Merger Control

The international regulation of mergers and joint ventures in 74 jurisdictions worldwide

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John Davies

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GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

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Latvia

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VILGERTS

Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The relevant legislation is the Competition Law, effective as of 1 January 2002. The Competition Law contains general merger control rules. Furthermore, Cabinet of Ministers Regulation No. 800, effective as of 4 October 2008, provides detailed rules on the procedure for the contents and filing of merger notifications, as well as describing the procedure for the examination thereof.

The merger provisions of the Competition Law and Cabinet of Ministers Regulation No. 800 are enforced by the Competition Council.

Latvia is a member state of the European Union, thus the relevant provisions of EU merger control are applicable in Latvia. Even for the purposes of evaluation of the purely national mergers the decisions of the European Commission and case law of the European Court of Justice are widely used by the competition authority and the national courts.

2 What kinds of mergers are caught?

Rules of the Competition Law apply to mergers as defined in article 15(1):

- the merger of two or more independent market participants in order to become one market participant;
- the joining of one market participant to another market participant;
- situations where one or more natural persons who already have a decisive influence over another market participant or other market participants, or one or more market participants acquire part or all of the fixed assets of another market participant or other market participants or the right to use such, or a direct or indirect decisive influence over another market participant or other market participants. An acquisition of assets or of the right to use such assets is considered to be a merger if the acquisition of the assets or of the right to use such assets increases the market share of the acquirer of the aforementioned assets and the usage rights in any relevant market; or
- situations where two or several natural persons jointly or a single natural person simultaneously acquire a part or all of the assets of two or several market participants or obtain the right to use such assets, or a direct or indirect decisive influence over two or several market participants.

It follows that the key factor for the transaction to qualify as a merger – an acquisition of direct or indirect decisive influence (a change of control) – must be established. The practice of the Competition Council shows that any type of transaction, irrespective of its legal and formal nature, will be caught by the merger control rules once the change of control is established.

3 What types of joint ventures are caught?

Joint ventures are caught under the merger provisions of the Competition Law if they involve the acquisition of shares or assets the same way as it is in a case of regular merger defined in article 15(1) of the Competition Law. There are no special provisions as regards joint ventures. The Competition Council, however, follows the practice of the European Commission, as outlined in the European Commission Jurisdictional Notice under Council Regulation No. 139/2004 (Jurisdictional Notice), and only full-function joint ventures are caught. Namely, a transaction qualifies as a merger only provided that it creates a joint venture, which on a lasting basis performs all the functions of an autonomous economic entity.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The term 'control' itself has not been defined in the Competition Law, however, article 1(2) defines the term 'decisive influence' as:

- control (regularly or irregularly) of the taking of decisions in supervisory or executive bodies of another market participant through their shareholding or without it; and
- appointment of such number of members in the executive or supervisory body of another market participant to ensure for the controlling entity a majority of votes in the relevant body.

However, the term decisive influence is interpreted by the Competition Council identically to the term 'control', as used in the European Commission's Jurisdictional Notice. For example, the Competition Council referred to the Jurisdictional Notice as a binding source of law in its decision regarding the merger case between OÜ PKL Holding and Amber Trust II SCA.

According to the practice of the Competition Council, not only de jure control but also de facto control has been caught, the same way as it is defined in the Jurisdictional Notice – even in the absence of the specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain control over a market participant (solo or joint). Thus the criterion used is the acquisition of solo or joint, de facto or de jure control, not the percentage of the shares acquired.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Under article 15 of the Competition Law two forms of notification of a merger can be filed before the actual merger takes place. First, it is necessary to file a full-form notification if one of two criteria set forth in article 15(2) have been met:

- the total turnover of the merger participants in the previous financial year in the territory of Latvia was equal to or above €35,572 million; or
- the combined market share of merger participants exceeds 40 per cent in any relevant market.

The second form of merger notification is the short-form notification that can be filed in case if the criteria stipulated in article 15(2) of the Competition Law have been met. For more details see question 16.

