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Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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Interactions between Competition Authorities and Sector Regulators

- Contribution from Latvia -

1. Introduction

1. In this paper the Competition council of Latvia (hereinafter – the CC) shares its experience with cooperation with sector regulators. The paper describes the legislation and cooperation agreements, challenges of cooperation as well as successful examples. The paper also describes examples of cooperation in practice with different regulators giving the background of each case and the type of cooperation that was executed.

2. Institutional context and cooperation

2. In The Republic of Latvia, the CC has the mandate to enforce competition law in all sectors and is an independent institution, separate from sector regulators. The CC does not have any sector regulation functions. Section 6 of The Competition law states the duties of the CC[1] and sector specific regulation clearly defines the roles of sector regulators. National case law also has been clear about the roles of the competition authority and the sector regulators.

2.1. Legislation and cooperation agreements

3. The CC cooperates with sector regulators regularly. The CC has a cooperation agreement with The Public Utilities Commission (hereinafter – the PUC) signed on April 4 year 2008 on the basis of Section 61 of State Administration Structure Law[2]. This is the only official cooperation agreement between the CC and sector regulators. This agreement was signed on the PUC's initiative and was the regulators practice at the time, and the CC had no objections to it. The agreement has not changed since and there are no discussions about the need to change it. The agreement allows for bilateral consultations between the two entities. It also allows for offering opinions on the matter or in a specific case to the other authority, sharing views and offering evaluations of documents or amendment proposals of law prepared by the other authority, exchanging information (including confidential information), notifying the other authority about adopted decisions or other operations that can affect competition, as well as allowing for some other lesser important matters (like exchanging information on any upcoming seminars, conferences, etc.).

4. Since 4 September 2020 the PUC has an Advisory Council where the CC takes part. The task of the Advisory Council is to provide recommendations on the PUCs operational strategy, strategic work directions and examine the progress of the PUCs strategy implementation and improvement opportunities.[3] The PUC organizes hearing meetings

[1] The Competition law Section 6; Available in English: https://likumi.lv/ta/en/en/id/54890-competition-law

[2] State Administration Structure Law, Section 61; Available in English: https://likumi.lv/ta/en/en/id/63545-state-administration-structure-law

[3] https://www.sprk.gov.lv/en/node/6864

where the CC is invited when issues within the remit of the CC are discussed. Through these hearing meetings the public can take part and express opinions before the decisions of the PUC, however they are not binding to the PUC.

5. Since 23 June 2022 Section 6^1 of the Competition Law states that the CC has an Advisory Council, however it has not been implemented yet. Paragraph 1 of Section 6^1 states that the Advisory Council includes representatives from state institutions and foundations representing the interests of social and cooperation partners. It is planned that PUC will be represented in the Advisory Council of the CC. The decisions of the Advisory Council are not binding but advisory in nature.

6. With other sector regulators, e.g., the Bank of Latvia, The Financial and Capital Market Commission and the National Electronic Mass Media Council, the CC cooperates on the basis of Section 53 of the Administrative Procedure Law[4] and section 54 of State Administration Structure Law. These provisions have been in the Administrative Procedure Law since it came in to force on February 1, 2004 and have not changed since. Since the legislation works well and there have been no major issues with cooperation between the CC and regulators, there have been no discussions about a need of another agreement or a new regulation.

7. The cooperation is mandatory when asked officially as stated in the paragraph two of the Section 54 of State Administration Structure law, with exceptions stated in Section 56 of this law. In practice, the regulators are willing to cooperate, however, the opinions are not legally binding to the CC and vice versa.

8. The CC does not have a requirement stated in the law to inform a regulator when issues that are within the competence of a regulator arise in its investigation. There is also no requirement to involve regulators when issues within their remit arise in the CC's investigation, and no requirement of the consent of a regulator before issuing a decision on matters of mutual relevance. There are no such requirements for regulators to involve the CC in their proceedings. However, it is good practice and usually helps with the investigation in different aspects therefore the CC informs the competent regulators whenever there is an investigation in a regulated market.

9. The cooperation is usually successful, however there are some challenges. The regulators cannot always reply speedily to requests of cooperation because of lack of resources. This is problematic because of the short terms for case investigation stated in the competition law, more precisely the terms for merger review. Another thing is that the CC and regulators might not always agree on everything and sometimes have different views on separate topics, however the opinions of the institutions are of advisory nature therefore it is not a major issue and happens rarely. Another challenge is the exchange of commercially sensitive information. Even though the CC does not see this as a particular problem, some regulators are cautious when sharing commercially sensitive information. The PUC and the CC share commercially sensitive information on the basis of the beforementioned cooperation agreement.

