

Unclassified

English - Or. English

8 November 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

The Standard and the Burden of Proof in Competition Law Cases – Note by Latvia

5 December

This document reproduces a written contribution from Latvia submitted for Item 7 of the 144th OECD Competition Committee meeting on 5-6 December 2024.

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03555038

Latvia

1. Introduction

1. While Latvian regulatory framework does not specify a distinct standard of proof for competition cases, including mergers, it is interpreted through case law and functions within a framework shaped by the principles of European Union (EU) and administrative law.
2. Recent cases in merger control illustrate the challenges faced by Competition Council of the Republic of Latvia (the CC), particularly in defining relevant markets and assessing potential competition issues. Judicial review processes further emphasize the importance of maintaining a clear evidentiary standard that respects the CC's economic analyses, ensuring decisions are both legally sound and economically justified.
3. In this context, the CC will present legal analysis of standard and burden of proof in merger cases, with a specific focus on the challenges on defining the relevant market and evaluating the effect of merger.

2. Current landscape

4. One of the tasks of the CC is to limit market concentration by taking decisions on mergers.¹ The substantive test for the assessment of a merger is either the creation or strengthening of dominant position, or substantial lessening of competition in the relevant market.² A positive outcome under either of the two tests could lead to a prohibition or approving the merger with conditions designed to prevent the negative effects of the merger.
5. The burden to present compelling evidence in evaluating the effect of merger lies with the CC, following a standard that requires that the evidence more likely than not supports the conclusion.³
6. The Supreme Administrative Court has indicated that whether a merger significantly strengthens a dominant position or substantially reduces competition is, in fact, a forecast. The factors considered in forming this forecast are of an economic nature and developed through long-standing practices. In assessing the legality of a merger prohibition, the decisive elements are the actual circumstances that existed prior to the notification of the merger and those during the investigation of the case by the CC. In

¹ Article 5 (1) point 4 of Competition Law. Available: <https://likumi.lv/ta/en/en/id/54890>.

² Article 16 (4) of Competition Law.

³ Case C-12/03 P, *Tetra Laval v Commission*, para 43; case C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala*, para 47; case C-265/17 P, *Commission v United Parcel Service*, para 32. *BGS/Gulfstream* case, para 42-43, available in Latvian: https://lemumi.kp.gov.lv/storage/files/04072024_BGS%20LV_L%C4%93mums_Publikojam%C4%81%20versija.pdf; *ANTALIS/PAKELLA* case, para 55-56, available in Latvian: https://lemumi.kp.gov.lv/storage/files/L%C4%92MUMS_ANTALIS_18.04.2024.pdf; *CleanR/RSC Noma* case, para 65-66, available in Latvian: https://lemumi.kp.gov.lv/files/documents/20221128_L%C4%93mums_CleanR_publicojam%C4%81%20versija_Nr.21.pdf.

contrast, the forecast regarding the specific market perspective is based on verifiable facts from the past and inductive conclusions drawn from these facts about correlations in the future.⁴

7. No presumption is made whether the merger would or would not lead to a situation in which effective competition in the relevant market is significantly impeded. A compelling case must be made for either position.⁵

8. Due to the need to adapt the economic methods used and evidentiary base based on the complexity and specific features of each merger case and because these are forward-looking assessments, the standard is not rigid, and it adapts to the availability and strength of the evidence. The evidentiary base can be lower for mergers that obviously raise concerns, or higher in more ambiguous cases where predictions about market impacts are harder to make. Nevertheless, the effect of merger generally is demonstrated through quantitative and qualitative evidence, meeting a cogent and consistent standard – predicting the most likely development scenario.

9. The CC's approach to assessing evidence in merger cases involves a comprehensive economic analysis, consideration of counterfactual scenarios, efficiency claims evaluation, and multiple sources of information (evidence from merging parties, suppliers, and competitors; customer surveys; economic data; publicly available sector specific market reports, and others). To adopt an objectively justified and lawful decision, the CC must obtain all the information and evidence necessary⁶, verifying its factual accuracy, reliability, and consistency, carrying out economic and legal analysis, and assessing whether the evidence contains all the information which must be considered to assess a complex situation and whether it supports the conclusions drawn from it.

