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Competition Advocacy During the Aftermath of the Covid-19 Crisis

*Contribution of
The Competition Council of Latvia*

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Written contribution of Competition Council of Latvia on Competition advocacy during and in the aftermath of the Covid-19 crisis

UNCTAD Intergovernmental Group of Experts on Competition Law and Policy Nineteenth session (Geneva, 7–9 July 2021)

In order to reduce the spread of the Covid-19 pandemic in Latvia, starting from March 2020, the Cabinet of Ministers (Government) and the Parliament of the Republic of Latvia (Saeima) issued regulatory enactments imposing various restrictions, for instance, in retail, beauty care, catering services, gambling industry, etc. At the same time, the regulatory framework also supports the businesses most affected by the Covid-19 crisis, such as downtime benefits for employees, rent reductions or exemptions, etc., type of support.

Based on Section 7, Paragraph two of the Competition Law¹, the CC is entitled to evaluate draft legal acts and other documents prepared by other institutions and provide opinions thereon, if they include norms affecting the market mechanism, the implementation of which may directly or indirectly restrict competition and Article 7, Paragraph one, clause 4, the CC is entitled to publish the opinion and recommendations of the CC.

The opinion of the CC regarding the regulatory enactments issued by the Government and the Parliament is only recommendatory. However, the CC is not directly involved in the development of Covid-19 restrictions, as in the context of the Covid-19 pandemic, epidemiological safety considerations and behavioural models developed by health authorities and specially established operational management bodies may play a key role.

Since the adoption of restrictions and support measures provided by State and their amendment, the CC has received complaints from individuals (merchants) requesting the CC to provide the authority's opinion on the possible discriminatory and unequal restrictions / support measures in relation to different groups of market participants. The CC understands the need to introduce strict epidemiological security measures to better cope with the Covid-19 pandemic crisis and to protect public health as much as possible. At the same time, it is crucial to consider the aspects related to the protection of competition what can also have an impact on the market in the post-crisis period.

CC conducted assessments and provided opinion in several cases regarding Covid-19 restrictions / support measures.

Restrictions on the gambling industry

- The CC evaluated the application of the gambling sector on the prohibition of gambling (incl. interactive gambling) included in the Law “On Measures to Prevent and Overcome State Threats and Its Consequences Due to the Spread of Covid-19” (the Law)², which in their opinion,

¹ *Competition Law*, <https://likumi.lv/ta/en/en/id/54890>

² *Law On Measures for the Prevention and Suppression of Threat to the State and Its Consequences Due to the Spread of COVID-19*, <https://likumi.lv/ta/en/en/id/313373>

Section 8. During the emergency situation related to the spread of COVID-19 it is prohibited to organise gambling and lotteries, except for interactive gambling, numerical lotteries, and instant lotteries.

Section 9. For the duration of operation of this Law the Lotteries and Gambling Supervisory Inspection shall suspend all the licences to operate gambling both in physical locations where gambling is organised (licence of a casino, license of a gambling hall, licence of a bingo hall) and in the interactive environment and (or) using the intermediation of electronic communications services.

provided competitive advantages to JSC “Latvijas Loto” (Latvian national lottery company, which is 100% owned by the Latvian state) as the activities of JSC “Latvijas Loto” (organization of nationwide lotteries) were not restricted by this regulation.

The Constitutional Court (the Court) also evaluated these restrictions and concluded that the gambling operators in physical locations and JSC “Latvijas Loto” are not in equally comparable conditions. Therefore, the Court determined that the restrictions on such gambling complied with the first sentence of Article 91 of the Constitution (Satversme)³. However, concerning the organizers of interactive gambling, the Court ruled Article 9 of the Law to be void. The CC also provided an opinion on the case.

Restrictions on the operation of beauty salons (and medical personnel working there)

- Upon the application of the beauty industry representatives, the CC assessed the established restriction on the provision of beauty care services (services provided by cosmetologists and beauticians who are medical practitioners). The restrictions provided that the provision of services was allowed only in medical institutions if there were medical indications for receiving the specific service. However, in the opinion of the CC, the respective restriction created an unequal situation between medical practitioners (cosmetologists) providing services in medical institutions and medical practitioners (cosmetologists) providing services in beauty salons (whose operation was completely restricted). A large part of the services that are provided in a beauty salon can be provided as medical services – only medical practitioners working in a medical institution could continue to provide their services.

