

Latvia

Unilateral Conduct Working Group Questionnaire

In case you have any questions on the questionnaire, please contact Elizabeth Kraus at the US FTC or Arno Rasek at the Bundeskartellamt. Please send the completed questionnaire by 31 October 2006 to ekraus@ftc.gov and arno.rasek@bundeskartellamt.bund.de, and provide a contact person who can answer possible questions on your response.

A. Objectives of unilateral conduct laws

1. With regard to your jurisdiction's unilateral conduct rules – *e.g.*, rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (*e.g.*, consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

a. Constitution

Constitution of the Republic of Latvia (Satversme) does not contain any remark on competition issues. Only following economical liberties are mentioned in Satversme as rights to property and rights to freely choose employment and workplace according to person's abilities and qualifications as well as, property rights may be restricted only in accordance with the law.

b. Statutes

Prohibition of abuse of dominant position is determined by Competition Law, adopted on October 4, 2001 and in force from January 1, 2002. This law was amended on 22.04.2004. and new amendments are elaborated and probably will be adopted by Parliament (Saeima) at the beginning of the 2007.

From the year 1991 when Latvia retrieved it's independence it is the third law regarding competition issues. First of them Law "On Competition and Restriction of Monopolization" was adopted already on 1991. It was in force till the next Competition Law which became into effect in January 1, 1998.

There are not laid down particular objectives in Competition Law regarding prohibition of abuse of dominant position.

As it can be seen from the Article 2 of Competition Law the objective of this law is protection of the competition as such.

„Article 2. Purpose of this Law

The purpose of this Law is to protect, maintain and develop free, fair and equal competition in the interests of the public in all economic sectors, to restrict market concentration, impose as an obligation the termination of activities which are prohibited

by the regulatory enactments regulating competition, and to call to account persons at fault in accordance with procedures prescribed by regulatory enactments.”

Competition Law gives following definition of dominant position:

“dominant position – an economic (commercial) position in a relevant market of a market participant or several market participants if the market share of such participant or the participants in this relevant market is at least 40 per cent and if such participant or such participants have the capacity to significantly hinder, restrict or distort competition in any relevant market for a sufficient length of time by acting with full or partial independence from competitors, clients or consumers” (Article 1 Point 1).

It had to be mentioned that the elaborated amendments, which are not yet adopted, provides elimination of 40 per cent threshold as the characteristic of dominant position.

Further regulation is provided in Articles 13 and 14:

“Article 13. Prohibition of the Abuse of Dominant Position

Any market participant, who is in a dominant position is prohibited from abusing such dominant position in any manner in the territory of Latvia. Abuse of dominant position may also occur as:

- 1) refusal to enter into transactions with other market participants or refusal to amend the provisions of a transaction without an objectively justifiable reason;
- 2) restriction of the amount of the production or sale of goods, the market or technical development without an objectively justifiable reason to the detriment of consumers;
- 3) imposition of provisions according to which the entering into, amendment or termination of transactions with other market participants makes such participants dependent on them, or these market participants accept such additional obligations as, by their nature and commercial usage, have no connection with the particular transaction;
- 4) direct or indirect imposition or application of unfair purchase or selling prices or other unfair trading provisions; or
- 5) application of unequal provisions in equivalent contracts with other market participants, creating for them, in terms of competition, disadvantageous conditions.

Article 14. Liability for the Abuse of Dominant Position

(1) If the Competition Council determines that there is a violation of Section 13, Paragraph one of this Law in the activities of market participants, the Council shall take a decision regarding the determination of a violation, legal obligations and imposition of a fine.

(2) The Competition Council may impose upon market participants fines of up to 5 per cent of their net turnover for the previous financial year each, but not less than 250 lats each. The funds referred to shall be paid into the State basic budget.

(3) If the legally imposed obligations have not been complied with, the Competition Council may take a decision regarding increasing the fines specified in Paragraph two of this Section up to 10 per cent of the net turnover for the previous financial year, however the fine may not be smaller than 500 lats each. The funds referred to shall be paid into the State basic budget.

(4) The Cabinet shall issue regulations regarding the procedures by which fines are specified, which provide for special features of the financial year net turnover calculation in separate cases, criteria for the specification of the amount of fines, mitigating circumstances and aggravating circumstances, and cases where the fine may be reduced.”