10. The administrative courts in Latvia have jurisdiction to rule on the legality of the CC's decision and according to regulatory framework⁷ and case law⁸ the judgement shall consider only the reasoning included by the institution in the decision. Nevertheless, national administrative courts seek to establish the objective truth, independently checking the sufficiency of the evidence and arguments supporting or rejecting the reasoning behind the CC's decisions, and they are entitled to collect evidence itself or instruct the parties on the need for the submission of the evidence, if necessary.⁹ But if a new circumstance comes into light the court cannot deny the CC the opportunity to respond to it solely because such justification was not included in the decision.¹⁰ However, the administrative courts should refrain from replacing the CC's assessments with their own.¹¹

11. As the CC has moved to a more economic approach in defining the relevant market and assessing the effects of a merger, it is expected that this might have some influence on

⁴ Case SKA-43/2012, *Ostas flote*, para 18-19; Case SKA-37/2013, *Plesko*, para 8; Case SKA-36/2024, *Maxima*, para 8.

⁵ Case C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala*, para 48.

⁶ Article 59 (1) of Administrative Procedure Law. Available: <https://likumi.lv/ta/en/en/id/55567>.

⁷ Article 250 (2) of Administrative Procedure Law.

⁸ Case SKA-177/2017, para 9; case SKA-67/2013, para 6; case SKA-145-2023, para 8.

⁹ Article 107 (4) of Administrative Procedure Law; case SKA-1102/2020, para 10.

¹⁰ Case SKA-138/2021, *Moller*, para 27.

¹¹ Case SKA-177/2017, para 9; case SKA-67/2013, para 6; case SKA-177/2017, para 9.

the approach of merging parties making more complex economic arguments aimed at undermining the conclusions of the CC's economic reasoning.

12. Just like with standard of proof, the Latvian regulatory framework does not specify a distinct burden of proof for competition cases, other than that the CC's decision needs to be objectively justified and lawful. In merger cases initially, in the notification stage, the merging parties must provide detailed information, including market shares, business operations, potential impact of the merger on competition, efficiency gains.¹² The burden of proof lies with the parties to submit accurate and complete information to allow the CC to assess the merger. Once the merger is notified, the CC takes over the responsibility of defining the relevant market and assessing the likely effects of the merger.

13. If the CC identifies potential competition concerns, the merging parties can present counter evidence or economic arguments to challenge the CC's findings.¹³ The merging parties may argue that the merger will generate efficiencies (like cost savings, innovation) that would offset any potential anti-competitive effects. In this case, the burden of proof to demonstrate that these efficiencies are verifiable, merger-specific, and would benefit consumers, is to the merging parties.¹⁴ If the merging parties propose remedies to alleviate competition concerns, they must prove that these remedies are sufficient and feasible to address the issues identified by the CC.¹⁵ Also, if the a failing firm defence is presented, the burden of proof lies with the merging parties.¹⁶

14. These rules of allocation of the burden of proof have not changed in Latvian jurisdiction and just like with standard of proof, it functions within the framework of EU un administrative law principles.

3. Challenges

15. The CC has faced several challenges regarding the approach in 1) defining the relevant market, particularly in a sector regulated pharmaceutical market, 2) assessing the effects of a merger, 3) the evidence used, and 4) the ways in which that evidence is gathered and evaluated.

¹² According to Cabinet Regulation No. 800 (29 September 2008) "Procedures for the Submission and Examination of a Full-form and Short-form Notification Regarding a Merger of Market Participants", available: <https://likumi.lv/ta/en/en/id/181924>.

¹³ Article 26 (6) and 26 (7) of Competition Law.

¹⁴ *Centrālā laboratorija/NMS Laboratorija* case, section VIII, available in Latvian: https://lemumi.kp.gov.lv/storage/files/20231121_Lemums_CL_NMS.pdf; and others.

¹⁵ *Plesko* case, section VIII, available in Latvian: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/7VUAkv16Y2.pdf#page=40&zoom=100,109,442; *MM Group/Forum Cinemas* case, section VII, available in Latvian: [https://lemumi.kp.gov.lv/files/documents/20210603_L%C4%93mums_kino_publicojam%C4%81%20versija%20\(003\).pdf](https://lemumi.kp.gov.lv/files/documents/20210603_L%C4%93mums_kino_publicojam%C4%81%20versija%20(003).pdf); and others.

