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REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Slovenia

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More documentation related to this discussion can be found at: oe.cd/sctr.

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Remedies and Commitments in Abuse Cases

- Contribution from Slovenia –

1. In the past 10 years, the Slovenian Competition Protection Agency (CPA) used commitments to resolve several abuse cases however, we have imposed remedies in only one abuse case. Given that, the focus of this contribution will be on the commitments, since the CPA has relevant experience in the matter, and we will reference the remedies issue only regarding certain, more general issues.

2. The CPA accepted commitments in various sectors – market of outdoor advertising space,[1] technical training market for vehicles, vehicle servicing market,[2] market of supply of natural gas to industrial customers from the transmission grid,[3] market of electronic data interchange.[4] Remedies were imposed in the market for the collective management of copyright for authors of musical works.[5] Given the diversity of the sectors in which the CPA acted with these tools, we have a rather broad understanding of their mechanisms, despite issuing relatively few decisions – four commitment decisions and one remedies decision.

1. Type of decision/remedy

3. The CPA is guided by criteria enshrined in national and EU legislation – the Prevention of the Restriction of Competition Act[6] (PRCA) and in Regulation 1/2003[7] when deciding on either remedies or commitments, however, neither act contains strict criteria or rules on when to apply either. The source for criteria of application are soft law instruments of the EU and case law of the European Commission and European courts. Both will be referred in the following.

4. The general guidance is the principle of proportionality, as a general legal principle, and especially emphasised for instance in recital 12 or article 7(1) of Regulation 1/2003. The principle of proportionality requires that the measures applied should be appropriate and necessary for reaching the goal of eliminating the infringement or CPA's concern, and not any stricter.[8] Commitments should be able to achieve the goal of

[1] Case no. 306-140/2007, *Europlakat*, 23rd February 2011.

[2] Case no. 3062-26/2015, *Renault*, 30th May 2018.

[3] Case no. 306-43/2012, *Geoplin*, 10. 11. 2017.

[4] Case no. 3062-13/2015, *Panteon*, 24th December 2020.

[5] Case no. 306-35/2009, *SAZAS*, 8th April 2011.

[6] Zakon o preprečevanju omejevanja konkurence (Uradni list RS, št. 36/08, 40/09, 26/11, 87/11, 57/12, 39/13 – odl. US, 63/13 – ZS-K, 33/14, 76/15 in 23/17).

[7] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

[8] See for instance T-65/98, *Van den Bergh Foods v Commission* (2003) ECR II – 4653, para 201.

eliminating the contentious market situation, but at the same time have mildest possible effects to the parties of the procedure.[9]

5. Building on principle of proportionality as a basis and following the practice of the European Commission,[10] the factors considered when applying commitments are in particular the nature of a suspected infringement, nature of the commitments and their ability to quickly and effectively solve particular competition concerns, and the need to ensure deterrence. Commitment decisions are not appropriate in cases where the Commission considers that the very nature of the infringement calls for a fine, for instance in the cases of secret cartels and similar hard-core restrictions.

6. According to Article 39 PRCA an undertaking can propose *commitments* after the CPA issues a procedural decision on the initiation of infringement procedures[11] of Articles 6 or 9 of the PRCA or Articles 101 or Article 102 of the Treaty on the Functioning of the European Union.[12] The undertaking against which the procedure is being conducted may propose commitments not later than by the expiry of the time limit for a reply to the Statement of Objections[13].

7. On the other hand, the CPA can issue infringement decision with *remedies* at any point after initiating the procedure (procedural initiation of the procedure) however, as other infringement decisions they must be issued within two years of issuing a procedural decision on the initiation of the procedure.[14]

8. The CPA generally subjects commitments to the market test based on Article 27(4) of the Regulation 1/2003, but does not have any more specific (national) rules that would prescribe or outline the market test. Given this legislative background, the CPA follows the good practice of preforming a market test before adopting a commitment decision in form of public call on the CPA's website to interested parties to give comments to the proposed commitments. In all cases so far, there has been a noticeable response to the market test and the invited comments were considered in forming the final version of the commitments. The responses in market tests are overwhelmingly by disclosed interested parties; however the CPA does receive at least one anonymous reply at every market test.

