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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note  
from Latvia****5 December 2017**

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More documents related to this discussion can be found at [www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm](http://www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm)

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## Latvia

### 1. Presumptions of liability in Latvian Competition Law<sup>1</sup>

1. The Competition Council of Latvia (the CC) mostly relies on presumptions and safe harbours in antitrust matters that have developed in international and European Union (EU) case law and practice. In general legal presumptions and safe harbours form the actual standard of proof that provides reasonable, proportional (from legal perspective) and effective (from prevention perspective) pattern to establish the competition infringements or evaluate the effect of merger. Standard of proof in administrative antitrust procedure have substantial differences in various aspects if compared to criminal procedure, especially when determining liability of undertaking.

2. In Latvian Competition Law (CL) safe harbours (market share thresholds and criteria for automatic or block exemptions) are based on the criteria and approach applied by European Commission in EU. There are general exemptions for vertical and horizontal cooperation agreements that are laid down in the regulation of the Cabinet of Ministers.<sup>2</sup>

3. This contribution focuses on liability presumptions and issues in CL, particularly, on parental liability presumption, liability of the undertaking for the actions of employee, liability of undertaking for the misconduct of outsourced service provider (third party) and specific liability presumptions for an anticompetitive behavior in civil damages cases.

### 2. Parental liability

4. In accordance with the Article 12 and 14 of CL fines for CL infringements are calculated from the net turnover for the last closed financial year of a market participant. Article 1 point 9 of CL states that the market participant<sup>3</sup> is any person (also foreign person), who performs or is preparing to perform economic activity in the territory of Latvia or whose activity shall influence competition in the territory of Latvia. If a market participant or several market participants jointly have a decisive influence over one market participant or several other market participants, then all market participants may be considered as one market participant. Actual scope of CL does not exclude application of liability for the group of companies.

5. Also actual norms of CL does not provide legal means to ensure the payment of the fine in cases decision is appealed in the court. Duty to pay the fine is only after court proceedings if court upheld the CC decision. That increases the risks for non-payment of a fine after 2 to 3 year period of the court proceedings.

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<sup>1</sup> Latvian Norms on Competition <http://www.kp.gov.lv/en/regulatory-enactments/norms-on-competition>.

<sup>2</sup> Latvian Norms on Competition <http://www.kp.gov.lv/en/regulatory-enactments/norms-on-competition>, (“Regulations Regarding Non-subjection of Certain Vertical Agreements to the Prohibition of the Agreement Specified in Section 11, Paragraph One of the Competition Law” No. 797 and “Cabinet Regulation Regarding Horizontal Co-operation Agreement Exemption from the Agreement Prohibition Specified in Section 11, Paragraph one of the Competition Law” No. 798)

<sup>3</sup> The term “market participant” is used with the same notion the term “undertaking” in European Commission decisions and in European Court of Justice judgements.

6. Consequently, in accordance with actual interpretation of CL and case law approved by the court a parent company may be held jointly and severally liable for infringements of CL committed by its subsidiaries and daughter companies. That provides deterrent effect and ensurance that the fine imposed is harder to escape.

7. The first case where such a principle was used was Preiss Agro case<sup>4</sup> in which the Competition Council of Latvia (the CC) imposed joint and several liabilities in its decision on the parent company. During investigation, the CC revealed that two competitors (SIA “Terra Serviss” and SIA “Preiss Agro”) agreed on fixing prices for agriculture machinery, their spare parts as well as allocation of market. Also shortly before the decision was taken by the CC, both SIA “Terra Serviss” and SIA “Preiss Agro” were declared insolvent. There were no parent company or successor determined for SIA “Terra Serviss”, however, fine of SIA “Preiss Agro” was attributed jointly and severally on its parent company (SIA “Preiss”) that had 100 per cent shareholding. Legal reasoning and evaluation of facts was carried out by the CC according to criteria developed in the application of EU competition law in the area of joint and several liabilities.

