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REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Latvia

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Remedies and Commitments in Abuse Cases

- Contribution from Latvia -

1. Introduction

1. In this paper, the Competition Council of Latvia (henceforward – CC) shares their experience and lessons regarding the application of remedies in the abuse of dominant position decisions. We are giving a general overview offering the most interesting and the newest examples of the cases investigated. The first section gives a general overview of the reasoning behind application of each relevant corrective measure. The second section delves deeper into application of structural and behavioural remedies. The third part of this paper describes the issues around implementation and ex-post evaluation of the imposed remedies and accepted commitments, and finally, the fourth part gives a brief overview of the interaction between competition law and regulatory authorities in abuse of power cases.

2. Choosing the type of remedy

2. Abuse of dominance cases can be resolved in many ways, and although there are no formal rules governing CC's considerations when deciding on a specific path of action, there is a general approach that the CC follows in practice. Usually, aside from the prohibition decision, the CC can apply a commitment or a settlement to correct the abuse of dominant positions. All of them can result in imposition of remedies. Typically, a fine is added in addition to the settlement or prohibition decision. When deciding whether to apply remedies in a settlement procedure or accept them as commitments in abuse of dominant position cases, the CC is free to choose the appropriate measure as long as it is following efficiency considerations and the overall goal, that is, to prevent the violation of the competition law. An obligatory precondition for the application of the corrective measure is that the CC should clearly define the infringement, only then it can consider the imposition of the legal obligation. If the undertaking proposes an effective commitment, then the CC will most likely accept the commitment provided that it efficiently remedies the violation. In all cases, the investigation is already initiated, however, the CC expects the commitment to be proposed before the undertaking receives a notification that the information required for the issuance of the executive order has been obtained. In certain cases, the CC might also accept the commitment after the notification, however it must be in a period before the final prohibition decision is made. Alternatively, after the Notification is sent, the CC and the undertaking may agree on a settlement procedure. There is no strict deadline, therefore the parties can settle either before or after the final decision is made. In case there is no dialogue between both parties, the CC will proceed with a prohibition decision and impose a remedy with a fine.

3. There is only one occasion in abuse of dominant position case, when the violation of the competition law is resolved in the preliminary stage because of an accepted *commitment*.¹ Generally, the undertakings decide to propose a commitment rarely; the

¹ KP 29.07.2021. Lieta Nr. 3114/09/05/1Par Konkurences likuma 13. panta pirmās daļas 4. punkta pārkāpumu AS "Latvenergo" darbībā, Available at: https://lemumi.kp.gov.lv/files/documents/20210729_Lemums_Latvenergo_tiesiskie.pdf

communication with the CC often begins only after the undertaking has received the SO letter, where the abuse of dominant position is already clearly identified, however then the parties opt for a settlement procedure. In case when the undertaking makes an offer for a commitment procedure, the CC strictly evaluates its effectiveness; there have been cases when the offered commitment has not been accepted because the proposed action only corrected the violation of abuse of dominant position partly. This occurred in case of Rīgas Siltums,² where the remedy was to cease the practice of demanding the repayment from house-managers and other apartment owners of the debts that are considered irrecoverable in the event of a person's death or insolvency. Despite the change in the company's practice, the CC concluded that the debt was not repaid consistently, thus the exploitative practice was continued despite the undertaking's commitment. In this case the CC did not accept the commitment, and together with the Rīgas Siltums opted for a settlement procedure. Another important element, that the CC considers during the evaluation of the commitment is how willing the undertaking is to cooperate with the authorities, for instance, in exchange for information or the correspondence with the CC. It also assesses the nature of the act itself, including the severity and duration of the abusive act. The Council, consisting of five members as of July 2022, is the only decisionmaker who has the sole right to decide whether the commitment will be accepted or not.³ In a situation when a commitment is not accepted by the CC, there is still an option for a mutual agreement but in a form of a settlement.