Providing its opinion to the Government, the CC indicated that because of such restriction, there is a possibility that the leading and stronger market participants (medical institutions that continue to provide the above services) are provided with a competitive advantage - the provision of services can be continued by avoiding competition with other service providers (medical personnel in beauty salons). As the competitive pressure decrease and the demand increases, there are opportunities to raise service prices. As a result, both in the short and long term, the sufferer will be the consumer, whose choice will be reduced, and prices may increase.

Consequently, the CC called on the government to evaluate the possibility of reviewing the established restrictions on the operation of beauty salons to ensure equal competition opportunities for all market participants (medical practitioners) regardless of the place of services, if they are able to meet the necessary epidemiological requirements.

The opinion of the CC was also supported by the Ombudsman and the Economic, Agrarian, Environmental and Regional Policy Committee of the Saeima (Parliament of the Republic of Latvia). CC expressed the above opinion at Committee meeting.

Publicly expressed opinion by the CC:

<https://www.kp.gov.lv/en/article/restrictions-beauty-sector-during-covid-19-cause-competition-inequality>

³ The Constitution of the Republic of Latvia, <https://likumi.lv/ta/en/en/id/57980>

Restrictions that would impede the development of competition after the recovery of Covid-19

- The CC considered the application of the Real Estate Industry Association, which was related to the European Union's Recovery and Sustainability Mechanism Plan prepared by the Republic of Latvia (the draft plan). The draft of the plan is intended to support long-term economic recovery following the Covid-19 pandemic. The objection of the Association was related to the planned allocation of funding by tender to local governments for the development of industrial parks in the regions. The CC pointed out that in order to promote the development of the business environment, including the interest and involvement of the widest possible range of entrepreneurs who are able to ensure the implementation of such projects, the creation of unequal conditions of competition for public and private persons should not be supported. The possibility to participate in development of industrial parks and territories in the regions should be promoted also for private entrepreneurs by setting specific qualification criteria.

The Government took note of this recommendation of the CC by submitting an updated draft plan to the European Commission on 30.04.2021. Private merchants (along with local governments) were included among the potential project applicants within the framework of the specific investment measure.

Exemptions from rent for tenants of public premises

- The CC has received several submissions from merchants related to the regulatory framework. The framework provided for an exemption or reduction of the rent of real estate or movable property of a public administrative body, or a capital company controlled by public administrative body to be applied to a merchant affected by the crisis, as well as in case of late payment, do not recover debts and apply contractual penalties.

Merchants pointed out that such legislative initiative distorts the commercial rental market and puts tenants of public premises in a better position than tenants of privately owned premises, as private operators do not have the resources of the public administrative bodies to compensate for the fall in rental income in exceptional circumstances and reduce or even abolish rents altogether. State support mechanisms cannot create advantages for separate companies and, at the same time, cause competition distortions on the commercial premise lease market in general.

In the opinion of the CC, with the established regulation, the state allowed public administrative bodies (lessors) to react as quickly and flexibly as possible to the situation created by the Covid-19 crisis. This prevented the public administrative bodies from responding to the changes in the market caused by the crisis by leasing their property to ensure long-term maintenance of leases and at least partial payment of rents without exempting tenants from paying for the utilities consumed. It is expected that the adoption of such regulation, which at the same time causes losses to public administrative bodies for a potentially unpredictable period of time, will minimize the risk that leases may be terminated, and tenants lost as a result of the crisis.

Meanwhile the CC pointed out that a solution should be found so that the support to cover the rent also reaches the tenants, whose landlords are private persons and not public administrative bodies. At the same time, the provided support should promote the equal sharing of losses due to the crisis between tenants and lessors. This would lead to more equivalent situation between market participants and a faster resumption of economic activity after the complete or partial lifting of restrictions. Referring to the OECD, the CC pointed out that small and medium-sized enterprises

are the ones that have suffered most from the Covid-19 crisis.⁴ These companies are most affected by the trade restrictions imposed, thus putting their solvency at risk. This raises CC's concern that in the long run, there will be a significant increase in concentration in several markets or a significant increase in market shares for those companies that are already stronger and will be able to survive the crisis. The bankruptcy and exit of small market participants may lead to the Latvian economy losing companies that could potentially develop into significant and efficient market players in the future. There are also risks that the leading market players could use the Covid-19 crisis to merge with competitors in difficulty on more favourable terms, thus strengthening both their position and eliminating competitors and increasing the level of concentration in the market as a whole.

Publicly expressed opinion by the CC:

<https://www.kp.gov.lv/en/article/competition-council-calls-assess-impact-covid-19-restrictions-competition-long-term-perspective>

Restrictions on the retail trade

- The CC also received complaints from retail sector about restrictions imposed by the Government⁵, which in the period from March 2020 till 02.06.2021. have been repeatedly reviewed and changed, considering the current epidemiological situation in the country.