8. The fact that a subsidiary has separate legal personality is recognized as insufficient excuse to exclude the possibility of imputing its conduct to the parent company<sup>5</sup> in practice of the European Court of Justice (ECJ) unless the undertaking proves the opposite. In a later judgement<sup>6</sup> ECJ has indicated that it is sufficient to show that the entire capital (or close to 100 per cent) of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy. The undertaking is obliged to rebut this presumption proving that subsidiary was acting autonomously.

9. In Preiss Agro case the CC argued that 100 per cent shareholding allows the parent company to appoint board members and control decision-making process in its subsidiary and thus its conduct on market cannot be regarded as independent according to this presumption. It was also noted that legal separation of the parent and its subsidiary cannot be considered as a sufficient proof that signifies subsidiaries independence. Thereby the presumption of decisive influence was not rebutted by the parent company. It was concluded by the CC that liability derives not from the fact that the parent company has initiated infringement or taken part in it, but rather from the fact that together with its subsidiary they form an undertaking. The parent company argued that it was not aware of the infringement, did not itself participate in the infringement and did not give any instructions regarding anticompetitive behavior to its subsidiary. This argument was rejected during the proceedings. Preiss Agro case decision was confirmed by the Supreme Court<sup>7</sup>.

10. The CC applied a joint and several liability also in KIA case<sup>8</sup> where AS “KIA Auto” was fined for restricting car owners to perform repairs and maintenance not

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<sup>4</sup> The CC decision (Preiss Agro), November 4, 2011; Regional Administrative Court decision, October 29, 2012 (in Latvian).

<sup>5</sup> The Case 48-69 (Imperial Chemical Industries Ltd.), July 14, 1972.

<sup>6</sup> The Case C 97/08 P (Akzo Nobel NV), September 10, 2009.

<sup>7</sup> Supreme Court decision (Preiss Agro), February 12, 2013 (in Latvian).

<sup>8</sup> The CC decision (KIA), August 7, 2014 (in Latvian). CC press release in English, 21.08.2014.

covered by warranty at independent services and to install spare parts of other manufacturers than KIA for a period more than 10 years. Joint and several liabilities was imposed on AS „KIA Auto” together with its parent company AS „Tallinna Kaubamaja” (had 100 % shareholding in OU “TKM Auto” that had 100 % shareholding in AS “KIA Auto”) stating that they together form a single economic unit with their subsidiaries that have committed infringement in the territory of Latvia.

11. The parent company claimed that its subsidiary independently operates on market and have not given instructions regarding infringement. The Regional Administrative Court stated that AS “KIA Auto” has not adequately proved that subsidiary acts independently. The fact that AS “Tallinna Kaubamaja” was not individually informed about the approval or application of the terms of the guarantee, there is no reason to conclude that AS “KIA Auto” would act completely autonomously and that both companies should be considered as separate economic entities. AS “Tallinna Kaubamaja” and SIA “KIA Auto” have filed cassation complaint and now the case under the review of the Supreme Court.

### 3. Successors liability for undertakings past infringement

12. Also liability to successors if undertaking or part of the assets of undertaking are transferred to another person (company) may be applied according to actual case law if the CC proves the succession.

13. General principle is included in Article 20 of the Latvian Commercial Law and states that if an undertaking or an independent part thereof is transferred to the ownership or use of another person, the acquirer of the undertaking shall be liable for all the obligations of the undertaking or its independent part. However, in respect of those obligations which arose prior to the transfer of the undertakings or its independent part to the ownership or use of another person, and the terms or conditions for the fulfilment of which come into effect five years after the transfer of the undertaking, the transferor of the undertaking and the acquirer of the undertaking shall be liable. Therefore, the undertaking liable for infringement cannot avoid the fine imposed by the CC through selling its assets or liquidation of the company.