4. A *settlement* takes place after the investigations has already started, it may happen when the CC and the undertaking mutually agree for a settlement, which usually also includes a remedy and a fine. The undertaking must recognize their unlawful behaviour and mutually agree on the appropriate remedy.

5. When resorting to settlement, the CC follows efficiency considerations. It is important to take into context the lengthiness and financial cost of a potential lawsuit, and therefore, once the undertaking is ready to cooperate, the CC will be willing to make a settlement, which is also known as administrative agreement. According to Administrative Process Law art. 66 (1) the administrative act should demonstrate its necessity, suitability, and whether it is possible to attain such goal by means which are less restrictive. This principle is applied to all the corrective measures, they should be the least restrictive and the most efficient. The CC also often aims for the shortest legal procedure, although in some cases it is very challenging. The *remedy* is applied only as the last resort.

6. There is a possibility to appeal against some but not all corrective measures that the CC decided on. According to Article 8 (2) of Latvian Competition Law, the company that is involved in the decision can lodge an appeal against the CC's decision, except for the decisions on initiation of the proceedings and extension of the time limit for adoption of the decision. They can appeal before the Administrative Regional Court within one month from the date of entry into force of these decisions, the judgment of the Administrative Regional Court may be appealed before the Supreme Court.⁴ While it is possible to appeal the decision, the remedy stays in force regardless.⁵ The other types of measures, such as, a

² KP 27.10.2022. Administratīvais līgums Nr. AL-2.1-4/1 (Rīgas Siltums) Available at: https://lemumi.kp.gov.lv/files/documents/20220203_KP_RS_AL.pdf

³ The Latvian Parliament decided to add two more members to the existing three by 1st of July, 2022.

⁴ Konkurences Likums, Article 8.

⁵ KP 30.09.2016. Lieta Nr.p/14/03.01./3 Par Konkurences likuma 13.panta pirmajā daļā noteiktā aizlieguma pārkāpumu SIA „Knauf” un SIA „Norgips” darbībās

settlement cannot be appealed, unless the dispute is about the exact procedure that the settlement took place. A settlement bundled with a remedy is also the most commonly used measure in abuse of dominance cases, while a commitment bundled with a remedy is rarest from all the corrective measure options.

3. Choosing between structural and behavioural remedies

7. When assessing the choice between structural and behavioural remedies in abuse of dominant position cases, it is important to keep in mind that this differentiation is usually used in context of mergers. In the abuse of dominance decisions, the violation is a certain *behaviour*, and the goal of the remedy is to prevent this behaviour, therefore in majority of cases, the applicable remedy is behavioural. A few examples, where the CC has applied behavioural remedies are in cases of the refusal to conclude a supply contract,⁶ unfair conditions for the service recipients to pay off the debts of the previous users,⁷ refusal to conclude an agreement for a certain service, where the company is also one of the service providers,⁸ unfair conditions to the partners,⁹ etc. See Table 1 below for more examples.

8. The only case when the CC resorted to the imposition of structural remedy was, when the undertaking did not respect the imposed remedy, and, as a result, the CC reopened the investigation on abuse of power. The investigation was on the activities of Freeport of Riga Authority (Rīgas Brīvostas Pārvalde), which was in charge of both - public and private services, related to Riga port activities. Because of its dominant position, it was able to choose the providers of tugboat services within the port. While also being one of the service providers, it unlawfully restricted their competitors' access to the port. Although the CC in its 2009 decision concluded that the Freeport of Riga Authority must stop restricting access of the other tugboat services providers, it did not comply with the remedy, resulting in the follow-up investigation.¹⁰ The second investigation was closed after a settlement between both parties in 2011 with an imposition of a structural remedy. The CC decided that the Freeport of Riga Authority must entirely suspend their commercial activity in tugboat services and halt their commercial activity completely to allow private companies to participate within this sector. It was, however, allowed to continue to carry

⁶ KP 01.10.2013 Lieta Nr.2923/11/03.02./20 Par Konkurences likuma 13.panta pirmajā daļā noteiktā aizlieguma pārkāpumu AS „Latvijas Gāze” darbībā Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/BXDT6x2tyV.pdf