¹⁶ *Dobeles dzirnavnieks/Baltic mill* case, section 11, available in Latvian: https://lemumi.kp.gov.lv/files/documents/L%C4%93mums_publicojam%C4%81%20versija_21.03.2022.pdf; *Centrālā laboratorija/NMS Laboratorija* case, section V, available in Latvian: https://lemumi.kp.gov.lv/storage/files/20231121_Lemums_CL_NMS.pdf.

3.1. *Maxima* case¹⁷

16. In 2018, the CC prohibited Maxima from acquiring the rental rights to commercial premises in Riga where a competitor was operating.¹⁸ The CC determined that if the merger were allowed, only two retailers – both of whom are the largest in Latvia – would remain in the relevant market. The CC concluded that the merger would reduce the number of competitors from three to two, strengthening the dominant players and significantly reducing competition in the relevant market.

17. To define the relevant market and assess the effects of the merger, the CC used information and evidence that was supported from multiple sources – the information given by Maxima itself, including opinion of an economist; information from competitors; publicly available information, including sector specific research reports; and data from the CC's conducted customer survey¹⁹. The CC also relied on its previous practice and the practice of European Commission (EC) and used the Herfindahl–Hirschmann Index (HHI) to measure concentration in the relevant market as a screen for potential competition problems. To map out customer behaviour and competitive conditions, the CC used isochrone method.

18. Maxima challenged the prohibition decision in the court and one of the main subject-matter of dispute in the proceedings is the use of customer survey and interpretation of information concluded from it. Maxima also reasoned that the CC should have used the hypothetical monopolist test (SSNIP²⁰) and the data from customer loyalty cards.²¹ The economist opinion indicated that the CC's approach assessing only changes in the HHI in absolute figures gives a misconception of a significant increase in concentration in a market which is very concentrated from the outset. Although there were no arguments regarding the use of isochrone method in defining the relevant geographical market, Maxima did not agree with the CC's conclusions that came from economic analysis and customer survey data interpretation and was used to map out isochrones.

19. To gain a deeper understanding of the economic aspects of the case, the Regional Administrative Court decided to obtain experts opinion on the economic analysis of the relevant market definition and effects of the merger. Even though the CC and even Maxima drew courts attention to the fact that there is no information about any economists in Latvia

¹⁷ *Maxima* case, available in Latvian: https://lemumi.kp.gov.lv/files/documents/A27_Maxima_17%2012%202018.pdf; Case SKA-36/2024, where Supreme Administrative Court overturned the judgement of Regional Administrative Court.

¹⁸ According to Article 15 (1) point 3 of Competition Law and case law (Case SKA-92/2021, *Plesko*, para 6-7; Case SKA-25/2015, *Palink*, para 7) an acquisition of assets or of the right to use such assets is considered to be a merger if the acquisition of the assets or of the right to use such assets increases the market share of the acquirer of the aforementioned assets and the usage rights in any relevant market.

¹⁹ The data was collected in cooperation with research company (external experts), which carried out a survey of consumers at acquired party's premises.

²⁰ Small but significant and non-transitory increase in price.

²¹ The CC concluded that data from customer loyalty cards is not suitable for defining the relevant geographic market, as according to the results of customer survey, only about 30 % of customers to the grocery store live nearby. This means that, when analysing loyalty card data linked to customers residences, the geographic market would be too broad and would not reflect the actual competitive conditions in the vicinity of the specific grocery store location.

who have in-depth knowledge specifically regarding aspects of competition law and who could provide the court with an objective and well-reasoned evaluation of the CC's conclusions, experts with no known education, knowledge or professional background in competition law were selected.

20. Although the written expert opinion was without any reasoning or economic basis, often justified in a simplicity-based view, and when examined in a court hearing the experts could not reason their responses, the Regional Administrative Court mostly relied on their opinion (which in CC's view was inadmissible and unreliable) and annulled the CC's decision. The Regional Administrative Court reasoned that the CC before making the decision did not obtain the necessary economic research data to objectively determine with "a high degree of probability" whether the proposed merger could cause significant harm to effective competition in the relevant market and the interpretation of the data from customer survey in defining the relevant market and making a conclusion about the negative effects to competition is ambiguous.