As it can be seen from Article 14 a fine for abuse of dominant position is up to 5 percent of net turnover for the previous financial year of each involved market participant, but not less than 250 LVL (~355 EUR) may be imposed. If the legally imposed obligations have not been complied with, Competition Council may take a decision increasing the fine specified above up to 10 percent of the net turnover for the previous financial year of the infringer but not less than 500 LVL (~711 EUR).

c. Regulations

Cabinet of Ministers Regulation No. 862 of 19.10.2004. “Procedures for Calculation of Fines for Violations referred to in Section 11, Paragraph one and Section 13 of the Competition Law” (i.e. about prohibited agreements between market participants and prohibition of abuse of dominant position) determines calculation of fines for abuse of dominant position.

According to these regulations abuse of dominant position is regarded as a serious infringement for which fine may be imposed from 0,5 up to 1,5 per cent of net turnover for the previous financial year.

Above mentioned amount of fine may be increased taking into consideration duration of the infringement and aggravating circumstances.

d. Agency enforcement policy (e.g., guidelines, speeches)

Competition Council of Latvia had not issued any particular guidelines regarding abuse of dominant position.

e. Case law

Courts in Latvia legally are not required to follow previous precedence even if it originates from a court placed higher in the judiciary system. However previous courts judgment may be used in argumentation and normally courts decide in accordance with judgments of courts of higher instances.

There are only few judgments regarding abuse of dominant position at this moment. Mostly in cases procedural questions are evaluated. In judgments there have been evaluated such issues as justified price, bundling of different products into the one service, also there is a trend to use references to the relevant European Commission’s decisions and ECJ judgments.

All cases have been heard in Administrative court as appeals of the decisions adopted by Competition Council of Latvia.

f. Other (please identify)

Strategy for 2007.-2009. of Competition Council (adopted by Cabinet of ministers on August 30, 2006) determines that the mission of Competition Council is to promote that market is working in the interests of consumer and that there exists strong competition between undertakings.

Also it contains the results of competition policy that includes positive changes in economics and all society, providing more broad options for consumers and more innovative operation of undertakings.

2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.

The Strategy for 2007-2009 of Competition Council contains abovementioned aspects prescribing that the competition policy must foster positive changes in economics and all society, providing broader choice for consumers and more innovative operation of undertakings.

3. If there are multiple objectives, how are these balanced or reconciled?

Objectives deriving from the Strategy for 2007-2009 of Competition Council do not contravene to the objective settled in the Competition Law and for this reason no reconciliation is needed.

4. How has your jurisdiction balanced the risks associated with over-deterrence (detering efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?

According to the callings in EU to more apply economical approach in assessment of the dominant position, Competition Council of Latvia grounds the assessment of the dominant position by more economical analysis of the relevant situation also taking into account effects of market power in the market in such a way paying attention to the markets participants behavior having actual or likely restrictive effects on the market. Therefore it is possible to adopt more balanced and proportional decisions.

5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.

There are no any exemptions in our laws regarding unilateral conduct of statutory monopolies or previous statutory monopolies.

6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (*e.g.*, small, transition, or recently-liberalized),

please explain.

Objectives of the Competition Law are not directly related to the nature of our economy. However as our economy is small and still continues liberalization process, that had been started about 15 years ago, achieving of these objectives are even more important.

7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.

Accession to the EU in 2004 required to enforce more rigorous steps to refuse from statutory monopolies in certain areas and to enforce competition legislation according to the EU competition principles.

8. Are there institutional features (e.g., the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency's ability to achieve the objectives of the unilateral conduct rules? If so, please explain.

Competition Council performs its activities as a public (state) body, under supervision of the Ministry of Economics. Independence of Competition Council in its investigation activities and decision-making procedure is provided by the Competition Law, which determines that no one may give directions to Competition Council regarding the investigation of possible infringements and adoption of decisions, also it is determined that decisions of Competition Council may be appealed only in the court.

9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?

One of the main challenges for our competition institution is to start investigation on its own initiative in cases where it is obviously necessary to improve competition initially, even if negative consequences may be foreseen only in future.

It is also very complicate for us to investigate cases on excessive pricing that however is very important for us as a small economy with less potential competition then in big economies.

B. Assessment of Dominance/Substantial Market Power

1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction's general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., "super dominance").

