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Working Party No. 3 on Co-operation and Enforcement

**AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A
CONDITIONAL CLEARANCE**

-- Note by Latvia --

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This document reproduces a written contribution from Latvia submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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LATVIA

1. Please provide a short description of i) mergers that your agency has prohibited in the last five years, detailing reasons, as well as whether remedies were offered and not accepted and the reasons for this and ii) a few important mergers your agency has cleared subject to remedies in the last five years.

1. In 2012-2016 there has been no prohibition decision taken by the Competition Council of Latvia ('the CC'). At the same there have been several (in total six) conditional clearances with both structural and behavioural remedies imposed. Short description will be given on two of these cases.

2. In 2012 the CC with conditions cleared a merger of AS "Rīgas piena kombināts" and AS "Vamieras piens" that were both active on dairies market (*'RPK/VP merger'*).¹ In markets where due to the merger the two dairies would acquire substantially larger market shares than before (wholesale market of milk and kefir and market of purchase of raw milk) – there would still remain strong competition among dairies in Latvia and in market of purchase of raw milk – among dairies in Baltic region. Thus, both farmers and retailers would have a choice to co-operate with other market participants active on dairies market. Despite increasing co-operation efforts, milk production level remains fragmented, while at the same time concentration levels on milk processing market are substantial. For these reasons in order to balance the market power for entities active on milk processing market, retailers and entities active on milk production level, a set of terminated behavioural remedies (until 31 March 2015.) were imposed on the merged entity:

- If the merged entity is willing to terminate the agreement with a milk producer (farmer, co-operative), it has to indicate it in a timely manner – at least 30 days prior termination. However, if the smaller farms (providing up to 500 kg of raw milk per day) are willing to terminate the agreement with the merged entity, this termination cannot be delayed longer than 15 days.
- The merged entity is obliged to apply equal prices, bonuses and other conditions on farmers (milk producers). These conditions need to be transparent and available to all farmers.
- The merged entity is prohibited to bundle its products – both retailers and wholesalers have to be granted a possibility to buy 'dominant products' milk and kefir without being obligated to buy other milk products from merged entity, taking into account the substantial market share of a merged entity in milk and kefir product markets as well as insignificant power of smaller retailers.

3. In 2015 the CC with conditions cleared a merger of SIA "Vides investīcijas", SIA "ZMK investīcijas" and SIA "Vides pakalpojumu grupa" that were all active on waste management sector (*'VI/ZMKI/VPG merger'*).² Structural remedies were imposed for the merger to be cleared. There was an obligation to separate assets and activities in waste management market in Latvia and divest it to an independent buyer within 10 months as of the adaptation of the CC's conditional clearance. All this was

¹ <http://kp.gov.lv/en/aktualitates-en/138-binding-obligations-set-to-merger-of-dairy-companies>

² <http://kp.gov.lv/lv/aktualitates/396-kp-piemero-saistosos-noteikumus-sia-zmk-investicijas-iegadei>

monitored by trusty that also gave regular reports to the CC. New entrant SIA “Pilsētvides serviss” took over the separated assets and started to operate on the waste management market in Latvia. The CC concluded that the structural remedies imposed on the merging parties were implemented successfully.³

2. Is your practice regarding prohibitions and remedies reflected in ‘best practice’ documents or in other guidelines? If yes, please describe the main factors/ circumstances to be considered according to your soft law document. If not, are you planning to issue guidance in the near future?

4. The CC’s practices regarding prohibitions and remedies are not reflected in ‘best practice’ documents or in other guidelines, however, the CC rely on the practice and experience of the European Commission as well as other competition authorities in Europe (mainly guidelines and examples from other merger cases in similar sector). The CC recognises the positive impact that can be reached if ‘best practice’ or guidelines are issued, however, currently a comprehensive overview of the CC’s best practices is not drafted. At the same the merging parties’ receive formal statement of objection that contains main concerns of the CC, and their rights to be heard, give counter opinion and proposals concerning remedies are observed by the CC.

5. An ongoing work is carried out by the CC concerning guidelines and ‘best practices’. For example, recently guidelines on drafting merger notification for the market participants have been published.⁴ It is also on the CC’s agenda to draft guidelines and ‘best practices’ regarding prohibitions and remedies.

6. Another important aspect to mention is that as of the 15 June 2016 when amendments of the Competition Law of Latvia⁵ entered into force, there is a possibility to prolong for 15 working days the reaching of a final decision in order to examine remedies proposed by the merging parties. There was not such a possibility before and placed an extra pressure on both the CC and the merging entity at the very end of merger investigation.

3. What challenges have arisen in the design of remedies? How do you decide which remedy, or combination of remedies, is unable to cure the competition harm? Which remedies have not worked in practice or not worked as effectively as anticipated?

