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### ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES – Contribution from Latvia

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More documentation related to this discussion can be found at: [oe.cd/eac](https://oe.cd/eac).

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## *Economic analysis and evidence in abuse cases*

### **- Contribution from Latvia –**

This paper briefly explains practical insights with the respect to the use of economic analysis and evidence gathering in abuse cases at The Competition Council of Latvia (the CC).

#### **1. Abuse of dominance or monopolisation theories of harm used by Competition Council in the last five years.**

1. The CC considers various exploitative, exclusionary, discriminatory and other abuse of dominance or monopolisation theories. However, in the last five years (2016-2021) the CC mostly has dealt with exclusionary practices. In 4 out of 5 investigations (2016-2021) the focus and the main theory of harm has been exclusion of competition in the market by the dominant company.

2. The most notable cases in last five years:

- In 2021 the CC imposed a fine on Jelgava's Municipality for abuse of a dominant position related to the municipality's actions, unreasonably and inconsistently with the regulatory framework granting its company Jelgavas komunālie pakalpojumi the right to operate in the waste collection and transportation market in the administrative territory of Jelgava city. The regulatory framework in Latvia stipulates that every local government has the freedom to choose the way to ensure waste management in its administrative territory by selecting a service provider in a procurement procedure, private-public partnership process or in-house procedure entrusting the provision of services to its capital company. Since 2004, Jelgava's Municipality has been providing waste management by applying the in-house procedure. However, when choosing an in-house service provider, the municipality must exercise complete control over the corporation without involving private capital (in accordance in-house regulations). At the same time, in the Jelgavas komunālie pakalpojumi, to which the collection and transportation of municipal waste in Jelgava have been transferred, 51% of the capital shares belongs to Jelgava's municipality, but 49% of the capital shares belongs to the private market participant. Thus, in the actual circumstances, there were not all the criteria specified in the regulatory framework that would allow the application of the in-house exception. Hence, Jelgava's Municipality by unjustifiably granting rights to provide waste management services to Jelgavas komunālie pakalpojumi excluded other potential providers of municipal waste management services, without allowing other market participants to offer their services.
- In 2021 the CC closed the case and signed a settlement with Riga City Municipality and Getliņi EKO in the dispute on the planned monopolisation of the waste management market in Riga for a period of 20 years. In 2019 Riga City Municipality, Getliņi EKO and the private partner Tīrīga concluded a concession agreement on the introduction of a new waste management system in Riga. Until 2019 the waste collection and transport was provided by four companies. Whereas the new waste management system provided that henceforward these four companies on the waste collection and transport market will be replaced by only

one company – Tīrīga, thus entirely excluding competition existing previously in the waste collection and transport market and preventing new market participants from entering the relevant market for at least 20 years.

- In 2020, the CC imposed a fine on LDZ CARGO (LC), a subsidiary of the state joint stock company Latvijas dzelzceļš, for abusing its dominant position in the market for the provision of freight transportation services by rail. The CC evaluated different exclusionary and exploitative actions of LC. LC for a long time is a sole provider of freight transportation services in the border area with Russia and Belarus what in most cases are unavoidable transportation service for all freight shippers that plan to transport cargo through Latvia ports. At the remaining part of route through the Latvia to the end station (usually to one of the ports operating in Latvia) that forms substantially longer transportation distance LC compete with others freight transporters operating in Latvia. Having competitive advantage at the border part LC used to apply freight rates in its contracts to customers, including various financial benefits (route discount, volume discount, etc.) both for border area and whole route, if they accepted LC as their carrier for the whole route. However, competitor's customers that chose LC services only at the border area were offered only standard freight rates, without the benefits. Thus, LC made it difficult for its competitors to operate in the Latvian market. In addition, similar effects aimed to restrict competition were achieved if the freight shipper even before the freight was to arrive in Latvia decided to terminate the contract of carriage mid-route, changing to another Latvia port and switching from LC to its competitor. In this case, LC terminated the initial contract of carriage and applied substantial fees, which increased the customer's expenses. As a result, customers were forced to pay more, if they decided to change carriers, thus preventing LC's competitors to compete for clients. Also, LC used to apply exploitative practices aimed at LC competitors' clients, charging them for downtime on common use railways, if freight was transported in wagons owned by private persons. The CC concluded that imposition of such fees were possible because of LC functions being in charge for freight wagons accounting (how many is coming in, leaving, resting in stations, etc.) and several others in railway stations throughout Latvia.
- In 2016 the CC imposed a fine on Knauf and Norgips for abusing their market power by creating and implementing anti-competitive loyalty rebates system. the CC concluded that Knauf and Norgips had created and at least from 2009 to 2014 implemented anti-competitive loyalty rebate system to their clients which are the largest Latvian retailers of building materials. The system laid down conditions of receiving individualized, retroactive loyalty rebates. For at least five years these anti-competitive conditions motivated retailers to purchase plasterboard together with other building materials primarily and at the maximum possible capacity from the Knauf group companies.
- In 2016 the CC imposed a fine and legal obligation on Rēzeknes autoosta, which is an operator of a regional bus terminal in Latvian city Rēzekne. the CC found that the infringer has abused its dominant position and has charged excessive fees from bus carriers for the entrance of the terminal. the CC during investigation found that Rēzeknes autoosta, after becoming an operator of the Rēzekne regional bus terminal in 2013, in entrance fee calculations included costs that substantially increased entrance fees without objective justification in years 2014 and 2015.