According to Competition Law dominant position is an economic (commercial) position in a relevant market of a market participant or several market participants if the market share of such participant or the participants in this relevant market is at least 40 per cent and if such participant or such participants have the capacity to significantly hinder, restrict or distort competition in any relevant market for a sufficient length of time by acting with full or partial independence from competitors, clients or consumers” (Article 1 Point 1).

As it has been already mentioned, in this year new amendments in Competition Law providing changes in definition of dominant position have been elaborated. According to these amendments market share threshold to establish dominant position will be withdrawn. Therefore, it will be possible to establish dominant position even if market participant’s market share is below 40%. These amendments probably will be adopted and come into effect during next year.

Competition Council at this moment does not categorize different levels of dominance.

2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?

- If dominance/substantial market power is present yes/no
- Acquisition or creation of dominance/substantial market power yes/**no**
- Attempt to acquire or create dominance/substantial market power yes/**no**
- Other (please identify)

Why did your jurisdiction choose these stages?

Acquisition and attempts to acquire dominance in the process of merger may not be regarded as infringement of Competition Law of Latvia. It is possible to prohibit merger of undertakings if as a result of it dominant position is created. The Competition Law contains prohibition of restrictive horizontal and vertical agreements, therefore, agreements resulting in acquiring of dominant position in the relevant market are regarded as violation of prohibition of restrictive agreements.

3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a “safe harbour”? yes/no

At this moment one of the criteria for dominant position is 40% of market share that could serve as a safe harbour.

However this threshold probably will be soon abolished.

If so, please respond as applicable:

- What is the market share level of the dominance presumption? NA
- Is the dominance presumption rebuttable? NA
- What is the market share level of the safe harbour? Less than 40%
- Is the safe harbour absolute (*i.e.*, dominance/substantial

- market power cannot be found below the specified percentage level)? **yes/no**
- What is the legal basis of the presumption **NA**
 - What is the legal basis for the safe harbor? **statute /case**
law/guidelines

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold ? **yes/no**

If so, please explain why and in which circumstances.

5. Does your jurisdiction's analysis of dominance/substantial market power first require that a relevant product and geographic market be defined? **yes/no**

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?¹

- Market share of the firm and its competitors **yes/no**
- Market position and market behavior of competitors **yes/no**
- Durability of market power **yes/no**
- Barriers to entry or expansion **yes/no**
- Economies of scale and scope/network effects **yes/no**
- Buyer power **yes/no**
- Access to upstream markets/vertical integration **yes/no**
- Access to essential facilities **yes/no**
- Market maturity/vitality **yes/no**
- Financial resources of the firm and its competitors **yes/no**
- Profits of the firm **yes/no**
- High prices (at absolute or comparative level) **yes/no**

Please specify any other criteria that you use to assess single-firm dominance/substantial market power.

In specific market transparency of the market may be used as a criteria.

7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?

The most important criteria at this moment are market share and market power. Barriers to entry as well as the situation of other market participants are taken into account as well.

¹ The answer "yes" should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer "no" should be provided if in practice you have not ever used that criterion.

8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

There are not elaborated national guidelines for assessing abuse of dominant position, however according to praxis assessment of dominance starts with the investigation on relevant market and competitor's shares in it. In further barriers to entry, access to essential facilities as well as financial resources has been taken into account. If it is more difficult to establish a dominant position in particular case then more criteria has to be evaluated.

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

There has not been any such cases in Latvia regarding dominant position. The level of recognizability of trade marks are taken into consideration in merger cases.

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction? yes/**no**

10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [**NB:** Jurisdictions that do not consider themselves "small" economies are welcome to skip this question.]

Assessment of dominance does not differ in a small economy; however dominance in small markets could be presumed at lower level of market share than in other jurisdictions as competition of small economy are more vulnerable than in large economy. The volume of market and market satiety is more important aspect in small economy than in bigger state. In small economy the above-mentioned aspects could be serious barrier of entry. It could help more flexibly preclude possible abuses of dominant position.

Free trade in certain cases may minimize the risk of substantial market power but free trade agreements in overall do not alter the assessment of dominance/substantial market power, because it basically affects assessment of barriers for entry in national market.

11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

To establish whether there exists dominant position it has to determine the amount of market share as well as whether relevant market participant has the capacity to significantly hinder, restrict or distort competition in any relevant market for a sufficient length of time. As the decision on abuse or not abuse of dominant position is adopted according to the regulation given in the Competition Law, it fully corresponds also to the objective of the Competition Law.