2.2. Cooperation in practice

2.2.1. The PUC

10. The CC cooperates with the PUC most out of all the regulators. The type of cooperation differs from each situation and the advice or help needed from each institution.

[4] Administrative Procedure law, Section 53

If a case is in the market that is regulated by the PUC, the CC informs the PUC about the case (an agreement, merger etc.)

11. One of the markets where the CC cooperates with the PUC is telecommunication market. One of the reasons for this close cooperation is that the PUC gives overview of the market participants and their obligations. Another factor is, the PUC defines the market the same way the European Commission does. Since the CC follows the practice of the European Commission and EU caselaw when defining the markets as well, the CC consults the PUC on how to define markets.

12. One common way of cooperation with the PUC (as well as other regulators) is exchange of opinions and expertise in merger cases. For example, the PUC as experts in the field of telecommunications offer explanations, data and help with understanding the specifics of the markets and their structure. This can be done in an informal meeting or in writing if the CC needs to refer to the opinion in the decision. In a recent merger decision on the telecommunication markets, the PUC explained the experts of the CC in a presentation the specifics of the markets - Internet connection and data transmission service market; market of wholesale and retail services of leased lines; voice telephony fixed electronic communication network service market; IT outsourcing market.[5] The CC often requests data from the PUC if it is needed for the investigation or merger review.

13. In another telecommunications case the PUC and the CC cooperated when the regulator was reviewing request for permission to share frequencies between telecommunication operators Tele 2 and Bite Latvija (two of three telecommunication operators in Latvia). The aim of the investigation was to evaluate whether this cooperation will not threaten competition in the electronic communications market in Latvia. One of the important factors for all three mobile operators to have equal opportunities to conduct commercial activities in the market is equal access to the limited frequency resource. For this reason, the PUC allowed Tele2 and Bite Latvija to jointly use frequencies if unequal competition between all three mobile operators does not arise.[6] The CC took part in meetings, reviewed the final decision of PUC and issued an opinion in writing about the cooperation between the two telecommunication companies and the influence on competition. However the CC only gave an opinion on the cooperation of the companies but not evaluation of the agreement since it is not in the remit of the CC to evaluate the agreements compliance with the sector regulation (in this case Electronic communications act). Therefore the opinion of the CC did not intervene in the competence of PUC. The decision of PUC allowed to jointly use 44% of the total amount of frequencies in the use of these companies. The remaining part of the frequencies was to be used individually. As part of this cooperation, both operators would also have had the opportunity to jointly use their infrastructure - towers, masts, equipment and base stations. Since the decision did not allow the cooperation to the full extent that the companies asked for, the deal was abandoned.

14. The competencies of PUC and the CC are defined clearly and do not overlap. In 2013 the CC made a decision in a *Latvia Gas* case[7] where AS "Latvijas Gāze" as the dominant undertaking linked new users of natural gas supply with the payment of debts of previous users. The practice was found as abusive and the decision stated exceptions from

[5] 12.05.2022. decision of the CC in the merger case No 8, *Tet / Telia Latvia*. Available in Latvian: https://lemumi.kp.gov.lv/files/documents/20220512_KP_lemums_Tet_Telia_publisk%C4%81_versija%20(1).pdf

[6] Available in Latvian: https://www.sprk.gov.lv/events/sprk-atlauj-sia-tele2-un-sia-bite-latvija-sadarbibu-mobilo-sakaru-frekvencu-izmantosana

[7] 01.10.2013. decision of the CC in case No E02-48, *Latvijas Gāze.* Available in Latvian: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/BXDT6x2tyV.pdf

the prohibition of linking new users to the debts of previous users.[8] Since AS "Latvijas Gāze" was a company regulated by PUC, the CC referred to data and information form PUC in the decision - when defining the relevant market, evaluating the market power of the undertaking etc. AS "Latvijas Gāze" argued that the regulator had accepted its practice and the CC could not intervene in this practice since it is regulated by the PUC. The CC denied this argument saying that the CC is the central institution responsible for the interpretation and application of the competition law as well as the fact that if an undertakings practice is lawful according to sector regulation does not automatically mean that it is lawful in the scope of competition law. The court upheld the decision of the CC in both first and second instance therefore stating the case law that the CC is the only competent authority in the system of public administration, who monitors the market, ensuring compliance with the principles of free competition in any sector of the national economy.[9] This case also clearly states that the PUCs practice and decisions are not binding to the CC. Another dimension of this case which is upheld by the court is that the CC does not breach the *non bis in idem* principle when fining an undertaking for its actions if the regulator has already expressed its opinion on the action.