14. According to decision taken by the Supreme Court in ECN Latvia case<sup>9</sup> the changes of the form of a legal entity (including even liquidation) does not end the liability of an economic operator if, from the economic point of view, this other entity is part or entirely the same economic entity. The termination of proceedings against an existing market participant in a certain legal form does not constitute an obstacle to the enforcement of a decision against a market participant in another legal form. Thus, in fact, legal liability may be imposed even on a company that is not a direct offender or has not exercised the right to appeal against the decision of the CC.

15. During the proceedings undertaking (successor) may argue that succession criteria is not fully met or proved by CC but it can't rebut presumption of successor liability.

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<sup>9</sup> Supreme Court decision, SKA – 407/2015 (ECN Latvia), March 3, 2015 (in Latvian).

#### 4. Liability of the undertaking for the actions of employee

16. The concept that employees form an economic unit with their employing organization is applied in practice of the CC in accordance with the ECJ case law. This presumption is not rebuttable if employee's actions forms infringement of CL.

17. Employees have obligation to perform their duties for and under the instructions of the management of undertaking that employs him or her. Also, company and its management have sufficient powers to order employee to comply with the law. Therefore, employees are considered to be part of the undertaking and any employee's anti-competitive conduct presumes the undertaking's liability. Therefore, the undertaking is liable for the anticompetitive conduct and it is not necessary to demonstrate that the employer knew of the anti-competitive acts.

18. In Samsung case<sup>10</sup> the CC found that Samsung Electronics Baltics Ltd and the biggest distributors of these goods in Latvia (wholesalers and retailers SIA "RD Elektroniks", SIA "ELKOR TRADE", SIA "ROTA un K" and wholesaler SIA "PROKS") engaged in concerted practices having as their objective vertical resale price maintenance and horizontal price fixing, exclusion of online retailers that did not follow the price level.

19. The CC held that in accordance with CL the liability of the market participant is not separated from the liability of its employees. Management of the company must ensure that employees in the performance of their duties comply with the law, including CL. The CC concluded that prohibited agreement cannot be applied to only those officials who have the right of signature in a company. The prohibited agreement is applicable to the activities of any employee of the market participant to whom the market participant has transferred its information relating to prices and other commercially significant market participant data and acts in the interest of the employer. Any information relating to prices and other commercially significant market participant data is considered to be owned by the market participant, not employee-owned.

#### 5. Liability of the undertaking for the actions of independent service provider

20. Employment is not the only form how company may perform the it's tasks. It is evident that outsourcing of certain services and tasks is close alternative for companies in many sectors. To perform the tasks of the company effectivelly outsourced service provider in most situations needs the same amount of information as companies employee. That means in such situations the risks of exchange of confidential information should be regarded the same. On the other hand, an independent service provider is a separate undertaking. The concept of companies liability in such situations seemed unclear.

21. However, the latest ECJ ruling in VM Remonts<sup>11</sup> case defined certain conditions under which an undertaking may be held liable for infringements of competition law committed by an independent service provider.

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<sup>10</sup> The CC decision (Samsung case), October 30, 2009 (in Latvian). CC press release in English 20.11.2009.

<sup>11</sup> Case C 542/14 (SIA 'VM Remonts'), July 21, 2016.

22. VM Remonts case was initiated after a request for a preliminary ruling by the Latvian Supreme Court concerning an appeal of the fining decision of the CC. The CC in its decision<sup>12</sup> at 2011 found an infringement by three undertakings that submitted tenders for the supply of food products to educational establishments in Jūrmala municipality. One of them contacted an external service provider to get assistance for the preparation of tender documents. The service provider used the prices given in the draft tender of the first undertaking when drafting the offers for the other two. It positioned one undertaking's bid at 5 per cent below the first offer and the other one another 5 per cent below the second offer. The CC found that the content and the technical presentation as the design, grammatical errors, financial sheet of the tender in dairy product group were identical in tender's documents of three bidders. The CC also founded that tender documents were printed with the same equipment, and part of the documents submitted by the three companies were most likely signed by one person.