9. As explained above, the CPA issued only one remedies decision so far, so the practice regarding the market test as well as other practical aspects of imposing such decision is not yet established. However, given the coercive nature of remedies as opposed the consensual nature of the commitments, it is unlikely that the CPA would perform a market test, as a rule. The CPA would however disclose the intended remedies to the parties and require their feedback.

10. A commitment decision is by its nature an administrative decision pursuant to provisions of General Administrative Procedure Act[15] and is formally and procedurally identical to an infringement decision, also guided by the same procedural rules and no

[9] Case 265/87, *Schräder* (1989) ECR 2237, para 21; case C-174/05, *Zuid-Hollandse Milieufederatie and Natur en Milieu* (2006) ECR I – 2243, para 28.

[10] See: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_189.

[11] Order on the initiation of a procedure, Article 24 PRCA.

[12] Restrictive agreements and abuse of a dominant position respectively.

[13] Summary of the relevant facts, Article 36 PRCA.

[14] While this is a statutory deadline, there are no legal consequences for exceeding the deadline and issuing the decision after two years.

[15] Zakon o splošnem upravnem postopku (Uradni list RS, št. 24/06 – uradno prečiščeno besedilo, 105/06 – ZUS-1, 126/07, 65/08, 8/10, 82/13, 175/20 – ZIUOPDVE in 3/22 – ZDeb)

particular guidelines. The General Administrative Procedure Act states in Article 229 that a party shall have a right of appeal against the decision issued at the first instance, PRCA as lex specialis states in Article 15(4) that there is no appeal against the decisions of the CPA. However, PRCA in Article 54 offers (direct) judicial protection against the decisions adopted by the CPA. The parties thus have direct path to judicial protection, without having to appeal to the second (administrative) instance, which in turn means that the CPA's decisions are directly subject to judicial review. This applies to all decisions ending the proceedings, including commitment decisions. However, it seems unlikely that the parties would appeal the commitment decision, since they are the ones proposing commitments in the first place. In this regard, it is questionable if they would be even capable of proving the legal interest in such appeal. Perhaps, if in a specific case there would be an intervening party, they would be able to appeal the commitment decision and show sufficient legal interest.

11. Despite this possibility, commitments have not yet been subject to a judicial review in the CPA's practice. The one remedies decision however has been appealed to the court and the decision was confirmed.

12. The number of commitment decisions in abuse cases has increased in past five years, compared to for instance previous five or so. Since 2017 there has been three (in 2017, 2018 and 2020), in previous five or so year period there has been only one commitment decision in 2011. There has only been one remedies decision, in 2011.

2. Structural and behavioural remedies and commitments

13. The CPA issued only behavioural commitment decisions so far. There are no legal constraints as to which type of measures should be applied; however guiding principle is the principle of proportionality while considering circumstances of each case and the specifics of individual decision.

14. Structural remedies (for instance restructuring or sales of assets) present a grave intervention into the rights of the undertaking, as well as shareholders, be it legal or natural persons. The severity of different types of measures is reflected in recital 12 of the Regulation 1/2003 that points out that 'structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.' That is why the CPA has been extremely reserved in imposing structural measures and has in cases so far not yet found such measures to be proportionate to the suspected infringements in which commitments were adopted.

15. When applying commitment decisions, the CPA considers all circumstances of a particular market sector, including their stages of development. For instance, the CPA's case *Panteon* concerned the electronic data interchange (EDI) services market. This market sector is relatively new, since it relates to IT hardware and software. Undertaking Panteon, the suspected infringer, was suspected of refusal to supply and/or applying impermissible conditions for providing the service of transferring technical information necessary to setup inter-network connection. In the context of this market, the commitments for instance included an obligation of Panteon to non-discriminatory treatment of all the potential clients (by sending same questioners), but also an obligation to include in their electronic data interchange agreements third parties – network maintenance and management persons.

16. On the other hand, in the case *Geoplin*, the undertaking concerned was a wholesaler of gas and hard fuel products, i.e. a very traditional and well-developed market. They were suspected of using contractual provisions with their industrial clients that could potentially

be anticompetitive and foreclose the competitors out of the market, such as long term contracts (3, 5, or 10 years), and take-or-pay clauses. In their commitments, undertaking Geoplin committed for instance that they would not include contractual provisions that would limit their customers with further handling of the gas and for instance, that they will not conclude contracts, longer than 36 months.

