensures the independence of the decision making of the Council from the Government.

1.2 What is the merger legislation?

Legal requirements for mergers are set up in the **Competition Act** (*Konkurences likums*) adopted by the Latvian Parliament and in force from January 01, 2002. Legal requirements are also in ***Regulation No 897 Order of the Submission and Examination of a Notification regarding a Merger of Market Participants*** ("*Noteikumi Nr. 897 Kartiba, kada iesniedzams un izskatams zinojums par tirgus dalibnieku apvienošanos*") adopted by Cabinet of Ministers and in force from October 26, 2004.

There are quite a number of changes proposed by Ministry of Economics and the Competition Council to the Competition Act. Some of those reforms are expected for mergers as well. First, it is being considered to lower the threshold of mandatory notification - that is from the existing 40% of combined market share to 35%. Second, reduction of requirements for notification is proposed in cases, when (1) the merger occurs between market participants, which do not cover the same relevant market; or (2) the merger does not constitute more than 15% of the combined relevant market. There is no specific date agreed, when the proposed amendments shall become effective.

1.3 Is there any other relevant legislation for foreign mergers?

There is no other relevant legislation for foreign mergers.

1.4 Is there any other relevant legislation for mergers in particular sectors?

There is no other relevant legislation for mergers in particular sectors.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

The Competition Act provides that the following types of transactions are caught by merger regulation:

- the consolidation of two or more independent undertakings in order to become one undertaking;
- the acquisition of one undertaking by another;
- the acquisition of fixed assets of another undertaking or the right to utilise such; and
- the acquisition of a direct or indirect control (decisive influence) over another undertaking or undertakings.

The concept of control (decisive influence) is defined by the Competition Act as the capability, either directly or indirectly:

- to control (either regularly or irregularly) the decision-making of the supervisory body of undertaking, with or without active participation thereof; and/or
- to appoint such number of members in the supervisory body of an undertaking, which ensures a majority of votes in the respective body.

2.2 Are joint ventures subject to merger control?

General principles of merger control are applicable to joint ventures as well.

2.3 What are the jurisdictional thresholds for application of merger control?

The Competition Act thresholds for the notification of a merger are as follows:

- the aggregate turnover of the merger participants exceeded more than 25 million LVL (35.6 million EUR or 45.3 million USD) during the previous financial year; or
- the aggregate market share of the merger participants for the relevant market exceeds 40%.

The total turnover of all merging parties shall be taken into account, if the consolidation of two or more independent undertakings or the acquisition of one undertaking of another occurs. If the merger takes place, where the acquisition of fixed assets of another undertaking occurs, the turnover shall be calculated as the sum of the net turnover of the acquirer with such net turnover, which has been obtained by using such assets in the economic activity. If the

merger takes place, where the acquisition of direct or indirect control occurs, the net turnover of the party, which loses control after the merger, shall not be taken into account.

The net turnover of a party is calculated as the sum of its income from the activities, the sale of goods and the provision of services in the territory of Latvia during the previous financial year, minus the amount obtained by a sales discount and other allocated discounts, and the VAT and other taxes directly related to turnover as well. For the calculation of the total turnover of a party, it shall be taken into account the net turnover of this party and the net turnover of the following market participants, to which the party has the direct or indirect influence:

- to control more than half of the assets of capital or economic activity, including property rights;
- the opportunity to exercise more than half of the voting rights;
- the opportunity to appoint more than half of the members of the administrative body; and
- the rights to manage the affairs, which exceeds the scope of management control.

However turnover from the sale of goods from the party to its influenced market participants is excluded. In any way, in case of any uncertainty, the double calculation of the turnover shall not be permitted. There is a specific order for calculation of turnover for credit and insurance undertakings.

2.4 Does merger control apply in the absence of a substantive overlap?

If the jurisdiction thresholds for merger control are met, it does apply in the absence of a substantive overlap as well.

2.5 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign to foreign" transactions) would be caught by your merger control legislation?

Merger control will be applied only when the Latvian market will be affected by the merger - that is, when the business activities of at least one of the merger participants takes place in Latvia. There was a decision by the Latvian Competition Authority, where a company from Cyprus was fined for breach of the merger law (Case No P/05/0618 [15.03.2006]). This foreign company was fined for failure to notify, on time, the transaction of obtaining shares of a Latvian company.