However, even if the above criteria are met, the notification does not have to be filed where the total turnover of one of the two merger participants in previous financial year in the territory of Latvia did not exceed €2,134 million.

Mergers that do not meet the above thresholds of the Competition Law do not have to be notified in Latvia.

There has been no case of national merger control where the Competition Council referred the case to the European Commission under the EU Merger Regulation rules.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

There is no notion of voluntary filing under Latvian competition rules.

Filing of a merger is mandatory in every case where the jurisdictional thresholds of article 15(2) of the Competition Law are met. Failure to notify the Competition Council leads to the transaction being qualified as illegal.

There are, however, two exceptions from the merger control rules, when filing is not mandatory. Namely, there is no filing obligation in the following cases:

- credit institutions or insurance companies whose activities include transactions with securities for own or other funds have time-limited ownership rights to market participant securities, which they have acquired for further sale, if such credit institutions or insurance companies do not utilise the voting rights created by the referred to securities to influence the competitive activities of the relevant market participant, or utilise the voting rights created by the securities to prepare the investment of fixed assets or relevant securities only of the market participant, or a part thereof, and such investments occur within one year after the creation of voting rights. The Competition Council may extend the time period on the basis of a submission from the relevant credit institution or insurance company if it proves that the relevant investment within one year is not possible; and
- a liquidator or administrator acquires a decisive influence in the case of the insolvency or liquidation of a market participant.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Foreign-to-foreign mergers must be notified if the jurisdictional threshold set forth in article 15(2) of the Competition Law has been met. The merger is notifiable to the Competition Council in case of any concentration between market participants. The Competition Law defines the term 'market participant' as any person who is directly engaged or is planning to engage in commercial activities in the territory of Latvia or the activities of which influence or can influence competition in Latvia. Thus foreign-to-foreign mergers fall within the scope of application of the Competition Law not only when the merger participants have group companies in Latvia, but also in other cases, provided that the activities of the merger participants affect competition in Latvia.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are additional requirements for the banking and insurance sectors that are being enforced by the Financial and Capital Markets Commission, which is the regulator of credit institutions and insurance companies. However, these requirements do not preclude the Competition Council from reviewing the merger under the rules of the Competition Law. Certain sectors, for example, related to the state defence or security, may be exempted from acquisition by foreign companies. Furthermore, there exist certain limitations on the acquisition of agricultural land in Latvia by foreign parties.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The notification must be filed prior to closing of the transaction.

Sanctions are imposed if the merger falls within the jurisdictional threshold and was closed prior to the filing. The Competition Council can impose a fine up to €1,400 per day, starting from the day when notification should have been filed until the illegal activity has been ceased. The Competition Council usually imposes a fine which does not exceed 25 per cent of the maximum allowed fine per day and it is common practice to reduce the fine to below 10 per cent of the maximum fine per day.

10 Who is responsible for filing and are filing fees required?

The merger participant who acquires control is responsible for filing. If the merger transaction provides for the acquisition of joint control, both jointly acquiring merger participants will be responsible for the filing of the notification.

There are no filing fees required.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

There are no mandatory waiting periods. The transaction may be closed immediately after the filing. There are, however, two aspects to be borne in mind. First, the notification is only considered as filed if it includes all information, required by the law. In practice there have been cases where the Competition Council did not agree with the parties' understanding and interpretation of completeness of the information filed. It is therefore advisable to wait until the notification is accepted by the Competition Council (a formal decision may be requested from the Competition Council). Second, the possible consequences of closing a transaction which is subsequently not cleared by the authority are to be considered by the parties.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

There are no sanctions for closing before clearance, provided that the notification to the Competition Council has already been submitted prior to the closing of the transaction.