⁷ KP 27.10.2022. Administratīvais līgums Nr. AL-2.1-4/1 (Rīgas Siltums) Available at: https://lemumi.kp.gov.lv/files/documents/20220203_KP_RS_AL.pdf

⁸ KP 30.11.2022. Lieta Nr.2336/10/03.02/12 Par Konkurences likuma 13.panta pirmās daļas 1.punktā noteiktā aizlieguma pārkāpumu SIA „Eko Osta” darbībā Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/2BrPvi8FHe.pdf

⁹ KP 21.03.2021. Administratīvais līgums Nr.AL-4-4/1 (ZAAO) Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/Rcvi01xYIX.pdf

¹⁰ KP 24.03.2009. Lieta Nr.2249/08/05/25 Par Konkurences likuma 13.panta pirmās daļas ģenerālklausulas un 13.panta pirmās daļas 1.punktā noteikto aizliegumu pārkāpumu Rīgas brīvostas pārvaldes darbībā Available at: https://www.kp.gov.lv/sites/kp/files/kp_old/local/lemumu_pielikumi/Zmv7UKUoOG.pdf; KP 29.04.2010. Par pārkāpuma konstatēšanu un naudas soda uzlikšanu Lieta Nr. p/09/05/12 Available at: https://www.kp.gov.lv/sites/kp/files/kp_old/local/lemumu_pielikumi/PF16w76Ozy.pdf; KP 29.04.2011. Par pārkāpuma konstatēšanu un naudas soda uzlikšanu Lieta Nr.1613/10/0302/10 Available at: https://www.kp.gov.lv/sites/kp/files/kp_old/local/lemumu_pielikumi/y4nulhzcHa.pdf

out the public functions entrusted to it, that is, winter navigation, rescue, firefighting, and pollution prevention.

9. Considering the above, it can be concluded, that, generally, the CC resorts to behavioural remedies, the only exception being a case, when the undertaking is not complying with the behavioural remedies, and therefore, a structural remedy was introduced. Another interesting take away is, that most abuse of dominant position cases are carried out by the companies, who are active not only in private commercial activities but also have public functions. Regardless, the choice of a divestiture is still left as the last resort and the CC prefers behavioural remedy to be applied first.

Table 1. An Overview of the types of remedies applied in latest abuse of dominant position cases

Case	Sector	Description of the remedy	Remedy/ Commitment/ Settlement
Rīgas Siltums ¹¹ (2022)	Central heating Waste management	<ul style="list-style-type: none"> To write off uncollectible debts. Inform the residential building managers for whose buildings Rīgas Siltums supplies heating energy. 	Behavioural remedy in a Settlement
Latvijas Gāze ¹² (2013)	Distribution of gaseous fuels through mains	<ul style="list-style-type: none"> Stop the discriminatory (unfair) rules by refusing to conclude a supply contract for new users before they have paid the debts of previous users 	Behavioural Remedy
KNAUF/NORGIPS ¹³ (2016)	Manufacture of construction products	<ul style="list-style-type: none"> To end the infringement; To stop practicing in future loyalty enhancing discounts that grow with the volume 	Behavioural Remedy
EKO OSTA ¹⁴ (2012)	Collection of hazardous waste	<ul style="list-style-type: none"> To conclude an agreement with the previously inadequately rejected company on terms no less favourable than those applied to other market participants (including itself) for the same or similar services 	Behavioural Remedy
Geltīņi EKO (Tīrīga) ¹⁵ (2019) (2021)	Waste management	<ul style="list-style-type: none"> To immediately suspend the Concession Contract (that excluded other competitors) with the municipality insofar as it affects the market for the collection and transport of unsorted and separated municipal waste. To impose an obligation to both parties to refrain from activities in the relevant market which have the effect of comparable to the alleged infringement of Article 102 TFEU found in the Decision. Riga City Municipality shall be obliged to immediately inform waste producers in its administrative territory who had valid contracts prior to the conclusion of the Concession Contract that its no longer valid. 	Interim measure: Behavioural remedy (2019)
		<ul style="list-style-type: none"> To refrain from and not to carry out any of the acts identified in the CC Notice or acts having equivalent effects to the infringement assessed in the CC Notice. 	Behavioural remedy in a Settlement (2021)
ZAAO ¹⁶ (2018)	Waste management	<ul style="list-style-type: none"> No longer require its partners to enter into contracts for the use of <i>all</i> sorted waste collection sites but be able to choose how many sites they want to choose; publish on its website a regular information. To develop a pricing methodology for the use of the sorted waste collection sites, which includes only the costs attributable to the service concerned. Do not charge differently for a sorted waste collection site use. To refrain from actions having similar effects to those investigated in Case No KP/5-5/16/19 identified by the CP and specified in this Agreement. 	Behavioural remedy in a Settlement