## 2. Tools and methods for assessment of market power in the abuse of dominance

3. The CC assess various factors and economic tools to analyze the strength of potentially dominant company. Market shares are used as a first indicator of market power. Especially historical market shares and changes over time to reveal the dynamics of a market. Usually market shares are determined by volume or value. However sometimes the CC focuses on capacity. For example, in 2021 the CC analyzed heat production market in Riga, where heat production in Combined Heat and Power Plant (CHP) was provided by incumbent energy company Latvenergo. In this case capacity was used to evaluate the market power of a incumbent supplier of heat. The CC concluded that the economic strength competitors were significantly limited because more than 90% of the capacity in the market was provided by incumbent. That gave incumbent advantage to influence market conditions and restrict total output substantially below its current level (which could lead to overall price increase because of the heat shortage).

4. The CC also considers product differentiation, responsiveness of customers (willingness to switch), entry barriers when analyzing market power. Also, recently (in 2019) the CC extensively analyzed buyer power to determine the seller's market power. The CC investigated a potential infringement by an undertaking holding exclusive distribution rights of popular television channels in Latvia (TEM LV) - its potential dominance, and the abuse thereof, towards the television channel operators downstream. These TV channels in Russian language were most popular and for TV channel operators these TEM TV channels were with limited substitution which indicated dominance. Market structure in TV operators market was fragmented one of the operators (TET) having substantially higher market share of around 50-60%. Both TET and TEM LV claimed that they cannot effectively continue running their business without one another, i.e. TET claimed that without the channels provided by TEM LV, a significant number of customers will switch to a different operator, while the distributor TEM TV claimed that due to TET significant audience, without a license agreement in place, the distributor would suffer significant (maybe even irreparable) loss in turnover.

5. The CC used bargaining framework to analyze buyer power - bargaining parties' relative "outside options" and analysis of prices paid by different buyers. The CC also analyzed if buyers can immediately switch to other suppliers, credibly threaten to vertically integrate into the upstream market or sponsor upstream expansion. However, the CC found that this was not the case. Buyers couldn't immediately switch to other suppliers because of the lack of adequate alternatives. Also, TET buyer power was not sufficiently effective constraint as it only ensured that only TET customers are protected from the market power of the TEM LV. Despite the dominance of TEM LV, the CC ended the investigation in 2021 because the Latvian National Electronic Mass Media Council suspended the TEM LV operations in Latvia.

## 3. The role of economists in abuse of dominance or monopolisation cases

6. The CC has a separate Economic Analysis Unit who (if necessary) provides methodological support during case investigations, as well as implements in-depth analysis of market processes during sector inquiries. However, the role of economist can vary depending on the specifics of the case. Although in last five years (2016-2021) economists to some degree have been involved in couple of dominance cases providing support in data collection and requests for information as well as analyzing the information, none of cases involved any substantial quantitative economic analysis.

7. Mostly economists provide support in merger investigations and court proceedings where is need to evaluate economic analysis submitted by the parties. The CC have 4 economists (including the head of unit) and unit recently founded. The involvement of the economists in abuse of dominance cases are limited also because the CC does not have economist who is specialized and experienced in abuse of dominance cases. The CC try to balance the needs with the available resources because of the limited number of economists and a wide spectrum of topics where economists may be needed (not only mergers and abuse of dominance, but also cartels, conduct of public administrative bodies, court proceedings, market inquiries, regulatory changes etc.). However, there are few cases (mentioned in this contribution) where economists took part (or lead the case).

8. Economists also have taken part in one remedy negotiations. In 2021 the CC modified Latvenergo's commitments in heat production market in Riga (which were first implemented in 2009). Remedy negotiations were led by economists because the discussion was about pricing practices and costs (avoiding possibility of predatory pricing by Latvenergo). Almost all heat by Latvenergo is produced in CHP what is most efficient but partly heat boilers are also used. That means that the costs of supplying heat necessarily come with additional electricity output (all costs are shared (joint) between electricity and heat).