15. The CC often is involved in the development of a new regulation or amendments of sector regulation. The CC takes part in meetings and gives opinions on regulation to ensure that sector regulation does not hinder competition. One of the sectors where the CC often takes part is the waste management sector.

16. On February 1, 2022 the package deposit system started working. The CC raised the issue that there is only one packaging deposit operator and therefore it is in dominant position and its activity must be regulated. The CC was involved in the development of the regulation and as a result of the discussions and work on the regulation, the deposit system operator is regulated by the PUC.[10]

2.2.2. Bank of Latvia

17. The CC cooperates with the Bank of Latvia (hereinafter - the BL) based on the Section 53 of Administrative Procedure Law.

18. The BL has consulted with the CC regarding its memorandums. For instance, the BL, the Financial Industry Association and four banks with the largest network of ATMs and branches (AS "Swedbank", AS "SEB banka", AS "Luminor Bank", Latvijas filiale and AS "Citadele bank") in the fall of 2021 signed a cooperation memorandum (it has been extended to continue in 2023). The situation was as follows - the banks were closing and removing ATMs since the use of cash has been declining, especially during Covid-19. However, the use of cash is still an important aspect of strategic and social responsibility in several regions of Latvia. Therefore, the goal of this memorandum was to increase access to cash for the citizens of Latvia.[11] The signatories of the memorandum agreed on the following actions to ensure the availability of cash throughout the territory of Latvia: 1) maintain the existing network of ATMs without reducing the number of ATMs by more than 5% until January 1, 2024; when creating a network of ATMs, in general, observe a distance of no more than 20 kilometers in a straight line to the nearest ATM from any place in Latvia for

[8] Ibid.

[9] 14.09.2016. decision of the Senate No. SKA-461/2016 *Latvijas gāze*, paragraph 7.

[10] See paragraph 2 of section 18^7 of Packaging Law; Available in English: https://likumi.lv/ta/en/en/id/57207-packaging-law

[11] https://www.bank.lv/en/component/content/article/596-for-media/press-releases/13117-updated-memorandum-on-ensuring-access-to-cash

99% of the population of Latvia; 3) determine an appropriate time of actual availability of ATMs in the interests of consumers (at least 12 h every day).[12] The CC was asked to evaluate whether this memorandum increased the risk of breaching the Article 101 of TFEU (and the national equivalent Section 11 of the Competition Law). The CC provided a written opinion based on an analysis of the memorandum itself and the risks of cooperation between the banks who signed the memorandum as well as the goal of the memorandum itself and concluded that there are no grounds for further investigation of the documents' conformity with the Competition law.

19. Another case where the CC was asked for opinion regarding the work of banks of Latvia was in year 2020 when the banks of Latvia signed a moratorium (not of regulatory nature) in order to support natural and legal persons who have suffered from the Covid-19 crisis.[13] The moratorium provided an extension of the term of payment of credit obligations due to an emergency situation. The Association of the financial sector asked the CC whether the moratorium complied with the competition rules, namely Section 11 of the Competition law and Article 101 of the TFEU. The Moratorium was discussed at the request of the financial and capital market commission, at the same time the moratorium is a private agreement between the banks in Latvia and will affect aspects of the economic activity of credit institutions as well as determine a common framework for cooperation with customers. Taking into account the economic consequences of Covid-19, the prohibition of exchange of commercially sensitive information between banks, the text of the moratorium itself (it included several guarantees that reduce the risks of hindering competition) and the aim of the moratorium – to reduce the economic consequences of covid-19 restrictions on natural and legal persons and therefore the financial system as a whole, the CC expressed the opinion that there is no reason to conduct further research on the moratorium in accordance with Article 11 of Competition law and Article 101 of the TFEU. The CC also consulted with the European Commission before giving this opinion.

2.2.3. The Financial and Capital Market Commission

20. The Financial and Capital Market Commission (hereinafter – the FCMC) cooperates with the CC based on Section 53 of Administrative Procedure Law and there has been no discussion about a potential cooperation agreement.

21. This year the FCMC asked for the opinion of the CC when the Share buyback law was being developed[14]. Considering issues with the submission of merger notifications in cases when the acquirer gained control over the target undertaking by carrying out a share buyback offer, the CC expressed the need for a change in the regulation. Since 3rd May 2022 Share buyback law is in force and the merging parties must submit a merger notification before asking for a permit to express a share buyback offer to the FCMC (if there is a possibility of acquiring control over the target company), therefore the offer can be expressed only in case the CC clears the merger. The CC and the FCMC also consult each other in such cases, however usually not disclosing any commercially sensitive information.