¹¹ KP 27.10.2022. Administratīvais līgums Nr. AL-2.1-4/1 (Rīgas Siltums) Available at: https://lemumi.kp.gov.lv/files/documents/20220203_KP_RS_AL.pdf

Rīgas brīvostas pārvalde ¹⁷ (2009) (2011)	Sea and coastal freight water transport	<ul style="list-style-type: none"> To immediately allow the provide tug services in the Freeport of Riga to all the interested undertakings. Set out the requirements for the tugs to provide services in the Freeport of Riga. <ul style="list-style-type: none"> Prohibited to impose additional conditions which are not essentially related to the commencement of the operation of a tugboat in the Freeport of Riga. 	Behavioural remedy (2009)
		<ul style="list-style-type: none"> RBP will discontinue and no longer provide tugboat services. RBP only refuses commercial activities that can be fully provided by private companies. As before, the port will not be prevented from using its own tugs to carry out the public 	Structural remedy in a Settlement (2011)
Rēzeknes autoosta ¹⁸ (2016)	Public transportation	<ul style="list-style-type: none"> To further assess the reasonableness of costs and to refrain from including unjustified and excessive costs when calculating the bus station entrance fee for operators. 	Behavioural remedy

¹² KP 01.10.2013 Lieta Nr.2923/11/03.02./20 Par Konkurences likuma 13.panta pirmajā daļā noteiktā aizlieguma pārkāpumu AS „Latvijas Gāze” darbībās Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/BXDT6x2tyV.pdf

¹³ KP 30.09.2016. Lieta Nr.p/14/03.01./3

Par Konkurences likuma 13.panta pirmajā daļā noteiktā aizlieguma pārkāpumu SIA

„Knauf” un SIA „Norgips” darbībās Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/1au0n5dpGD.pdf

¹⁴ KP 30.11.2022. Lieta Nr.2336/10/03.02/12 Par Konkurences likuma 13.panta pirmās daļas 1.punktā noteiktā aizlieguma pārkāpumu SIA „Eko Osta” darbībās Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/2BrPvi8FHe.pdf

¹⁵ KP Administratīvais līgums Nr. AL2.1-4/1 Available at: https://lemumi.kp.gov.lv/files/documents/20211607_AL_KP_RPP_Getli%C5%86i.pdf; KP 09.09.2019. Lieta Nr. KL\2.2-5\19\14 Par Līguma par Eiropas Savienības darbību 102. pantā noteiktā aizlieguma pārkāpumu SIA “Getliņi EKO” un Rīgas pilsētas pašvaldības darbībās Available at: https://lemumi.kp.gov.lv/files/documents/20190909_KP_Interim%20measures.pdf

¹⁶ KP 21.03.2021. Administratīvais līgums Nr.AL-4-4/1 (ZAAO) Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/Rcvi01xYIX.pdf