7. In the past, the CC has in most cases applied behavioural remedies in problematic merger cases and the main argument is that in a small market like Latvia the use of structural remedies is less likely to be effective. This could be the case, for example, if the smaller size of the market results in higher concentration which might make it more difficult to find a suitable buyer. This is also one of the concerns that was raised in the OECD Accession review of Latvia in 2014.

8. Since than the CC has shifted its focus to application of structural remedies in problematic merger cases. For example, in 2015 *VI/ZMKI/VPG merger* (see also answer of question one) structural remedies were used in a merger in waste management sector. Also in other problematic merger cases, where Phase II examination has been initiated, after identifying problematic markets the CC has discussed with merging parties as well as other stake holders possible structural remedy scenarios in case merger is prohibited (for example, in *VIG/BTA merger* in 2016 (see also answer to question five) in insurance sector such a strategy was employed, but at the end merger was given ‘a green light’).

³ <http://kp.gov.lv/lv/aktualitates/534-pildot-kp-paredzetos-apvienosanas-nosacijumus-izveidots-jauns-atkritumu-apsaimniekotajs>

⁴ <http://kp.gov.lv/en/aktualitates-en/485-the-cc-publishes-merger-notification-drafting-guidelines>

⁵ <http://kp.gov.lv/en/aktualitates-en/567-saeima-passes-amendments-to-the-competition-law>

4. Has your agency's approach to accepting and/or rejecting remedies been tested in the courts? If yes, please describe the main points of the court's decision which upholds or rejects the agency's i) prohibition decision, ii) decision to clear the merger subject to remedies, and/or (iii) the agency's approach or analysis of proposed remedies.

9. In past five years the courts in Latvia have from limited number of aspects tested the CC's approach in remedy cases. One interesting example concerns both application of structural and behavioural remedies in 2013 to merged entity AS "Recipe Plus" and AS "Sentor Farm aptiekas" (*'RP/SFA merger'*) active on pharmaceutical industry.⁶ The initial decision dates back to 2009 when a merger between AS "Recipe Plus" (wholesaler of pharmaceutical products) and AS "Sentor Farm aptiekas" (retailer of pharmaceutical products) was cleared subject to behavioural remedies. Amongst other things an obligation was imposed to notify (even in case notification thresholds according to the Competition Law of Latvia were not reached) the CC in case the merged entity has planned to obtain additional pharmacy⁷ thus making retail market for pharmaceutical products more concentrated in certain identified geographic markets of Latvia. This behavioural remedy was terminated – from 2009-2012 with a possible extension until 2015.

10. In 2012 the CC extended the behavioural remedy to 2015 as it came to the conclusion that there had been insignificant changes to the situation in the identified geographic markets since 2009.⁸ Later the merged entity (taking into account behavioural remedy of 2009) notified a merger in 2013 and the CC after a careful examination imposed a condition on clearance by stating that one particular pharmacy should be divested.⁹ The merged entity later claimed that it is impossible for it to divest this asset as there is no potential buyer and asked to extend the term in which the potential buyer has to be found. At the same time, the CC had obtained a contradictory information that there are several buyers that were ready to buy these assets and even made offer to the merged entity, but unsuccessfully. Thus the conditional clearance was not prolonged by the CC.

11. The merged entity initiated proceedings in court both concerning the CC's decision on extension of behavioural remedies to 2015 as well as validity of structural remedies imposed on the merged entity in 2013. The matter went up to the Supreme Court of Latvia that dismissed the merged entities claims confirming the CC's approach. The Supreme Court of Latvia indicated that when extending the term of behavioural remedy, the CC was not obligated to reassess necessity of such behavioural remedy (as it was examined in the CC's decision of 2009), but only the necessity to extend it. What concerns the application of the structural remedy, the Supreme Court of Latvia indicated that it is solely the competence of the CC to decide on conditions that remedy the negative effects on competition and ultimately to take a clearance or prohibition decision.

⁶ <http://kp.gov.lv/files/pdf/5jfX898dBg.pdf>

⁷ In Latvia there is a legal obligation to obtain a special licence in order to open a new pharmacy that creates high barriers to market entry and put constraints on smaller market players to extends their activities on the Latvian market while at the same time allow to benefit from such a regulation the big market players (such as the merged entity) and strengthen their market power. The CC has frequently stressed its concerns about effects on competition that result from this regulation to the Ministry of Health in Latvia, but with poor results.