2.6 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The national merger control provisions are not applicable, where there is an obligation to notify a transaction to the European Commission or if the case is referred to the European Commission in accordance with the EC Merger Regulation.

2.7 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

For the moment there has been no case in Latvia, where a merger has taken place in stages. It is quite likely that the Competition Authority will apply principles already adopted in EC level. That includes the "salami transactions" principle, that a series of transactions taking place within a two-year period between the same parties will be assessed as a single transaction, taking place on the date of the last transaction in the series. In case a target company would be purchased by a group of joint purchasers, with the intention of dividing up the assets between the joint purchasers so that each takes part of business - it is more likely that the initial purchase will not be analysed as a merger, but as a preliminary step to the subsequent series of acquisition of a part.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

If the jurisdictional thresholds are met, the notification is mandatory - lack of such notification is illegal. The concentration should be notified prior to a merger occuring. Notification shall contain all information required by *Regulation No 897 Order of the Submission and Examination of a Notification regarding a Merger of Market Participants* - if it does not, it will be considered as lack of notification.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

The Competition Act provides the following exceptions, where notification is not required, even though the jurisdictional thresholds are met:

- for financial or insurance undertakings, who's activities include transactions with securities for their own or other funds, and who have time-limited ownership rights to market participant securities, which they have acquired for further sale, if such credit or insurance undertakings do not utilise voting rights created by the referred to securities in order to influence the competitive activities of the relevant market participant, or utilise the voting rights created by the referred to securities in order to prepare the investment of the fixed asset or relevant securities only of the market participant, or a part thereof, and such investments occur within a period of one year after the creation of voting rights; and
- for liquidators or administrators, who acquire a decisive influence in the case of the insolvency or liquidation of an undertaking.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

If notification is not submitted, a fine may be imposed up to 1,000 LVL (1,423 EUR or 1,811 USD) for each day, starting from the day when notification should have been submitted. Notification shall contain all information required by *Regulation No 897 Order of the Submission and Examination of a Notification regarding a Merger of Market Participants* - if it does not, it will be considered as lack of notification. The new undertaking or the acquirer of control will be fined.

There is quite a descriptive recent case of the Latvian Competition Authority, where an undertaking was fined (Case No P/05/06/18 [15.03.2006]). The company acquired the shares of another company and notification occurred beyond the deadline, though the legal thresholds were met. The requirements of Latvian merger control provides that notification should be submitted prior to merger. As the registration of the purchase of 86.55% shares of the company at the Commercial Register already occurred on July 25 2005, the notification should have taken place before this date.

However the report was submitted on November 07 2005. Moreover, the report did not contain all the information required by law, and the Competition Authority asked to correct such a failure. Finally, all necessary information was sent on December 07 2005. According to the requirements of Latvian merger control, submission of notification was not considered on November 07, but December 07 instead. Therefore a total amount of 135 days of delay was calculated from the July 24 to December 07. The fine of 150 LVL per day was imposed considering that the clearance decision was made and the notification was done by the undertaking, though beyond the deadline. The total amount of the fine imposed was LVL 20,250 (135 days of delay x 150 LVL fine per day).

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Carve-out from the Latvian jurisdiction by completion in another jurisdiction is impossible, as any concentration in Latvia must comply with all applicable requirements of Latvian merger control.

3.5 At what stage in the transaction timetable can the notification be filed?

Notification can be filed as soon as documents relating to the merger are adopted and copies of them are provided to the Competition Authority - such as contracts, decisions of the supervising body, minutes of agreements, and proposal for bidding.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The timeframe for scrutiny of a merger by the regulatory body starts only when the application of the notification contains all information and documents required by law. If such required information or documents are absent, the Competition Authority asks to correct such a failure. After notification is filed, the Competition Authority shall within one month make a decision, which:

- prohibits the merger;
- permits the merger; or
- provides that further additional investigation is necessary.