Should the Competition Council deem that the transaction is to be prohibited or should the conditions imposed be unacceptable to the acquirer of the control, the buyer will be given time to dispose of the acquired business. Unless a clear agreement between the buyer and the seller exists to the contrary, the seller is not under an obligation to buy the target company back.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

There are no separate rules applied to foreign-to-foreign mergers. The Competition Council enjoys full jurisdiction in the territory of Latvia and it may prohibit the merger or impose conditions with respect to the territory of Latvia. No specific sanctions are applied if the notification was filed prior to closing.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Closing before clearance is permitted as long as the notification has been filed before the closing. If the merger notification is not submitted, the 'hold-separate' arrangement may be used, but it is advisable to obtain guidance from the Competition Council on the sufficiency of the 'hold-separate' arrangement in question. Such guidance will not, however, have a binding force and will be informal.

Even if the parties are willing to request such permission, it will not have any binding force.

15 Are there any special merger control rules applicable to public takeover bids?

The Competition Law does not include any special merger control rules applicable to public takeover bids. However, Directive 2004/25/EC on takeover bids has been implemented in Latvia, but no relevant amendments were introduced into the Latvian Competition Law. Formally, in the case of a public takeover bid being completed prior to the filing of the notification, the Competition Council is entitled to pronounce the transaction unlawful and impose a fine. In practice, however, the Competition Council has interpreted the merger control rules so that there is a de facto exemption from the obligation to file before the closing where the acquirer is objectively only capable of preparing the notification after the acquisition of the shares. For example, such approach was adopted by the Competition Council in respect of auctions.

16 What is the level of detail required in the preparation of a filing?

Merger participants that have met the criteria set forth in article 15(2) of the Competition Law also have the right to file a short-form notification if:

- none of merger participants are operating in one specific market or a downstream market related to it; or
- the total shareholding of merger participants in that specific market does not exceed 15 per cent.

Cabinet of Ministers Regulation No. 800 regulates the contents of both forms of notification. A short-form notification has a lower requirement for detailed information compared with a full-form notification especially as regards market analysis and financial details. Full-form notification requires a more detailed analysis on the markets that might be affected by the merger of market participants, information on legal and financial aspects of the merger, analysis of supply and demand structures and other detailed information regarding the transaction. The level of detail required

for the notification is not too high or burdensome, but the submission of detailed notifications with, where available, market studies or surveys, substantially reduces the time required for the authority to reach a final decision.

It is necessary to bear in mind that even if filing of a short-form notification is permitted, the Competition Council reserves the right to commence an in-depth investigation and then a full-form notification will be required.

17 What is the statutory timetable for clearance? Can it be speeded up?

The Latvian merger control rules provide for a two-stage examination procedure for notified concentrations. As of 16 April 2008 the Competition Law provides for two types of notifications to be submitted: full notification and short notification.

Short notification shall be submitted to the Competition Council, where either of the following criteria is met:

- the merger participants are not active on the same relevant market or any relevant market, which is vertically related thereto; or
- the combined market share of all merger participants does not exceed 15 per cent in any relevant market.

Upon the receipt of the full or short notification, the Competition Council must, within one month, decide whether to: give an unconditional approval of the concentration; approve the concentration subject to certain commitments to be fulfilled by the parties concerned, in order to avoid the creation or strengthening of a dominant position; or proceed with a second-phase investigation (which may last up to three months).

The concentration is deemed to be approved if within 45 days as of the submission of the notification the concentration participants do not receive the decision of the Competition Council on either approval of the concentration subject to conditions or the prohibition of the concentration or the decision to proceed with a second-phase investigation.

The second phase may last up to three months. The concentration in question is deemed to be approved if the second-phase investigation is initiated but within four months as of the submission of the full notification the concentration participants do not receive the decision of the Competition Council on either approval of the concentration subject to conditions or the prohibition of the concentration. It is advisable to suspend the transaction prior to clearance. See question 12.