21. However, in 2024, after the CC's appeal the Supreme Administrative Court concluded that: (1) the fundamental questions raised by the parties regarding the knowledge and experience of the selected experts have not been evaluated, therefore there are grounds to doubt the expert opinion as evidence; there is no assurance that the chosen experts possess sufficient knowledge and experience in the area of expertise determined by court; (2) the responses in expert opinion have essentially been provided without justification, often based solely on authority, and scientific basis for the answers are unclear; (3) this raises reasonable doubts about legality of the expertise conducted in this case; significant procedural violations have occurred both in the selection and evaluation of experts and in conducting the expertise, therefore the Regional Administrative Court's judgment cannot be considered lawful and justified.

22. The Supreme Administrative Court also re-confirmed the conclusions already made in case law regarding merger control being a forward-looking assessment and indicated that the Regional Administrative Court has not taken this into account by setting a high standard of proof to CC to make a prohibition decision according to Article 16 (3) of Competition Law.

23. *Maxima* case is still ongoing, yet there are several key takeaways that come from it regarding the standard of proof, the scope of judicial review and economical methods, and type and quality of evidence used to draw conclusions in merger cases.

24. Firstly, the Regional Administrative Court in *Maxima* case seems to have applied a strong (high degree) probability standard of proof. In a recent case the Court of Justice of the European Union (CJEU) ruled that the prospective nature of the economic analysis which the EC must carry out precludes a requirement for that institution to meet a particularly high standard of proof to demonstrate that a concentration would or would not significantly impede effective competition. In those circumstances, it must be held that, in order to declare that a concentration is incompatible or compatible with the internal market, it is sufficient for the EC to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it. Consequently, the stricter than "more likely than not" standard of proof – "strong probability" – does not follow from Regulation No 139/2004.²² The judgement of Supreme Administrative Court in *Maxima* case confirms that effects of

²² Case C-376/29, *Commission v CK Telecoms*, para 86-88.

mergers are forward-looking assessments, therefore the CC concludes that the standard of proof in merger cases cannot be set unreasonably high.

25. Secondly, *Maxima* case raised a question on the scope of judicial review when assessing the economic justifications provided in the merger decisions of the CC. According to the case law of the CJEU, although as a general rule the courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the EC is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.²³ While the CC should have a margin of discretion regarding its economic expertise and analysis, still there is no legal certainty in national case law if the judicial review regarding complex economic matters should be clearly limited only to examination whether the evidence presented by the CC is sufficient and supports the conclusions drawn from it, and there have been errors in the CC's exercise of discretion – exceeding it, failing to exercise it, incorrect use of their discretion or failure to comply with procedural requirements. There is no legal clarity how far the national administrative courts should go further in its analysis of economic reasoning without the risk of substituting the CC's assessment with their own.

26. Thirdly, this case also raised questions about the applicable economical methods and data (information and evidence) relevant to it. Regarding this case the SSNIP test was not used by the CC because it was not effectively applicable for assessing the substitutability of a wide range of goods at retail locations, as consumers are presented with a vast array of products in daily consumer goods retailing. In a similar merger case, the Supreme Administrative Court emphasized that the SSNIP test is just one of the methods used to determine demand substitutability. The use of various criteria and evidence for it depends on the specific factual circumstances of each case and the CC may also employ other tools such as market research or assessments of consumer and competitor opinions. Appellant should justify why only its mentioned method is valid in a relevant case while methods used by the CC are invalid and could not lead to a reliable result.²⁴

27. In defining the relevant geographical market, the CC extensively uses isochrone method to serve as a framework for market analysis, particularly in local narrow markets, like retail food, pharmaceuticals, and fuel. The applicability of this method has also been confirmed in case law in a similar case.²⁵ In both *Plesko* and *Maxima* cases there was no dispute about the suitability of the method itself, but a disagreement regarding data to be used – specifically, which data is relevant, and which is not, and how to interpret it. However, in the next section of this paper the challenges that the CC faced when defining the relevant geographical market and using isochrone method in a sector regulated pharmaceutical market will be described.

28. Also, given the limited resources and time, the CC rarely use customer surveys to define the relevant market and assess the effect of the merger. The use of customer surveys in merger control, especially in markets with a significant number of customers, whose opinions might be difficult to gather otherwise, could be very useful tool. However, *Maxima* case shows that there are challenges with question design and bias, complexity of analysis and different opinions of the interpretation of the data gathered. The Supreme Administrative Court stated that the interpretation of this data done by Regional

²³ Case T-201/04, *Microsoft v Commission*, para 87.

