Financial disclosures to associations and inherent risks 3/43/21

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The increasing role associations play in society and certain industries raises questions about data the associations use in their activities and communications, which is often obtained from their members. We should not forget that any association is governed by the Competition Act and that associations and their members, just like any market participant, are subject to its requirements, including restrictions on how commercially sensitive information may be transferred, gathered, and made available to association members. What rules do the members have to follow when it comes to disclosing financial data to their association?

Provisions of the Competition Act (CA)

CA section 1(9) defines the "market participant" as any (including foreign) person that carries on or plans to carry on a business in Latvia or whose activities affect or may affect competition in Latvia. Section 1(11) then defines the "agreement" as a contract or a concerted effort involving two or more market participants, and a decision made by a registered or unregistered association (union etc) of market participants or by its officer. So the association is treated as a CA subject governed by the prohibitions and restrictions it imposes, and if any of those are broken, the Competition Council has the power to levy a fine prescribed for a prohibited agreement between market participants.

CA fails to provide a clear and exhaustive answer to the question of what information competitors (e.g. association members) are allowed to exchange, as in each case we need to evaluate the market structure, the content and relevance of information, and the regularity of exchange. The Competition Council has put together practical recommendations for permitted and prohibited communications within associations to protect their members from the risk of unwittingly entering into a prohibited agreement. Guidance for associations and their members on compliance with the prohibition laid down by CA section 11 is available here.

Commercially sensitive information

Identifying and addressing certain industry issues (e.g. fighting the shadow economy or easy gathering of commercially sensitive information) cannot serve as an argument to justify a prohibited agreement within an association. The Competition Council's practice suggests that association members are expected to abide by the principle of not disclosing any information that a market participant considers a trade secret he would guard from his competitors under normal circumstances.

In establishing the commercially sensitive nature of some information, the Competition Council has evaluated parameters such as its public availability and whether it takes considerable resources to gather that information, the degree of detail (it does not identify a particular market participant), and relevance (information is historical or has lost its relevance).

A key factor in recognising information as commercially sensitive is whether it may affect the behaviours

and market strategies of competitors.

Commercially sensitive information is basically information on prices or price-setting conditions, sales volumes, cost structures, profit margins, suppliers etc. Information that is available to the public, is not individualised, is historical and does not disclose details of market participants' competitiveness is not usually considered commercially sensitive.

So, before any information and data (including corporate financials) can be disclosed to the association, the following questions should be asked:

- Is that information considered commercially sensitive?
- Is it adequately protected among the association members (competitors)?

In the case of a disclosure, we need to make sure there is an adequate mechanism in place for gathering and circulating that information.

If you have any doubts as to whether some data or other information is considered commercially sensitive and may put your company at risk of breaching CA, please reach out to our experts.