If additional investigation is required, the decision either to prohibit or permit the merger shall be made within four months after notification is completely filed. If no decision is made within four months after notification is filed, it is presumed that permission to the merger is granted. Competition Authority is not entitled to suspend the timeframe provided by Competition Act.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

There are no prohibitions on completing the transaction before clearance is received. However, if the merger occurs and the Competition Authority prohibits it, the responsible person is fined. The fine is up to 1,000 LVL (1,423 EUR or 1,811 USD) for each day starting from the day when merger has occurred.

3.8 Where notification is required, is there a prescribed format?

The notification shall include all information and documents required by *Regulation No 897 Order of the Submission and Examination of a Notification regarding a Merger of Market Participants*. This Regulation provides the prescribed application form for the notification as well. Information required includes:

- identification of the parties to the merger;
- net turnover;
- legal, financial and economic aspects of the merger;
- relevant markets;
- goal of the merger and possible consequences; and
- documents to be attached.

Notification has to be filed in Latvian. Supporting documents are to be filed in their original language and, if they are not in Latvian, a translation must be attached.

3.9 Is there a short form or accelerated procedure for any types of mergers?

There in no short form or accelerated procedure for any type of merger.

3.10 Who is responsible for making the notification and are there any filing fees?

All concerned undertakings are responsible for the notification of the consolidation of undertakings or the acquisition of one undertaking of another. The undertaking, which obtains assets, is responsible for the notification of the acquisition of fixed assets of another undertaking or the right to utilise such, if such acquisition increases the market share of the acquirer thereof in any relevant market. The undertaking, which obtains control, is responsible for the notification of the acquisition of a direct or indirect control over another undertaking or undertakings. The natural person, who already has control over one or several undertakings, is responsible for the notification of the acquisition of direct or indirect control over another undertaking or undertakings. There are no filing fees for notification in Latvia.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The substantive test against which a merger will be assessed is provided in the Competition Act §16(3) - mergers have to be prohibited if they result in the creation or strengthening of a dominant position, or if they may significantly reduce competition in any relevant market. Therefore it corresponds to the EC's former "dominance" test.

Moreover the merger shall be evaluated, taking into account:

- the structure of the relevant market, the competition created by the market participants and the necessity to maintain and develop competition in the Latvian market as well;
- the economic and financial situation of the undertakings, the availability of alternative markets for suppliers and consumers, administrative or other barriers for entry into the particular market, the trends of supply and demand of the particular goods, the interests of intermediaries and

consumers, the development of technical and economic progress and the possible obstacles to competition;

- the international market position of the undertakings and the export possibilities of the products thereof; and
- the potential gain of consumers and the entire society of Latvia.

For example, there is in Latvia Case No P/05/0618 [15.03.2006], where clearance was granted for an undertaking, which already had a dominant position and obtained control over other undertaking. The "dominance" test was applied, and the merger was permitted because of: (1) the existing competition at a national level and in neighbouring countries as well; and (2) the lack of the barriers to enter the market, which was evident from the numerous importers. Therefore it was concluded that nevertheless for such a significant market share of the merger, the strengthening of a dominant position was not going to occur.

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

There are no legal requirements for the Competition Authority to publish or make any announcement when it receives a new notification. However, when a merger is reviewed, the main competitors and suppliers are normally always heard. The Competition Authority almost always requests written comments and statements from the competitors and suppliers regarding the contemplated concentration and its effects. Third parties do not have rights to claim access to key submissions or documents, and they do not have any rights to attend meetings or hearings as well.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The Competition Authority is generally authorised to request all information, which is necessary to make its decision, therefore it applies in relation to the scrutiny of the merger as well. Any person must provide the requested information within 7 days. During market assessment, the requested information, the preparation of which does not necessitate special compilation or analysis, must be provided without delay. If information is requested, the preparation of which necessitates special compilation or analysis, and the submitter of the information, due to objective reasons, cannot prepare the requested information within the specified time, he or she must notify the Competition Council in writing, indicating such reasons and the date when the information shall be submitted. The Competition Authority, taking into account the referred to notice, may specify another deadline for the submission of information. If the requested information is submitted with a delay or if it is incomplete, natural persons can be fined up to 500 LVL (712 EUR or 906 USD), but undertakings can be fined between 500 and 10,000 LVL (between 712 and 14,229 EUR or between 906 and 18,109 USD).