During 2014 the Competition Council adopted 15 decisions regarding clearance of mergers, of which five were subject to second-phase investigations. In cases where a second-phase investigation was not initiated, the average time period for the adoption of the decision was 23 days, however, in case of initiation of the second-phase investigation, the average period extended to 97 days.

18 What are the typical steps and different phases of the investigation?

Latvian merger control rules provide for a two-stage examination procedure for notified concentrations. Most of the decisions are passed within the first phase. The Competition Law prescribes that the second phase is required for mergers that raise serious competition law concerns. Thus, the second phase, if commenced, is an in-depth investigation for those transactions that may potentially result or are likely to result in a substantial lessening of competition or creating or strengthening of a dominant position in a relevant market (ie, have either coordinated or unilateral negative effects).

At the same time a second phase is sometimes required owing to inability of the Competition Council to gather all the relevant information and opinions from the clients and competitors. The Competition Council regularly imposes fines for non-submission of the requested information. Thus some mergers are delayed only because of the lack of relevant market information from competitors and clients.

Substantive assessment

19 What is the substantive test for clearance?

The substantive test that must be satisfied is that the merger will not result or be likely to result in a substantial lessening of competition or creating or strengthening of a dominant position in a relevant market. The Competition Council will also consider the potential benefits to consumers.

There have been certain situations when a more lenient assessment has been applied, however, the official decision of the Competition Council has not reflected this assessment. For example, in the merger of two banking sector participants, AS Parex banka and VAS Latvijas Hipoteku un zemes banka, the failing firm defence was used, as owing partially to the economic crisis AS Parex banka would have faced inevitable bankruptcy had the merger not been cleared (see question 22). The formal clearance decision did not, however, rely on the failing firm defence argument as such. Instead, a rather lenient definition of possible negative effects on competition was adopted in this particular case.

20 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures.

21 What are the 'theories of harm' that the authorities will investigate?

The Competition Council will assess the prospective merger from the point of view of whether or not it is likely to result in a substantial lessening of competition, or creation or strengthening of a dominant position in a relevant market by taking into consideration the practice of the European Commission regarding to its decisions on 'theories of harm' such as non-coordinated and coordinated effects, market dominance and vertical foreclosure. The Competition Council generally follows the methods of analyses used by the European Commission. Deviations therefrom are, however, used and there is no consistent and foreseeable practice regarding the conditions of such deviations from the EU merger control principles.

22 To what extent are non-competition issues relevant in the review process?

In addition to purely economic factors, the Competition Council takes into account the potential social or economic gain for the consumers and the society in general. These arguments are widely used, but the Competition Council tends to strictly review any social or economic gains argument, and in the case of a potentially harmful merger they only play a limited role.

The economic crisis has substantially affected most industries in Latvia and an important proportion of the notified transactions were filed using the failing firm defence. The defence was not on the whole accepted by the Competition Council, including some obvious cases. In contrast, a merger between a failing bank (AS Parex banka) and a state-owned bank (VAS Latvijas Hipoteku un zemes banka) was cleared, notwithstanding the fact that VAS Latvijas Hipoteku un zemes banka was not necessarily the only possible entity to which the state could have transferred the shares of AS Parex banka.

23 To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiency arguments are widely used by merger participants and are normally carefully examined by the Competition Council. Economic efficiency is normally not, however, sufficient in itself to justify the unconditional approval of a merger, which leads to a concentration of substantial market power. The Competition Council tends to accept such arguments only when the merging market participants create a significant countervailing market power to a dominant or near-dominant undertaking.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

In respect of the concentrations that raise competition concerns, the Competition Council can approve the concentration subject to the imposition of conditions on the merger participants. The conditions should eliminate the negative consequences of the concentration to competition. In cases where no conditions are sufficient to remedy the potential negative effect on competition, the Competition Council may refuse to grant approval for the concentration.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Commitments imposed by the Competition Council may be both structural and behavioural (eg, selling a part of the assets or shares, cancelling

