Aspects to consider in communicating with staff of other companies (3/35/20)

Each company's day-to-day work involves communicating with suppliers, distributors and customers. We often see that company employees are not aware that the way they carry out their daily responsibilities can be treated as part of a breach of competition law, which can result in their company facing fines and reputation damage. Even a single email your employee sends in the course of business might contribute to a breach of competition law and make the regulator suspicious. To avoid this, employees as well as management should be aware of risks associated with their day-to-day work and potential breaches of competition law.

A breach of competition law can arise from a seemingly innocent situation. For example, a friend of yours has recently joined a competitor and has to prepare a bid in a procurement where your company also plans to bid. As a new employee, he does not know how to prepare the procurement documentation and asks you to email him some templates you have prepared at your company. Willing to help out, you send him a couple of procurement proposals your company has prepared.

Exposed to a higher risk are employees that –

- regularly communicate with other companies, especially competitors;
- deal with sales matters;
- plan their company's business development or pricing strategy;
- organise participation in public procurements;
- were formerly employed by competitors;
- belong to associations.

The legal framework

Latvian competition rules are laid down by the Competition Act.[1] Competition rules typically cover the following aspects:

- Prohibited horizontal agreement (cartel) or any other illegal agreement;
- Contracts or agreements with customers or suppliers;
- Activities conducted by companies in a dominant position;
- Mergers and acquisitions.

As for communication between market players, the Competition Act provides that any agreement between market players which is aimed at or has the effect of hindering, restricting or distorting competition is illegal and void from the date it was entered into.

It is important to note that the term "agreement" from a competition law perspective should be interpreted broadly. Agreement need not be in writing, it does not even have to be legally binding, and email correspondence or a chat at some event may constitute agreement.

Red flags

From a competition law perspective, part of a breach can be any exchange of information (conversation, email etc) about a company's –

- prices or pricing policy, including discounts and pricing changes;
- sales volumes (market share), sales areas, marketing plans, business partners etc;
- participation or intention to participate (or not to participate) in public procurement, as well as proposed prices and terms;
- particular suppliers and amounts, prices and terms of procurement;
- cost structure, profit margins, production capacity, investment in production capacity, utilisation capacity etc.

If you take part in a meeting attended by representatives of other companies (especially competitors) you should –

- draw up an agenda for the meeting and stick to it during the meeting;
- take minutes of the meeting;
- if anyone attending the meeting begins to discuss topics you think might include commercially sensitive information, you should object to it, point out risks, and disassociate yourself, or leave the room after entering this in the minutes.

Conclusions

Every employee should keep in mind that even a seemingly innocent email they send to another market player in the course of business can be treated as part of a breach of competition law. If an employee has sent or otherwise passed sensitive information to another market player, this fact must not be concealed or ignored, and these sorts of incidents must always be reported to the management.

[1] Competition Act. Latvijas Vestnesis, 151, 23 October 2001