

Controversial Competition Law Amendments Before Parliament

Contributed by Ieva Azanda, Attorneys at law Liepa, Skopina/ BORENIUS for International Law Office Competition Newsletter

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Introduction

Estonia has reformed its concentration control rules to encompass domestic turnover and thus cover more mergers between Estonian companies, but Latvia has taken a different approach to its competition law reform. Early in September 2007 the government finally adopted and submitted to Parliament the much-debated and controversial amendments to the Competition Law, which has not been amended since 2004, when changes were made in preparation for Latvia's accession to the European Union. The proposed amendments have had a mixed reception from industry stakeholders and legal practitioners.

In brief, the amendments propose:

- the introduction of voluntary notification of restrictive agreements. To some extent, this change would bring the law into line with EU Regulation 1/2003;
- slight but potentially significant changes to the merger notification procedure - namely, the introduction of short-form notification in cases when there are no affected markets or the joint market share of the parties increases by less than 15%;
- a number of changes to increase the investigative powers of the Competition Council's executive arm, the Competition Bureau. The same amendments would implement a change advocated by the chair of the council and narrow the range of issues which fall under the council's jurisdiction. If adopted in their present form, the amendments would abolish the council's authority over certain matters relating to unfair competition, which would become the responsibility of the courts;
- the removal of the 40% market share threshold from the definition of 'dominance'. This would bring Latvia's statutory definition into line with those used in EU case law. Like the change with respect to prohibited agreements, such an amendment would be welcomed by practitioners and academics, even though it would introduce slightly greater legal uncertainty; and
- a definition of a new concept distinct from dominance - namely, 'significant or appreciable influence'. This has been the most hotly debated of the proposed changes, raising questions about its necessity, aims and possible application.

Voluntary Notification of Restrictive Agreements

The measure allowing for voluntary notification of restrictive agreements would bring about a theoretical rather than a practical improvement; Latvian competition lawyers spend more time drafting merger notifications and defending their clients in alleged dominance or cartel cases than drafting notifications about restrictive agreements. The idea of concluding and notifying restrictive agreements in order to obtain exemptions has gained less popularity in Latvia than in the rest of the European Union since the introduction of the notification procedure. Nevertheless, the amendments would bring Latvian law closer to

the European regime on controlling restrictive agreements.

Short-Form Notification

The council's existing merger control procedure is in urgent need of a form of short-form notification which can be scrutinized quickly without requiring the parties to undergo a second-phase investigation. In many cases, the only factor preventing a deal from being closed is the absence of mandatory suspension under Latvian law; parties may rely on their self-assessment and may proceed with their transaction even before clearance has been received from the council. The introduction of short-form notification would assist parties having to make formal notifications in respect of a transaction in which no markets are affected. However, some consider that the turnover criterion is too high to catch some mergers which have a significant effect on Latvian markets - the joint turnover of the parties in Latvia for the preceding financial year must exceed Lats25 million (€6 million).

The other merger filing criterion - a combined market share in the relevant market of 40% or greater - would be reduced to 35% under the amendments. Some practitioners have questioned whether the reform should have been used as an opportunity to eliminate the market share criterion in order to simplify merger control filings and assessment.

Investigative Powers

The proposed procedural changes and increase in the council's investigative powers seem to be the result of trends in the council's enforcement practice over the past three years. The amendments address some procedurally sensitive issues, such as obtaining warrants for dawn raids and the powers of the council's officials during investigations. Although the changes may meet with slight disapproval from undertakings and practitioners, such changes are necessary for the council to ensure practical control over undertakings operating in the markets.

To some extent, the same is true of the proposed amendments which would narrow the council's jurisdiction with respect to unfair competition cases and encourage enforcement through private actions. The process of proving alleged abuse of one undertaking's commercial secrets by another undertaking would undoubtedly be cumbersome, lengthy and of little wider value to consumers and society. Moreover, the courts before which such cases would be brought possess fewer procedural powers than the council in requesting information and investigating allegations. If the amendments are adopted as they stand, parties bringing unfair competition claims will be heavily reliant on their own ability to demonstrate to the courts that their competitors have behaved unfairly.

Dominance and Significant or Appreciable Influence

Clarifying the definition of 'dominance' would facilitate the council's enforcement tasks, giving it a more flexible tool to apply when dealing with large market players which enjoy significant market power. However, the proposed introduction of the concept of significant or appreciable influence has proved the most contentious point. The proposal defines the term as a position in a retail market in which an undertaking enjoys a market share of over 25%, but is not in a dominant position. The term 'retail market' means one in which goods (but not services) are sold to consumers for daily consumption. There is also an article on

the abuse of significant or appreciable influence, which covers, among other things, the imposition of unfair and unjustified payments for:

- the storage of retail goods on retail premises;
- the conclusion of agreements for the delivery of retail goods; or
- the delivery of goods to new retail premises.

This section of the amendments clearly draws on investigations by the council which have uncovered such practices in retail markets. Nevertheless, adopting the proposed amendments would require retailers to overcome two hurdles: significant or appreciable influence and dominant position. This raises the question of whether the undesirable situation in the retail markets, in which large retailers allegedly dictate the commercial behaviour of almost all of the smaller suppliers, could not have been tackled by thorough application of the rules on dominance. If incorporated into law, the idea of significant or appreciable influence would have to evolve in its own way, being shaped by the council's decisional practice and, subsequently, by court decisions. It may be justifiable to invent new tools for tackling overwhelming market problems, but the value of such tools becomes clear only when they are applied to current retail market issues. Ultimately, the question will always be whether there are not simply too many barriers and hindrances for competition to be effective, and whether the economy is not attempting to fight the consequences when it should instead attempt to discover the causes.

For further information on this topic please contact [Ieva Azanda](mailto:ieva.azanda@borenius.lv) at Liepa Skopina Borenius by telephone (+371 7 201 800) or by fax (+371 7 201 801) or by email (ieva.azanda@borenius.lv).