Update and trends

One of the landmark merger decisions in 2014, similarly to in 2013, was related to the merger between AS Sentor Farm aptiekas and SIA Farma Balt aptiekas. Previously, in 2013, the Competition Council approved the merger, imposing structural changes and binding provisions upon the buyer. In 2013, the Competition Council ordered AS Sentor Farm aptiekas to dispose one of its assets with a certain period of time; however, as AS Sentor Farm aptiekas was not able to comply with this provision in time, they asked for an extension to the period for the divesture of the said pharmacy. The Competition Council extended the period for disposal in late 2013, providing for additional period of six months. After the six-month extended period, again the AS Sentor Farm aptiekas was not able to fulfil the binding provisions and asked for additional extension, which the Competition Council refused to apply.

Another noteworthy merger case in 2014 was the merger of Orkla ASA group companies and the NP Food concern, where the Orkla ASA obtained decisive control over AS Gutta (second-largest manufacturer of soft beverages and natural juices in Latvia); AS Staburadze (the leading manufacturer of quality pastries and fresh food in Latvia); AS Laima (the largest manufacturer of sweets in the Baltic with export to more than 25 countries) and other companies.

During the past financial year no court judgments have been delivered and no changes to the legislation have been made; however, amendments to the Competition Law have been drafted and are expected to be adopted by Parliament during 2015. The relevant amendments provide for changes to the jurisdictional threshold for merger notification, excluding the 40 per cent market share criterion and reducing the annual turnover criterion (from €35,572 million to €30 million). Additionally, the proposed amendments provide for an introduction of notification duty and several procedural amendments to the process of notification and the scope of short-form notification, extending the scope to a wider perspective.

an agreement). The parties may put forward their proposal regarding the commitments. However, such procedure is not explicitly regulated in the Latvian legislation.

The Competition Council has so far used a wide range of commitments, including the obligation not to divest or continue the usage of a certain brand, the obligation to inform the customers of the target company about the merger, the obligation to divest a related entity or assets, obligation to refrain from geographic market-specific marketing activities, etc. A more peculiar example was the recent case of the acquisition of control (through a long-term rent agreement) over retail premises by one of the Latvia's largest supermarkets. In that case the Competition Council allowed the merger for a limited period of time – three years only, but with the right to re-notify the transaction upon expiry of the said time period.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are no provisions in the Competition Law applicable to either conditions or timing of divestments or other remedies. The practice of the Competition Council varies from case to case, but where divestment is concerned, the Competition Council may be willing to determine the term for compliance with the obligation up to the maximum of 18 months.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

All foreign-to-foreign mergers that have been notified to the Competition Council have been closed without binding provisions for the participants.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There are no explicit legal rules stating the exact circumstances when the clearance decision should cover the related arrangements. The Competition Council does, however, follow the approach of the European Commission in that respect and will impose remedies where the proposed transaction is not in compliance with the principles, set out in the European Commission Notice No. 2005/C56/03 on restrictions directly related and necessary to concentrations.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Competition Council generally requests opinions on the proposed merger from competitors, clients and, where relevant, suppliers of the merger participants. Information about the notified mergers is also published on the website of the Competition Council alongside an invitation for any interested party to submit its observations. The Competition Council may also question professional organisations, associations, experts or consultants to define the relevant markets, analyse the structure of the market and the possible effects of the merger on the relevant markets.

Although there is no regulation providing for appeal of the decision of the Competition Council by a third party, at least a theoretical possibility to appeal, based on fundamental principles of EU law, exists. It is only where the notifiable merger was not notified that third parties are entitled to submit complaints to the Competition Council. Upon receipt of the complaint the Competition Council should render a decision on the initiation of violation procedures. The decision to initiate proceedings can be appealed by all case participants, including the complainant.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

An announcement on the receipt of the merger notification, along with the invitation to submit observations, must be published on the official website of the Competition Council (www.kp.gov.lv) within three working days as of the receipt of the notification.