[12] https://www.bank.lv/en/component/content/article/596-for-media/press-releases/13117-updated-memorandum-on-ensuring-access-to-cash

[13] Available in Latvian: https://www.fktk.lv/jaunumi/citas-aktualitates/fktk-atbalsta-vienotu-banku-pieeju-kreditbrivdienu-pieskirsanai-uznemumiem-covid-19-del/

[14] Share buy-back law; Available in Latvian: https://likumi.lv/ta/id/331726-akciju-atpirksanas-likums

22. Another example of cooperation between the CC and the FCMC was during a broker and insurance market monitoring carried out by the CC[15]. The CC monitored the insurance company cooperation with brokers when distributing the compulsory civil liability insurances for owners of motor vehicles. The CC stated that brokers presence in the market enhances the competition between insurance companies. It was concluded that consumers who use the help of brokers and analyze the offers in the market get a better offer than those who do not change insurance companies and do not do market research. The CC also concluded that brokers are not competitors, because they sell the insurances in the name of the insurance companies and their role is to represent the interests of the consumer. To ensure fair competition the insurance companies must offer the brokers the same offer than to the clients if they turn straight to the insurance companies. Otherwise, if the price directly to the consumer was lower, it would endanger and hinder the operation of brokers even though the regulation requires the presence of brokers in the market. The CC offered to include narrower price parity conditions in the agreements with brokers to insure their presence in the market. The market monitoring also showed that the brokers themselves cannot make enough pressure on insurance companies to include such rules in the agreements therefore a wider discussion in the market is needed to solve this issue. The CC involved the FCMC in the monitoring of the market, organized meetings to discuss the issues in the relevant market and asked for the opinion of the FCMC.

2.2.4. The National Electronic Mass Media Council

23. The CC cooperates with the National Electronic Mass Media Council (hereinafter – the NEMMC) regarding competition neutrality issues.

24. On example was when the national media interfered in the advertisement market by selling the advertisement slots below the market price. The national media was able to do so because it is subsidized by the government, and they do not need the income form advertisements the way private media does. The CC involved in this issue, exchanged opinions with the NEMMC, also provided written opinions stating that such situation in the market is against competition neutrality and the private media cannot compete with national media. The CC addressed the written opinion to the NEMMC, also to the ministries responsible for this issue, as well as the private media representatives. As a result of the discussion the national media exited the advertising market.

3. Conclusion

25. The CC cooperates with sector regulators daily in many ways – informal meetings, formal written opinions, exchange of experience, exchange of data and views on different issues.

26. In this paper the CC has shared only some of the cases when there has been cooperation between the CC and sector regulators. The CC cooperates with sector regulators in case investigations, consulting experts when reviewing mergers or when defining markets in abuse of dominance cases. The CC also cooperates with sector regulators when carrying out market monitoring and when it is expressing views on the regulation – either the need for a new regulation or amendments in the existing law. The CC is involved in the work of sector regulators giving its opinions on issues that are in the scope of its remit. Cooperation between the CC and sector regulators helps to fulfil the duties stated in the competition law

[15] Summary of research on cooperation of insurance companies with insurance intermediaries, while distributing OCTA policies; Available in Latvian: https://www.kp.gov.lv/lv/media/9522/download

as well as to protect, maintain and develop free, fair and equal competition in the interests of the public in all economic sectors.

27. There is a clear distinction between the competence of the CC and regulators and the competencies do not overlap. The national case law states that the CC is the only public institution that can give the evaluation of the undertakings conducts compliance with the competition law. It works the same way around as the CC cannot evaluate a conducts compliance with the sector regulation since it is not its competence. At the same time, it is not a breach of the *non bis in idem* principle if the CC evaluates an undertakings action and its compliance with the competition law, if these actions have already been evaluated by a regulator by the sector regulation.

28. The CC cooperates with sector regulators mostly on the basis of the Section 53 of Administrative procedure law. The only official cooperation agreement is with the PUC. The cooperation usually is effective since the regulators are willing to cooperate. Since there are no major issues in the cooperation, there are no discussions about a need for a formal cooperation agreement.

29. Even though there are some challenges, e.g., the exchange of commercially sensitive information is not always easy, there are not always enough resources to offer the needed opinion or data in time, the cooperation with sector regulators is easy, the competencies are clear and even if the opinions of experts not always are the same, the opinion of the CC is always respected and valued by the regulators and vice versa.