

DRAFT QUESTIONNAIRE
ON ABUSE OF SUPERIOR/DOMINANT BARGAINING POSITION
(SPECIAL PROJECT)

A. How, if at all, is “abuse of superior/dominant bargaining position” defined in business to business relations in your jurisdiction?

The concept of abuse of significant impact is elaborated in the Draft Amendments of Competition Law of Latvia (is in the process of deliberation in the Parliament). The definition will apply only to the buyer side namely to the large retailers which market share in the relevant retail market in Latvia is at least 25% who are however not in a dominant position.

The reasons for applying this concept solely to one side -- the abusive practices by large retail chains in relation to suppliers/producers and final consumers.

B.

1.

(1) Does your jurisdiction have

a. Competition laws and/or guidelines which apply to the prohibition of “abuse of superior/dominant bargaining position” in business to business relations?

The concept of prohibition of abuse of significant impact in large retailers relations to suppliers is introduced in Draft Amendments to the Competition Law

b. Other laws and regulations which address the problems arising from superior/dominant bargaining position? no

(2) How are such acts regulated, including whether these rules are handled by the competition agency and/or handled under the rubric of competition policy?

After adopting the Amendments of Competition Law in the Parliament these rules will be handled by Competition Council of Latvia (will improve the implementation of the competition policy and safeguard rights of consumers).

(3) Why are such acts regulated?

In Latvia significant buying power is concentrated in hands of a small number of enterprises distorting fair balance in the market and creating significant barriers to the entrance and limiting the choice of suppliers. The retail market of daily consumer products in Latvia is highly concentrated – the are two large retail chains which both together own more than 60 percent market share in the relevant market -- retail of daily consumer goods, mainly carried out by retail outlets such as supermarkets, hypermarkets and discount chains. The large retailers are abusing its bargaining power in the grocery market by setting unfair contractual obligations and different payments, unduly long terms of payments for the supplied goods, unfair sharing of

risks for the return of unsold goods etc. Regarding to the flexibility of choice of suppliers there is a great variety of suppliers existing in Latvia by now as well as consumer goods create a significant share of the imports, but only the limited number of retail trade enterprises could be considered as effective competitors and buyers of these products. In such situation especially food producers, even large have to work near by losses, can not develop and produce new product lines etc. and following them the ultimate consumers are more and more limited in choice of groceries goods. Inquiry in the diary products market done by the Competition council proved that the existing buying power of large retailers causes the increase in prices and limitation of consumer choices.

(4) Please provide the text (in English if available) of your jurisdiction's rules (including rules other than competition laws) on "abuse of superior/dominant bargaining position."

Significant impact in the Draft Amendments of Competition Law of Latvia is defined as: an economic position of a market participant or several market participants in the relevant retail market, when, exercising an economic activity individually or within the framework of mutually concluded franchise agreements or horizontal agreements, the market share in Latvia of this market participant or these market participants is at least 25%, which is, however, not in a dominant position. Retail is understood as selling goods for the individual consumption or utilisation, and is not related to provision of services.

Market participant holding significant impact is prohibited from any kind of its abuse within the territory of Latvia by imposing or applying directly or indirectly unfair or discriminatory contracts terms, provisions or payment terms upon other market participants. Abuse of significant impact may also occur as:

- 1) unfair or ungrounded share of responsibility about potential risks between contract parties;*
- 2) unfair or ungrounded application or imposition of payment terms for goods being present in the store unless these payment terms are justified due to promotion of new and unknown to the consumers goods in the market;*
- 3) unfair or ungrounded application or imposition of payment terms for the conclusion of contract unless these payment terms are justified thereof contract is being concluded with a new supplier which wherewith has to be specially evaluated;*
- 4) unfair or ungrounded application or imposition of payment terms for supply of goods to the new store;*
- 5) application or imposition of unfairly or unduly long terms of payment for supplied goods.*

(5) If there are different regimes to address this situation (competition law and other laws) how are competences defined/interventions coordinated?

In Latvia private action against bargaining dominant position may be brought only by using

general rules of civil law requiring dismissing the contract or certain part of it as inconsistent with the principle of good faith. Reference also to mistake, fraud or duress can be made if appropriate. But such claim seems not very successful.

