

Unclassified

DAF/COMP/WP3/WD(2016)12

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

25-May-2016

English - Or. English

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

Working Party No. 3 on Co-operation and Enforcement

PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by Latvia --

14-15 June 2016

This document reproduces a written contribution from Latvia submitted for Item 3 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm*

JT03396590

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1. Legislation

1. The aim of the Competition law is to protect, maintain and develop free, fair and equal competition in the interests of the society in all economic sectors. Notion “society” include consumers, undertakings and public administrative bodies. Law defines certain means how the purpose of the Law must be achieved – by restricting market concentration, abuse of dominance and vertical restraints and illegal agreements among competitors (also cartels), by setting remedies and by preventive fines.
2. Latvian Merger regulation does not state any criteria for non-competition issues such as industrial policy, public interests, total welfare. These criteria, traditionally, are not factored also into review process by competition authority. CC can prohibit a concentration that creates serious competition issues despite proof that the concentration is in the public or other interest.
3. According to Competition law CC must consider actual or potential effect of the merger according to SLC and dominance test (does the merger create or strengthen dominant position, or substantially lessens competition).
4. There is no plans to make any changes at Competition law regarding this matter.
5. Other governmental bodies cannot intervene in the merger control analysis or overturn decision of CC (non-opposing merger, accepting remedies or prohibiting merger). Governmental bodies have the same rights as other private undertakings to participate in the merger review process and give their opinion about the effects of the merger.
6. Judicial review is based on the same test defined by Competition law. Also observance of due process of merger review is examined.
7. At the same time, CC is not a fully independent governmental body. Institutional subordination to the Ministry of Economics may bear a conflict of interest and provide a remote, but still a chance of political interference, when examining merger involving state owned companies. Few years ago there were unsuccessful discussions to exempt state owned companies of the obligation to notify mergers, which would, if adopted by the Parliament, as a matter of law restrict jurisdiction of the CC to review such mergers.
8. Merger allowed by CC may be prohibited by financial or media sector regulators on other grounds.
9. The Competition law define certain criteria at the same time do not prevent CC to take into account other considerations that complement competition analysis.

2. Case examples

10. Non-competition issues are not normally considered in the CC analysis as regards mergers. In case non-competition issues constitute effects of transaction, these effects as an exception could be considered in the balance with any factors impeding competition as a result of transaction. That means

to some extent and at a discretion of the authority public issues could play certain role in the final decision.

11. It is not uncommon that CC receive opinion from ministries other public bodies that supervises certain market/sector what contains concerns about public interests affected by the merger. But in rare cases CC take into account considerations that are based on public interests.

12. On 11 May 2012 the CC adopted a decision to approve proposed merger of MTG Broadcasting AB (MTG) and AS Latvijas Neatkarīgā Televīzija – owners of the two leading private TV general interest channels with Latvian language content (TV3 and LNT). Also both competitors had a package of specialized (Russian language channels, for youth auditory and others) channels in their portfolio that created horizontal concentration. Market situation – financial losses of both competitors at TV advertising market after crisis, high cost for broadcasting at free to air market, entrance of other foreign channels (especially Russian) retransmitted content channels to the TV advertising market.

13. During review process National Electronic Mass Media Council (NEMMC) provided their opinion about the possible risks that was based also on public interests (plurality). Decision of CC was based on evaluation of competition concerns, and by accepting commitments CC also took into account non-competition issues and also accepted additional commitments from merging parties that besides competition concerns were aimed to maintain separate **and** independent editorial staff and unchanged amount of news in both TV channels and to leave the same amount (21% of the broadcasting time) of original content (retransmitted from other channels).

14. On 23 of January 2009 he CC adopted a decision to approve proposed merger of the largest drug wholesaler and the largest retailer. CC found that vertical integration creates serious foreclosure concerns in four local market.

15. During merger review Ministry of Health (MH) drew attention that vertical integration in question would create a precedent that could further undermine independence of pharmacists and also consumers, and have adverse effect on the quality of health care. MH also pointed to the risk that the merged undertaking will be motivated to offer more expensive drugs, which is not in the interest of the consumers. Also it will undermine special regulation according to what drugs have to be reimbursed by the state, the cheapest interchangeable drugs will not be offered to the consumers. CC analyzed those public risks effects that may create also potentially harmful risks for competition and also consumers only in concentrated local markets.

16. Merger review practice shows that CC take into account public interest considerations to limited extent. That means public considerations may play supportive role in competition assessment but not vice versa. For example, remedies may be applied with broader scope also covering non-competition interests. Or if both risks (competition and non-competition) may be resolved by same remedies then argumentation for public interest defense also may be added in decision to strengthen position. It seems that model CC have is more close to the model of *shared competences*.

3. Balance between competition advocacy and merger review procedure

17. Competition advocacy rights and also the duty to consult government and other public administrative bodies is a great advantage for the authority and possibility to advance competition culture. However involvement of the authority in the analysis of state company's possible mergers that later may or may not be notified to the authority could have adverse effects. Competition concerns is one of the public interests that is evaluated during this *process* by the government.

18. Latvian Competition law provides CC with powers to submit to the institution concerned (usually a ministry) written proposals or opinions regarding observance of the principles for the protection, maintenance or development of competition in the event of privatization, reorganization

and demonopolization of State or by local governments undertakings (companies). This opinion also may be requested by a ministry at the very early stage before the merger is notified or even before merger consultation phase could start.

19. Balancing public interests against potential competition harm in such situations will not be accurate if compared to merger review procedure. It is a risk that other public interests could be more convincing than competition concerns. And public considerations may be accepted without knowing in detail current market situation, which might have changed.

20. Also for competition authority taking into account or accepting in this *process* public considerations it could create conflict of interests later in merger review procedure.

21. Latvian government is now discussing for more than a year a possible merger between the two biggest partly state-owned telecom (fixed and mobile) operators. During debates about this hypothetical merger competition issues are confronted with non-competition interests (international competitiveness of domestic firms, benefits of stakeholders etc.).

22. In such cases for competition authority it might be better to hold back from competition advocacy that may conflict with merger review later.