Depending on the variable epidemiological situation, for example, such stricter and less stricter restrictions have been in place: restrictions on non-food stores to work, except for pharmacies, pet shops, etc.; restrictions on grocery stores to sell non-food goods, except for necessities or seasonal goods, in accordance with the product groups specified by the government; restrictions on shops and shopping centres, depending on the area of their point of sale, restrictions on the number of visitors, etc.

The CC assessed the application of a specialized cosmetics trader, which objected to the discriminatory nature of the restriction on retail sales in non-food stores, i.e., allowing to work only stores in which food is sold in the amount of not less than 70% of the assortment of goods and shops in which hygiene products are sold in the amount of not less than 70% of the assortment of goods. This distorted the conditions of competition by giving an unjustified advantage to certain retail chains, which mainly sell everyday consumer goods, household chemicals, household goods, and also cosmetics and perfumes.

Regarding to the imposed absolute restrictions, i.e., a total ban on on-site retailing, the CC pointed out the risks to effective competition in the long run. The possible exit of relatively small market players may lead to the economy losing businesses and markets becoming increasingly concentrated. Completely prohibiting traders from a particular group of goods, while allowing them to buy this type of goods in everyday consumer goods stores, creates an unequal competitive situation, although traders of specialized goods are able to meet the epidemiological requirements for the number of customers at the point of sale, etc. Thus, given that specialized operators may also be willing and able to comply with all the necessary epidemiological requirements and that restrictions are imposed depending on the entity marketing a particular type of product, there does not appear to be any objective justification.

⁴ OECD Coronavirus (COVID-19): SME policy responses (2020), <https://www.oecd.org/coronavirus/policy-responses/coronavirus-covid-19-sme-policy-responses-04440101/>

⁵ *Epidemiological Safety Measures for the Containment of the Spread of COVID-19 Infection*, <https://likumi.lv/ta/en/en/id/315304>

Similarly, smaller non-food stores with different specializations are also unable to provide online sales, so the on-site restriction completely excludes them from the market. As a result, the leading and strongest players benefit twice - on the one hand, they can continue their business by avoiding competition with specialized market players and, on the other hand, by reducing competitive pressures, including smaller players leaving in the future, increasing demand and declining competitive pressure, they have the opportunity to raise prices, thus creating additional profit opportunities. In both the short and long term, the sufferer will be the consumer with reduced choice and higher prices for services and products. In addition, the closure of specialized retail stores, while not changing consumer habits, may increase the concentration of people in open retail stores, as the only way to get the goods you need is to buy them in everyday consumer goods stores.

Also, in respect with trade restrictions, the CC assessed the complaints related to restrictions on the operation of stores located in shopping centres (with an area over 7000 m²), restricting the activity of stores located in such shopping centres (in many cases, it was possible to provide access to these shops through a separate entrance, thus not increasing the total number of visitors to the mall). This created an advantage for competing stores operating outside the mall.

In assessing these restrictions, the CC expressed the view that restrictions, if any, including the number of visitors allowed per area, etc., should be carefully weighed and non-discriminatory towards any market participant, regardless of the point of sale chosen (shopping centre or in a separate point of sale with an outside entrance), categories of traded goods, shopping centre areas and other factors in order to ensure, as far as possible, the operation (resumption) of merchants, if they are able to meet the epidemiological requirements for safe trade. The CC stated that based on industry's provided information on the performed air quality measurements and the views of the health industry, is better to ensure a safe trade model with additional safety criteria - regular air quality control measurements or more detailed requirements for to the total number of visitors to the mall. In the opinion of the CC another possible solution in case the large shopping centres are not fully opened could be a permit for the large shopping centres to operate, not exceeding the total sales area of 7000 m² (excluding the shops with separate external access), for example, by agreeing with tenants to arrange trade on certain days, etc.

The CC does not deny that strict restrictions are needed to prevent the Covid-19 pandemic. However, at the same time, the CC consequently stressed the need for the Government to assess the long-term effects of the chosen restrictions on competition in order to prevent the restrictions from being applied in a discriminatory manner during the epidemic and also not to cause the risk of a significant reduction in the competition following the end of the Covid-19 pandemic, leaving many smaller market players unable to resume their business after pandemic. Accordingly, in the opinion of the CC, such restrictions that impose competitors who are capable of meeting all the necessary epidemiological requirements with equal efficiency, different regulatory conditions – allowing for one to continue the economic activity and completely prohibiting or substantially restricting the activity of another market participant for a long time is not justified.