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Confidential information, that has been obtained, shall not be disclosed. Officials and employees of the Competition Council shall be liable for the non-observance of confidentiality and for damages incurred by an undertaking due to illegal actions of the Competition Council. The confidentiality of information is decided by the undertaking, although the Competition Authority is entitled to demand reasons why particular information is to be confidential. The decisions of the Competition Council are published; however any confidential information or business secrets are excluded to the public.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The procedure of merger assessment ends through the administrative decision of the Competition Council, which either permits or prohibits the merger. If no decision is made within four months after notification is filed, it is presumed that permission for the merger is granted. Decisions are published in official newspaper *Latvijas Vestnesis*.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The Competition Act provides that the Competition Council is entitled to permit mergers, where competition problems are detected. In such cases binding provisions for the undertakings have to be adopted, which prevent the negative consequences of the merger - that is the restriction of competition through the creation or strengthening of a dominant position. Such settlements are included in the same administrative decision, where the permission for the merger is granted.

5.3 At what stage in the process can the negotiation of remedies be commenced?

There are no provisions at which stage the negotiation of remedies can be commenced. Therefore negotiations can be started before or during the merger assessment procedure. As time for the procedure is limited, the negotiation of remedies should start as soon as possible. Therefore it is recommended that the undertakings already identify and analyse the effects of a merger and its possible competition concerns even before notification is filed. There are no statutory deadlines for the negotiations of the remedies. However it shall be taken into consideration that if a decision is not made during four months from the completion of the filing, it will be presumed that the clearance is granted. Therefore in case of competition problems, the negotiations are going to be limited within the time necessary to make the decision.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

Although the Competition Authority is entitled to require divestment remedy, for the moment it has never required any - neither obligation to sell one or more specified business nor to remove a competitive overlap. Therefore there is not any standard approach to the terms and conditions to be applied to the divestment yet.

5.5 Can the parties complete the merger before the remedies have been complied?

The remedies could be agreed, which allow the parties to go ahead and complete the merger. In case such remedies are not performed, the Competition Authority is entitled to apply a fine.

5.6 How are any negotiated remedies enforced?

In case a party does not comply with conditions set by a decision, the Competition Authority is entitled to impose a fine of up to 1,000 LVL

(1,423 EUR or 1,811 USD) for each day the remedies are breached. The Competition Authority is monitoring by itself that the remedies are being performed, additionally competitors are entitled to submit a petition in case remedies are not being performed.

5.7 Will a clearance decision cover ancillary restrictions?

There are no provisions for the treatment of ancillary restrictions in the course of merger assessment proceedings. However such ancillary restrictions can be dealt with in the merger clearance if the parties so request.

5.8 Can a decision on merger clearance be appealed?

General principles of an appeal with regards to a decision on merger clearance apply as for any decision of the administrative body. Any person, whose rights are infringed by the decision, can apply to the administrative court within 30 days, when he or she becomes aware of the decision. A decision can be appealed on substance and procedural grounds as well.

5.9 Is there a time limit for enforcement of merger control legislation?

There is no time limit for the enforcement of requirements of merger control by the Competition Council - a merger, which has been put into effect without clearance, can be ordered to be dissolved by the Competition Authority at any time. Such a time limit is not provided neither by the Competition Act nor by general administrative procedure law.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The Competition Council is a member of the European Competition Network and International Competition Network as well. The Competition Act provides the scope of co-operation with the Competition Authorities of other Member States of the EC, if it is necessary to investigate possible violations of EC competition law. If there is such a request from another Competition Authority, the Latvian Competition Council is entitled and shall perform the following procedural activities:

- request from any person necessary information;
- visit undertakings without prior warning - to receive explanations and investigate the site and documents;
- collect property and documents of an undertaking and its employees, which may be of importance;
- enter and investigate without prior warning the property of an undertaking or its employees (only if court authorisation is received); and/or
- enter and investigate without prior warning the property of other persons, if there is reasonable suspicion of the existence of evidence of illegal competition activities there (only if court authorisation is received).

Representatives of the Competition Authorities of other Member States are entitled to participate in the performance of such activities as well.

6.2 Please identify the date as at which your answers are up to date.

June 15, 2007.

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