²⁴ Case SKA-788/2022, *Plesko*, para 2.

²⁵ *Ibid*, para 4.

Administrative Court is not logical and coherent, and the reasoning of the CC's decision is left unaddressed. How the Regional Administrative Court will evaluate the data from customer survey when ruling on the case for the second time is yet to be seen.

29. Lastly, there are several significant conclusions that come from *Maxima* case with engaging economists in merger control to perform economic analysis. Not only its fundamental that the experts should have sufficient knowledge and experience in specific expertise, but also appropriate expertise methods should be applied, the analysis should be transparent, consistent, reliable, and clearly presented.

3.2. Defining the geographical market in sector regulated retail pharmaceutical market

30. Since a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition²⁶, it is used as a tool for obtaining meaningful information regarding market power and how competition operates on the relevant market. Therefore, it is necessary to meet a certain standard not only when assessing the effects of the merger, but also in defining the relevant market.

31. In 2022, the CC assessed *AB City/Olainfarm* case²⁷, examining the retail pharmaceutical market which is strictly regulated with high administrative barriers for market entry, such as criteria for pharmacy locations in specific populated areas based on demographic and geographical factors. While the sector regulation is aimed at different objectives (to promote rational pharmacy placement and ensuring accessible and qualitative pharmaceutical care) rather than an objective to evaluate the supply and demand side according to existing criteria within competition law, the notifying party argued that the relevant geographical market should be defined according to this regulation. However, the CC's assessment indicated a narrower relevant geographical market definition than just populated areas.

32. In 2023, the CC received an information about a merger which did not meet the applicable notification thresholds, but there were indications about a possible significant harm to competition in the retail pharmaceutical market. Therefore, there were grounds to CC to start investigating whether the substantive requirements to request a merger notification are met.²⁸

33. When assessing the conditions of competition according to existing criteria and methodology within competition law and mapping out isochrones, it was concluded that, following the merger, in both narrower and broader relevant geographical markets

²⁶ Cases C-68 and 30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission*, para 143.

²⁷ Decision available in Latvian: https://lemumi.kp.gov.lv/files/documents/20220614_LEMUMS_ABCITY.Olainfarm.publiskojam_a.versija.pdf.

²⁸ According to 15 (2.¹) of Competition Law the CC can request a merger notification within 12 months from implementation of the transaction if:

- 1) the merger is taking place in the relevant market where the merging parties operate, and their aggregate market share in the relevant market exceeds 40 %, and
- 2) there is a cause for suspicion that the merger might result in or strengthen a dominant position, or the competition in the relevant market might be notably reduced.

examined the merger is taking place in the relevant market where acquiring parties market share exceeds 40 %.

34. However, there were ambiguity about the economic methods and data used to map out isochrones and significance of the legislation which determines the placement of pharmacies in populated areas when and its impact on the definition on geographical market in the relevant case, and therefore whether the substantive criteria of market share at least 40 % to request a merger notification is met. Consequently, a decision not to call-in a merger notification was made.

4. Conclusions

35. In conclusion, the analysis of the CC's approach to merger control reveals key insights into how Latvia applies EU competition law and national administrative law principles, particularly in forward-looking economic assessments in merger cases, where the standard of proof requires a balance between economic forecasting and the need for cogent evidence.

36. Challenges in defining relevant markets and assessing the effect of merger underscore the complexity of market dynamics and the importance of reliable data, expert opinion, and the use of various economic tools in a very limited time to do the assessment.

37. Additionally, the scope of judicial review in these cases demonstrates the need for courts to respect the expertise of competition authorities, ensuring that economic analyses are properly scrutinized without overstepping into the realm of discretion reserved for these bodies. At the same time, the judicial system lacks personnel with the specific expertise that the CC possesses, capable of comprehensively assessing complex competition aspects. Therefore, the court is left to review the assessment conducted by the CC or to engage independent experts. Moreover, this issue of personnel available to the court will become increasingly pressing as the complexity of competition cases grows, for example, with the rising importance of IT systems and data analytics.