17. The cases *Panteon* and *Geoplin* reflect the difference in approach between more traditional industries (natural gas) and newer industries (IT, data exchange). It is clear that the different nature of the markets in question leads to very different commitments, content wise. On one hand, the more service-oriented commitments in the wider IT sector and on the other hand a very concrete commitments regarding for instance the maximum duration of the contract in the natural gas sector. These differences are a natural consequence of differing types of industries of the two cases.

18. Aim of the commitments is a quick and effective resolution of potential or suspected abuse of dominance that is in the interest of all parties of the procedure. In our view, a competition authority should consider the possibility of commitments throughout the procedure, if the circumstances of a particular case indicate that they could bring potential infringement to stop quickly and would be more effective than a monetary fine. Considering commitments would depend also on the behaviour of a potential infringer – their cooperation throughout the procedure and other signals that might indicate their willingness to adopt commitments. If the undertaking is willing to propose the commitments at the very beginning of the procedure, they should be considered, since this would substantially relieve the CPA's workload.

19. At the very least, the possibility of commitments should be entertained at the end of the evidence-gathering phase of the procedure, when all avenues for gathering evidence have been exhausted. At that point, a competition authority should balance the quality of gathered evidence against the possibility of a successful infringement decision[16] and effective monetary penalty execution. If the gathered evidence would not likely result in an successful infringement decision or the required efforts for gathering more efficient evidence would be disproportionate to the possibility of a successful infringement decision, commitments should seriously be considered.

20. On the other hand, imposing remedies should be considered at the penalty-setting stage of a procedure. Since contrary to the commitments, remedies are not agreed upon but rather imposed, they represent a behavioural penalty that could be in certain terms even more severe than purely monetary penalty. This is especially true for structural remedies that can profoundly change the nature and functioning of an undertaking. The possibility of a vigorous appellate procedure is therefore very likely and the authority should be very certain in the quantity and quality of its evidence when imposing such penalty.

3. Compliance with remedies and commitments

21. The CPA has overall positive experience regarding compliance with the commitments. There has been no relevant non-compliance detected in past ten years, especially one that would result in rescinding the commitments or imposing a fine for non-compliance. The compliance with commitments is in this view on a very high level. It should be added that the CPA and individual case handlers work very closely with parties that show interest in proposing commitments. While it is absolutely the parties that have to

[16] Successful infringement decision is in this context an infringement decision that would survive an appellate procedure.

propose the commitments, the final text of the commitments is adopted with the highest possible consensus with the CPA. In our view, this is also an important factor that contributes to a high level of compliance.

22. The CPA does not have a dedicated compliance-monitoring unit, however every commitment decision includes a reporting obligation by the undertaking. The undertaking has to inform the CPA about the ongoing fulfilment of the commitments, usually once a year. The review of the periodical report is done by the case handler of a particular case, so in effect they are responsible for monitoring compliance. The case handler of a particular case would also review a potential commitment infringement reports.

23. It should also be added that there is an effective on-going de facto monitoring of commitments compliance by other actors (competitors) in a particular market. The competitors are highly motivated to closely follow potential infringer's (competitor's) behaviour and compliance. They are also motivated to report non-compliance to the CPA that can act within the scope of its powers.

4. Remedies and commitments in regulated sectors

24. So far, the CPA does not have any relevant experience with the regulated sectors and potential cooperation with other regulators in the context of commitments and remedies.

5. Ex-post evaluation of adopted measures

25. There is no dedicated ex post evaluation of the adopted measures in particular. However, the CPA issues a yearly report of activities that touches upon adopted commitment decisions as well.

26. There are two main reasons that an individualised ex-post evaluation is not executed. Firstly, as explained above, there is an obligation to report on a regular basis to the CPA. This means that in effect the CPA is continuously informed about the performance of the undertaking under ongoing commitments. This is basically a periodical mini ex post evaluation, since it provides an opportunity for the CPA to look back to the designated timeframe and evaluate the progress (or lack thereof) and also react swiftly. Secondly, as it is often the case, it is an issue of a lack of resources that an in-depth analysis of the past commitment decisions and their execution would entail.

27. As with compliance monitoring, it is also important to point out the abovementioned role of competitors that are motivated to monitor and report on the compliance. This is also true for the ex-post evaluations. The CPA can receive de facto evaluation from other competitors.