¹⁷ KP 24.03.2009. Lieta Nr.2249/08/05/25 Par Konkurences likuma 13.panta pirmās daļas ģenerālklausulas un 13.panta pirmās daļas 1.punktā noteikto aizliegumu pārkāpumu Rīgas brīvostas pārvaldes darbībās Available at: https://www.kp.gov.lv/sites/kp/files/kp_old/local/lemumu_pielikumi/Zmv7UKUoOG.pdf; KP 29.04.2010. Par pārkāpuma konstatēšanu un naudas soda uzlikšanu Lieta Nr. p/09/05/12 Available at: https://www.kp.gov.lv/sites/kp/files/kp_old/local/lemumu_pielikumi/PFI6w76Ozy.pdf; KP 29.04.2011. Par pārkāpuma konstatēšanu un naudas soda uzlikšanu Lieta Nr.1613/10/0302/10 Available at: https://www.kp.gov.lv/sites/kp/files/kp_old/local/lemumu_pielikumi/y4nullhzcHa.pdf

¹⁸ KP 25.05.2016. Lieta Nr.596/14/03.02./6 Par Konkurences likuma 13.panta pirmajā daļā noteikto aizliegumu pārkāpumu SIA „Rēzeknes autoosta” darbībās Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/WBafJoy5A2.pdf

4. Compliance with remedies, ex-post evaluation

10. The CC emphasizes that, the compliance and implementation of the remedy greatly. It depends on the factors, such as, the duration of the remedy, as well as the exact wording of it. For instance, if the remedy has a deadline, the CC will follow closely if the undertaking complies with it within the time limits. An example can be found in the RBP decision, where the undertaking was obliged “*to suspend the operation of tug services for shipping companies and/or their representatives in the Freeport of Riga by 31 December 2015*”¹⁹ In such cases, the CC would request the party to update whether the requirement is fulfilled by the date and to support it with the necessary background information. In case there is no end-date, and the measure is indefinite, the CC periodically evaluates, if the remedy is still applied, if it has the available resources. If there is a complaint from a competitor, consumer or any other party, the CC evaluates the compliance with remedies immediately.

11. Another variable that impacts the assessment of the compliance and ex-post evaluation is the formulation of the remedy, the more detailed the remedy is, the easier it is to clearly evaluate its implementation. In its practice, the CC has defined very precise and easily assessable remedies, for instance, “*to immediately allow the provide tug services in the Freeport of Riga to all the interested undertakings*”,²⁰ “*to discontinue and no longer provide tugboat services*”²¹, “*to not charge differently for a sorted waste collection site use*”,²² “*to stop the discriminatory (unfair) rules*”,²³ and “*to conclude an agreement with the previously inadequately rejected company*”.²⁴ However, there are equally the decisions, where the appropriate remedy that the CC imposes is rather vague, for instance, “*the prohibition of acts having equivalent effects to the infringement assessed in the CC Notice*”²⁵, or the remedy “*to further assess the reasonableness of costs and to refrain from including unjustified and excessive costs*”.²⁶ The evaluation of these types of remedies takes a considerably longer time as it requires more profound analysis.

12. Overall, the companies tend to comply with the remedies. In case of a failure to comply with a legal obligation, the CC may carry out forced execution of the legal obligation by imposing pecuniary penalty. The addressee shall get a written warning on

¹⁹ KP 10.06.2015. Administratīvais līgums Nr.2-AL Par tiesiskā strīda izbeigšanu administratīvajā lietā Nr.889/13/03.02./7, (Rīgas Brīvdostas Pārvalde), p.2. Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/G04G0eAGDO.pdf

²⁰ Ibid.

²¹ Ibid.

²² KP 21.03.2021. Administratīvais līgums Nr.AL-4-4/1 (ZAAO) Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/Rcvi01xYIX.pdf

²³ KP 01.10.2013 Lieta Nr.2923/11/03.02./20 Par Konkurences likuma 13.panta pirmajā daļā noteiktā aizlieguma pārkāpumu AS „Latvijas Gāze” darbībā Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/BXDT6x2tyV.pdf

²⁴ KP 30.11.2022. Lieta Nr.2336/10/03.02./12 Par Konkurences likuma 13.panta pirmās daļas 1.punktā noteiktā aizlieguma pārkāpumu SIA „Eko Osta” darbībā Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/2BrPvi8FHe.pdf

²⁵ Ibid.