⁸ <http://kp.gov.lv/files/pdf/Kw1D8q9jxH.pdf>

⁹ <http://kp.gov.lv/files/pdf/2xyCKwtyh5.pdf>

5. To what extent does your agency consider the opinion of third parties/public in i) deciding whether to prohibit a merger, and ii) designing and implementing remedies? In your reply, please specify the role of market testing in your process. What is, in your view and experience, an effective market test and which lessons have been learnt over time to improve market testing? What other tools have you used to consider opinions of stakeholders in your analysis of remedy effectiveness?

12. The CC consider the opinion of third parties/ public crucial both in deciding whether to prohibit a merger as well as designing and implementing remedies. After identifying the problematic markets, first of all, the CC searches for past examples - merger cases where remedies have been imposed (for example, the European Commission, other National Competition Authorities decisions) in the same or similar industries. The CC also meets with merging parties to indicate its main concerns (often before official statement of objection is sent) as well as other stakeholders (competitors and other market players that are active in related markets). This allows to address the CC's main concerns in a timely manner and allows the merging parties to come forward with additional information and justifications or possible remedies.

13. For example, *RPK/VP merger* where behavioural remedies were imposed in order to protect smaller milk producers and retailers, the CC extensively consulted not only the merging parties, but also other stake holders (especially smaller milk farmers, co-operatives) in order to design the most suitable conditions in case of clearance. At the same time, as these behavioural remedies included terms and conditions that the merging parties applied to their contracting partners, transparency of pricing, bonus system and other conditions as well as prohibition to bundle certain products, the monitoring by the CC of implementation of these remedies turned out to be rather problematic. For this reason the CC carried out a sector inquiry in the market of milk production and processing¹⁰ to evaluate the level of competition after *RPK/VP merger*. The CC examined milk processing plant contracts with farmers in order to assess the balance of the market power, as an ex-post evaluation of the *RPK/VP merger*. The CC did not find any sign that would allow to establish abuse of market power against farmers. The sector inquiry also confirmed that behavioural remedies imposed by the CC were implemented.

14. Another example in 2016 that can be noted is *VIG/BTA merger*¹¹ in the non-life insurance sector. There were three markets that were considered problematic and Phase II investigation initiates, namely, MTPL (motor vehicle owners' compulsory third party liability) insurance, guarantee and travel insurance. Even though the this merger was cleared without remedies as the identified problematic markets turned out to include broader range of product than pointed out by the merging parties in the notification, the CC at an early stage of the investigation indicated to the merging parties the concerns it has in these three problematic markets and additional information was filed in the CC. Meanwhile, the CC also got in contact with other market participants as well as intermediaries active on non-life insurance market and asked their opinion about the proposed merger as well as their opinion on possible and effective structural remedies in identified problematic markets. This helped to get an insight in a valuable experience of another undertaking active on non-life insurance sector that went through a procedure of implementation of structural remedies imposed on them by the Lithuanian Competition authority.

¹⁰ <http://kp.gov.lv/en/aktualitates-en/258-the-competition-council-concludes-sector-inquiry-into-milk-production-and-processing>

¹¹ <http://kp.gov.lv/lv/aktualitates/583-kp-atlauj-apdrosinasanas-pakalpojumu-sniedzēju-apvienosanos>

6. In your experience, what mechanisms minimise the risk of ineffective implementation of remedies? In your reply, please specify the role of divestiture/hold separate/monitoring trustees in your process.

15. As indicated in the answer to question five, it is highly important to start talking about indicated problems with merging parties at a very early stage of a notified merger. This is extremely important taking into account time constraints in which a decision must be adopted by the CC (maximum four months with a possible extension up to 15 days in case it is necessary for examination of possible remedies that parties have proposed). Implementation of imposed remedies as well as monitoring possibilities of the CC is crucial thus carefully considered when deciding on the most suitable conditions.

16. As indicated already in the answer to question three, the CC has shifted its focus on application of structural remedies in the problematic merger cases due to monitoring difficulties that the CC encountered applying behavioural remedies. As an example must be mentioned *VI/ZMKI/VPG merger* (see also answer of question one) in 2015, where divestiture of business activities in waste management sector and appointment of independent monitoring trustee was made as a condition in order to clear merger.

17. After official statement of objections was sent to the merging parties indicting the most problematic markets and competition concerns that could lead to a prohibition decision, the merging party put forward three optional structural remedy proposals. One of them was chosen as a base and discussed further issues that in the CC's opinion would not address efficiently identified competition concerns. For example, it was agreed that the market participant that would carry out the actual separation and divestiture would be impartial and independent entity (no connected in any way with the merging party). In addition a trustee was introduced (chosen by the merging party and approved by the CC) that monitored the whole separation and divestiture process as well as prepared reports that were submitted to the CC. It was concluded that the separation and divestiture was successful as confirmed by the trustee.