9. In remedy negotiations this was the main topic of discussion because one possibility was to look at the both markets (heat and electricity production) together. If the price combination for heat and electricity covers all the CHP joint production average avoidable costs or long run incremental costs, there would be no exclusionary conduct. But that could create a significant disadvantage for rivals that are only active in heat market and therefore must incur all the stand-alone costs (does not have economy of scope). Other option was to allocate joint costs between electricity and heat on some reasonable bases. This however raised many practical problems because allocating common costs is difficult and arbitrary. After long and intensive negotiations which also involved two economic consultant companies, the CC final conclusion was that the modified remedies shouldn't contain detailed commitments on how to allocate common costs. The responsibility to find and implement a cost allocation method to avoid predatory pricing was put on Latvenergo because the CC was not required to stipulate for Latvenergo what kind of cost allocation method was to be put in place.

10. Overall merger cases always have been the priority of the CC because of the limited timeframe for investigation (the CC have up to 4 months to finish the investigation compared to abuse of dominance case where the timeframe is 24 months). Also till only recently one department (Analytical department) in the CC investigated both type of cases which affect the speed of investigation in abuse of dominance cases (since resources are primarily devoted to merger cases). However, since 2021 economic analysis unit took over part of the workload and in the future the CC is planning to divert the merger investigations exclusively to economic analysis unit. That will free up resources of the Analytical department to speed up the investigation process in abuse of dominance cases. The role of economists in abuse cases will involve methodological support for economic analysis, use of case specific economic methods and data necessary for further investigation.

#### 4. Evidence and data acquisition in abuse/monopolisation cases (third-party data, use of surveys, or etc.).

11. The CC find particularly helpful evidence from market participants, entry events, clients, third parties (experts), surveys, studies and experience of other member states. In recent years the CC has used many of these types of evidence. However, the CC rarely use firms' internal documents because abuse of dominance is an objective concept and exclusionary intent is not necessary to determine whether conduct is abusive.

12. For example, in Riga City Municipality and Getliņi EKO case regarding monopolization of the waste management market in Riga one of the aspects analyzed was the municipality statement that it is more efficient to have a monopoly in waste management market. Waste collection usually exhibits significant economies of population density and, therefore, is usually considered to be a local natural monopoly. However, studies<sup>1</sup> have showed that the minimum efficient scale for waste collection occurs at about 15 000 – 16 000 inhabitants. When analyzing information, the CC concluded that Riga has about forty times more inhabitants with high density so there was no indication that the market for household waste collection in Riga monopoly may create any efficiencies. In this case studies done in other countries provided a helpful information and evidence.

13. Also, in the mentioned TEM LV case the CC used insights and experience from other EU member states to analyze buyer power. The CC has also used economic assessments from economic consultants. For example, when analyzing heat production market in Riga two market participants provided the CC economic assessments to help determine the scope of remedies imposed to Latvenergo. Overall, the types of evidence used usually are determined by the specifics of the case, theory of harm and available information to market participants.

14. So far, the CC have not encountered major data limitation problems in abuse of dominance cases.

15. But in few cases when there has been an issue of obtaining data about the relevant market, the CC has used publicly available databases for a wider economic sector data as well as surveys. For example, in Riga City Municipality and Getliņi EKO case the CC used a consumer survey to find out the opinion of waste generators. In addition, the organizers of the surveys (research agency) did not had a specific database at their disposal that include persons living in Riga and uses waste collection service. Therefore, to overcome the lack of data, the CC asked all waste managers in Riga to give 3000 randomly selected person contact information who use waste collection service in Riga. The contact information was by the research agency to conduct the consumer survey.

16. If necessary, the CC also uses Nielsen and similar databases to obtain data. The CC is also actively working to have direct access to various state-maintained databases (State Revenue Service, The Register of Enterprises of the Republic of Latvia databases and other) so that the necessary information can be obtained in an already compiled form, rather than requesting it from the market participants.

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<sup>1</sup> See for example <https://www.oecd.org/daf/competition/Waste-management-services-2013.pdf> (p.19) and <https://www.cpc.ie/business/wp-content/uploads/sites/3/2018/10/The-Operation-of-the-Household-Waste-Collection-Market.pdf> (p.12)

## 5. Analytical techniques used when assessing effects in abuse of dominance or monopolisation cases

17. The CC has not used any quantitative economic techniques to test the effects on consumer welfare. Such inquiries are fact-intensive and often it will not be possible to examine the direct impact of an abusive practice on consumers (the effects may not yet have materialized or may never materialize). The CC puts emphasis on the impact of conduct on market structure (form-based analysis) instead of a more direct analysis of the effects of the conduct on consumer welfare. In the mentioned cases it was possible to infer consumer harm based on a likely consequence for consumers of the dominant firm's actions.

18. However, in Riga City Municipality and Getliņi EKO case the CC used a consumer survey to evaluate the benefits of competition (and disadvantages of monopolies). In respondents' opinion, competition under free-market conditions ensured such possible advantages as lower price, higher quality, individual approach, etc. The survey results also showed that legal persons (66 % of respondents) would like the free competition model in the waste management market with the possibility to choose the service provider freely.

19. Also, the CC has not undertaken any ex-post assessments of its abuse of dominance cases.