23. The Regional Administrative Court found that senior managers of one the undertaking had not authorized the actions taken by external service provider or were aware of those actions. The court was uncertain whether an undertaking may be considered knowingly participated in concerted practice separating actions of a service provider and liability of company.

24. The Supreme Court referred to ECJ also the considerations in the judgment of 7 June 1983 in *Musique Diffusion française and Others v Commission*<sup>13</sup> and the judgment of 7 February 2013 in *Slovenská sporiteľňa*<sup>14</sup> according to which the liability of an undertaking does not require action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned, action by a person who is authorized to act on behalf of the undertaking sufficing - and enquires whether those considerations are relevant in a situation such as that in issue in the main proceedings.

25. ECJ ruled that the undertaking may be held liable for the acts of a service provider when a service provider which presents itself as independent is in fact acting under the direction or control of an undertaking. This would be the case, for example, if the service provider had only little or no autonomy or flexibility in how it provides its services to the client undertaking. Furthermore, such direction or control might be inferred from the existence of particular organizational, economic and legal links between the service provider and client undertaking. In such circumstances, the undertaking using the services could be held liable for the possible unlawful conduct of the service provider. Even where the service provider is not in that situation, the practice at issue may be attributed to the undertaking using the services, inter alia, if the undertaking was aware of the anticompetitive objectives pursued by its own conduct. Whilst it is true that such a condition is met when that undertaking intended, through the intermediary of its service provider, to disclose commercially sensitive information to its competitors, or when it expressly or tacitly consented to the provider sharing that commercially sensitive information with them, the condition is not met when that service provider has, without informing the undertaking using its services, used the undertaking's commercially sensitive information to complete those competitors' tenders. The concerted practice at issue may also be attributed to the undertaking using those services if the latter could reasonably have foreseen that the service provider retained by it would share its

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<sup>12</sup> CC decision (VR Remonts and others), October 21, 2011 (in Latvian).

<sup>13</sup> Joined cases 100 to 103/80 (*SA Musique Diffusion française and others*), June 7, 1983.

<sup>14</sup> Case C-68/12 (*Slovenská sporiteľňa a.s.*), February 7, 2013.

commercial information with its competitors and if it was prepared to accept the risk which that entailed.

26. Therefore, the undertaking using service provider should consider to include a confidentiality clause in the service agreement relating to the information in competition law sensitive matters or even include an exclusivity clause to prevent situations when the service provider works with several competitors at the same time. Keeping in mind that the conditions for liability for service providers conduct are not cumulative and the company may be held liable even if they could reasonably have foreseen the anti-competitive acts and accepted the risk which they entailed.

27. It is clear that concept and presumption of liability of undertaking although having the same risks differs in situation when illegal actions are done by employee or independent outsourced third person.

## 6. Liability for damage in competition cases

28. Civil liability is an instrument to guarantee compensation for person who has incurred losses due to an anticompetitive behavior and to increase the effectiveness of punishment. This “private” sanction also aims to strengthen deterrence from competition infringements. The obligation to compensate damages caused by competition infringements was included in CL since 2002 but until 2017 in competition infringement civil damages cases the general civil procedural rules and respective rules governing compensation principles were applied. This significantly impeded the development of court practice. But in 2016 CL was amended adding legal presumption that amount of damages caused from cartel is equivalent to 10 per cent price increase, unless proved otherwise. Transposing the Damages Directive (2014/104/EU)<sup>15</sup> in 2017 CL and Civil procedure law was substantially amended.

29. Before 2016 in Latvia only a few such cases claiming compensation were examined by civil courts with low success. Difficulties created the applicant’s limited ability to obtain evidence, prove amount of damages, etc. This 10 per cent presumption rule is rebuttable in case other amount of damages can be established. At the same time it significantly improves ability to claim damages for the party that is injured by Competition law infringement. Transposition of the Damage Directive in Latvia law will also ease the procedure in civil damages cases for injured party.

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<sup>15</sup> directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union