²⁶ KP 25.05.2016. Lieta Nr.596/14/03.02./6 Par Konkurences likuma 13.panta pirmajā daļā noteikto aizliegumu pārkāpumu SIA „Rēzeknes autoosta” darbībā Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/WBafJoy5A2.pdf

forced execution of the legal obligation. The warning is not subject to appeal. The amount of pecuniary penalty shall be determined up to five percent of the average net daily turnover in the last financial year per day, but not less than 250 euros per day until the legal obligation has been fulfilled.²⁷

5. Remedies in regulated sectors

13. Many of the investigations (see Table 1) include regulated sectors, therefore there is a close cooperation between the CC and the regulatory agencies. For instance, during the investigation of a case related to public transport services,²⁸ the CC cooperated closely with the Directorate for Road Sport (Autotransporta direkcija). Both parties shared the tasks, including the information on cost analysis. However, the CC noted that in cases of collaboration, the competences and tasks of each party should be clearly defined- the CC should be the only decisionmaker on the violations of the competition law. However, there have been cases when the competences between the CC and other regulatory authorities may intertwine. This was raised as the basis for an appeal of CC's decision. Latvijas Gāze, a gas supply company, appealed the CC's decision on the ground that CC does not have the competence to regulate a sector that is already regulated by the Public Utilities Commission (Sabiedrisko pakalpojumu regulēšanas komisija). The party argued that the CC pursued identical interests that was provided by the Public Utilities Commission, and it is a publicly regulated institution.²⁹ The Court did not support such a reasoning and strengthened CC's position clearly stating that no matter if the undertaking operates within a regulated sector or not, it must adhere to Competition Law.³⁰

6. Conclusion

14. The goal of this paper was to give an overview of the CC's practice in abuse of dominant position cases. We gave a general outline of the framework on the application, imposition, and evaluation of corrective measures in cases of abuse of dominant position. This paper focused exclusively on the rules governing the choice of remedies in context of commitments, settlements, or unilateral decision by the CC.

15. Although there are no formal guidelines on the application of remedies, there is a clear general structure that the CC follows. The CC should be able to clearly define the infringement before choosing the appropriate measure. The CC strictly evaluates whether the commitments remedy the violation entirely. If the undertaking is willing to cooperate, it can participate in a settlement procedure. A settlement is usually bundled together with a remedy. There are also cases, when the undertaking is not willing to cooperate within the

²⁷ Konkurences likums, Article 8¹.

²⁸ KP 25.05.2016. Lieta Nr.596/14/03.02./6 Par Konkurences likuma 13.panta pirmajā daļā noteikto aizliegumu pārkāpumu SIA „Rēzeknes autoosta” darbībā Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/WBafJoy5A2.pdf

²⁹ KP 01.10.2013 Lieta Nr.2923/11/03.02./20 Par Konkurences likuma 13.panta pirmajā daļā noteiktā aizlieguma pārkāpumu AS „Latvijas Gāze” darbībā, p.4 Available at: https://lemumi.kp.gov.lv/files/lemumu_pielikumi/BXDT6x2tyV.pdf

³⁰ Administrative District Court, 02.09.2015. Lieta Nr.A43017613 (Latvijas Gāze) Available at: https://www.kp.gov.lv/sites/kp/files/kp_old/local/lemumu_pielikumi/2015_09_02_aa_latvijasgaze_otto.pdf

investigation process, as a result, the CC unilaterally decides on the most appropriate remedy.

16. In most cases, CC resorts to behavioural remedies, however, there have been one case, when a structural remedy was applied. The CC may use various tools for enforcement, for instance, a fine or re-investigation with an imposition of a stricter remedy. The monitoring of compliance depends on two factors, first, the wording of the remedy, and second, whether the remedy is for definitive or indefinite period. The competences between the CC and other regulatory authorities are divided very clearly, and therefore there are no obvious disagreements between the agencies.