2.

(1) Which of the following criteria do you use to assess superior/dominant bargaining position?

a. Degree of trade dependence on the firm by the other (e.g., percentage of the firm's total sales attributable to the allegedly abusive party) no

b. Probability of finding an alternative trade partner no

c. Supply and demand forces of the product or service no

d. Difference in scale of business between the parties no

e. Other – please explain

The definition of “significant impact” is elaborated based on the real market situation, (taking into account the market shares of the companies which have power to force unfair or discriminatory contract rules or payments upon its suppliers):

an economic position of a market participant or several market participants in the relevant retail market, when, exercising an economic activity individually or within the framework of mutually concluded franchise agreements or horizontal agreements, the market share in Latvia of this market participant or these market participants is at least 25%, which is, however, not in a dominant position.

(2) Please specify examples of conduct that constitutes abuse of superior/dominant bargaining position.

Imposing or applying directly or indirectly unfair or discriminatory contracts terms, provisions or payment terms upon other market participants. Abuse of significant impact may also occur as:

1) unfair or ungrounded share of responsibility about potential risks between contract parties;

2) unfair or ungrounded application or imposition of payment terms for goods being present in the store unless these payment terms are justified due to promotion of new and unknown to the consumers goods in the market;

3) unfair or ungrounded application or imposition of payment terms for the conclusion of contract unless these payment terms are justified thereof contract is being concluded with a new supplier which wherewith has to be specially evaluated;

4) unfair or ungrounded application or imposition of payment terms for supply of goods to the new store;

5) application or imposition of unfairly or unduly long terms of payment for supplied goods.

(3) Must effects on competition, including harm to consumer welfare, be demonstrated in order to prove “abuse of superior/dominant bargaining position”?

no

(4) What sanctions are imposed on firms if they commit “abuse of superior/dominant bargaining position” in your jurisdiction? Please describe the type and nature of the sanction imposed.

The Competition Council will take a decision regarding the determination of a violation, legal obligations and imposition of a fine. For abuse of significant impact the Competition Council may impose fines upon each of the market participants up to 5 percent of their net turnover of the previous financial year, but not less than 250 lats (~350 Euro). The funds referred to shall be paid into the State basic budget. If the legally imposed obligation has not been complied with, the Competition Council may take a decision about the increase of the fines up to 10 percent of the net turnover of the previous financial year, however the fine may not be less than 500 lats (~700 Euro). The funds referred to shall be paid into the State basic budget.

3. When assessing cases of abusive conduct, does your agency also take into account positive aspects of (countervailing) buyer power which may lead to the conclusion that a superior/dominant bargaining position does not exist?

no

4.

(1) To the extent possible, please provide the number of “abuse of superior/dominant bargaining position” cases your agency decided or reviewed (beyond a preliminary investigation) during the past 10 years.

The Draft Amendments of Competition Law is not yet adopted.-

(2) Please provide a short English summary of the leading “abuse of superior/dominant bargaining position” decisions/cases in your jurisdiction and, if possible, a link to the English translation/press release.

See 4. (1)

5. Does your jurisdiction allow private cases challenging “abuse of superior/dominant bargaining position”?

No.

6. What is the relationship between “abuse of superior/dominant bargaining position” and “abuse of dominance/monopolization” in your jurisdiction?

Significant impact is substantially different from dominant position. A company with significant impact might not be able to significantly distort competition or act independently from its competitors, though it is capable to force unfair and discriminatory contract rules or payments upon their suppliers, etc.

Under the terms of Latvian retail market situation classical competition rules (i.e. dominant position rules) are not sufficient to protect the competition as none of the groceries chains have a dominant position (the threshold in Latvian Competition Law is 40% of the market share). The prohibition of the abuse of significant impact is analogue to the prohibition of the dominant position, the only difference is that the latter applies to monopolies only (only one company/ [or several companies in case of collective dominance] may be dominant in the relevant market), while the Draft Amendments of Competition Law applies to oligopolies (may be two or more companies who are capable of abusing its market power).