The full decision will be published as an official publication on the official Latvian website, www.vestnesis.lv, within 10 days of a making of a decision.

Confidential information, including business secrets, must be identified in every submission to the Competition Council. The request to grant the status of protected information must be substantiated and it is normally granted for a period of one year with the right of the merger participants to request an extension to the protection time period.

The officially published decision will not include any commercially sensitive information. The merger participants will also receive the decision, excluding the commercially sensitive information, as may be provided by other market participants, including any information on prices, market shares and similar data.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Competition Council actively participates in the work of the European Competition Network as well as the International Competition Network. There are special links between the competition authorities of the Baltic states and they regularly meet to discuss current competition policy priorities. Owing to the fact that in many aspects the competitive conditions in the three Baltic states are similar or, at least, comparable, as well as taking into account that many market participants view all three Baltic states as one geographic market, the three Baltic states' authorities cooperate on an almost daily basis and are actively exchanging information in ongoing investigations.

Judicial review

32 What are the opportunities for appeal or judicial review?

The Competition Law provides that all decisions of the Competition Council, except for the decision to initiate administrative proceedings and the decision to extend the term for investigation of the case, can be appealed to the Administrative Regional Court, which is the first instance court. The filing of a cassation complaint in the Supreme Court's Department of Administrative Cases is the last resort of appeals after the decision of the Administrative Regional Court.

The Administrative Regional Court decides on the merits of the case basing its decision on the Administrative Procedure Law. A regional court

can exercise control over the legality or efficiency of the administrative act (decision) issued by the Competition Council and it can also evaluate the actual action of the Competition Council in terms of its discretion to act.

33 What is the usual time frame for appeal or judicial review?

The usual time varies on the complexity of the case. In some cases the waiting period for judgment (after the completion of the court hearing and debates) may be from three up to nine months, but less complex competition cases are heard within approximately two years. In more complex cases the judicial review may last up to five years.

Enforcement practice and future developments

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The total number of merger cases is not particularly high, with a total of 14 merger-related decisions during 2014, 30 per cent less than in the previous year. At the same time, the recent focus of the Competition Council is the identification of the merger transactions not notified or not properly notified. Out of all of the cases reviewed during last year, only one was a foreign-to-foreign merger matter, which was approved with no binding provisions, and in only one case the Competition Council applied binding provisions for the merger to be cleared. The Competition Council approved all of the mergers notified in 2014.

However, one decision of the Competition Council concerned an unsuccessful request to prolong the merger clearance for a further period. In 2013, AS Sentor Farm aptiekas submitted a notification on its merger with SIA Farma Balt aptiekas and the approval was granted, conditional upon sales by AS Sentor Farm aptiekas of one of its pharmacies – Sentor aptieka 1. The pharmacy was to be sold within six months as of the date of the decision, when the parties had to reapply for the new approval of the said merger. However, the obligation to divest was not complied with by the acquirer. The unresponsiveness and lack of active conduct towards compliance with the binding provisions led to the refusal by the Competition Council to prolong the term of validity of the merger clearance. The parties have appealed against the initial decision and were requesting the authority to postpone the obligation to divest Sentor aptieka 1 until the dispute is resolved in the administrative courts.

The Competition Council has not yet revealed any potential shift of focus from the particular industries that were mentioned in the 2013 annual report and its current enforcement concerns are still in the following industries: retail, pharmacy, airlines, post services and waste management.

35 Are there current proposals to change the legislation?

Amendments to the Competition Law have been drafted and are currently under discussion. The draft amendments will have a particularly great influence on issues such as recovery of damages caused by a breach of competition law, recovery of imposed fines and the priority setting process. One of the most awaited changes is the introduction of oral hearings, which are currently not formally available and case participants are not entitled to properly exercise their right to be heard before the adoption of the final decision by the authority. As these amendments still have to be adopted in the Latvian parliament and also need to undergo an examination in the Cabinet of Ministers, when they will come into effect cannot be accurately predicted.

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