Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

23-May-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by Estonia --

15-17 June 2016

This document reproduces a written contribution from Estonia submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm

JT03396420

DAF/COMP/WD(2016)35
Unclassified

English - Or. English

ESTONIA

1. In Estonia the power to adopt commitment decisions is quite new legal instrument which was introduced to the Competition Act. Although the Council Regulation (EC) No 1/2003 (on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty) provided for the power of the competition authorities of the Member States to accept commitments when they apply Articles 101 and 102 of the TFEU in individual cases since year 2004 the conditions for adopting commitment decisions were not specified by national legislation until June 2013.

2. The Competition Act (§ 63^7) sets out the terms for application for assumption of obligation by undertaking and approval of assumption of obligation by the Competition Authority. The legal requirements for adopting commitment decisions were largely designed in accordance with the relevant requirements set out in Regulation 1/2003 taking into account specific distinctions of national legal system (especially administrative procedure).

3. As it is stated in the Competition Act an undertaking, the activities of which may be in violation of the prohibition of anti-competitive agreements, concerted practice, decisions or abuse of dominant position provided for in Competition Act or Article 101 or 102 of the Treaty on the Functioning of the European Union and on whom the Competition Authority considers imposing, by a percept, an obligation to eliminate the violation, may submit to the Competition Authority a written application for assumption of an obligation. The obligation must be directed at improving the competitive situation and be suitable for eliminating the damaging effects of the violation. The application for assumption of a commitment must also be sufficiently detailed in order to enable the Competition Authority to assess the suitability of the suggested obligations and their improving effect on the competitive situation. If the Competition Authority approves commitments, the Competition Authority may, by its decision, make the approved commitment binding for the undertaking and terminate the proceedings. The existence of violation itself is left open. While on commitment is assumed for a specified term the undertaking is required to notify the Competition Authority of performance of the obligation (e.g. activities or measures) at the time previously determined by the Competition Authority.) The Competition Authority may, at its own initiative or on the basis of an application of a person, resume the proceedings terminated on the basis of issuing the commitment decisions if the circumstances which are the basis for the proceedings have significantly changed, the undertaking fails to perform the assumed obligation or the obligation was approved or the proceedings were terminated on the basis of incomplete, incorrect or misleading information submitted by the undertaking.

4. The commitments decisions are only provided for by law and the Authority have no intent to issue any guidelines as to the application of this possibility.

5. As it was previously mentioned, the power to approve commitment is provided for both common types of possible infringements and it is the discretion of the Competition Authority to decide in every specific case whether or not the remedies would be appropriate considering the nature and circumstances of the infringement. In practice the Estonian Competition Authority has adopted commitment decisions only in abuse of dominance cases. During the three years of applications of the this power the Competition Authority has adopted three commitment decisions and has no extensive practice regarding this issue, so it is very difficult to make any definitive conclusions. Nonetheless, it is extremely unlikely that proposed commitment would be approved in cartel cases as it is hard to

foresee any positive effects the commitment would bring along and usually it is more prudent to demand the infringement to be terminated and impose a criminal punishment on the offender.

6. The ratio of commitment decisions to infringement decisions is close to 50/50, i.e. since 2013 the competition authority has adopted 4 infringement decisions where it has ordered the anti-competitive activities to be terminated.

7. As there is very little case law it is not possible to point out specific industries which are more subject to commitment decisions. Two commitment decisions of the Competition Authority concerned undertakings acting in the energy sector (distribution of central heating[1] and electricity distribution network and selling of electricity[2]) and one decision related to an undertaking providing the cash-in-transit service[3].

8. As for the types of commitments then to date the Competition Authority has made decisions which included behavioural commitments but not structural remedies. The Competition act does not explicitly foresee the possibility to accept structural remedies in the course of state supervision (administrative) proceeding and it is unlikely that an undertaking would voluntarily propose that kind of commitment. The law allows to approve the structural remedies in the cases of control of concentrations and in practice the Competition Authority has accepted the structural remedies where the parties to a concentration have proposed to divest some part of business or economic unit in order to be permitted to give effect to the contemplated concentration.

9. It is hard to assess the success of remedies in restoring effective competition. In one occasion it is safe to conclude that the remedies have been successful because there was a transparent and fair tender carried out to purchase heating services as the undertaking had proposed. In two other cases the fulfilment of commitments is still pending.

10. The Estonian Competition Authority ensures the suitability of commitments by asking third parties to the proceeding (usually the complainants) who would be affected by the commitments for their standpoint. We can also publish the text of proposed commitments on our web-page to enable all interested persons to reveal their opinion on the situation, should they desire it. As a result of the consultations with other market participants and submitted observations the undertaking have been required to modify or amend the proposed commitments and it has improved the possible outcome of behavioural remedies. Thus, despite of consultations with affected parties there is still the risk that not all the market participants are completely happy with the commitments.

11. The Estonian Competition Authority monitors the fulfilment of the commitments but until now it has been fairly easy to do so because the commitments have been quite straight-forward and easy to monitor. The commitment decision usually includes an exact time-frame for execution of the commitments, the act(s) an undertaking will have to perform in order to get the desired results are pre-determined and there is also a general obligation to inform the authority of the progress. In practice an average period for monitoring compliance with the commitments is up to 1.5 years. Until now the Authority has not encountered situations where an undertaking was not able to perform the necessary activities on time. There are also no examples of an undertaking breaching the commitments. Should this happen the authority has a power to adopt a compulsory precept to fulfil the commitments or an undertaking would face periodic penalty payment (up to 9600 euros) for failing to do so. Penalty payment may be applied repeatedly until the objective sought by a precept (compliance with the commitments) is achieved. However, in one occasion the Authority has altered the commitments and

1 Short summary availible in Annual Report 2014 http://www.konkurentsiamet.ee/public/Aastaraamat/Annual_Report_2014.pdf

2 Short summary availible in Annual Report 2015

3 Short summary availible in Annual Report 2014 http://www.konkurentsiamet.ee/public/Aastaraamat/Annual_Report_2014.pdf

encompassed fees of additional clients to the same pricing conditions as were in the original commitments due to the changed circumstances.

12. As the commitment decision is an administrative act the Code of Administrative Court Procedure applies to the juridical review of it. In general, in assessing the lawfulness of an administrative act issued as a result of the exercise of a discretionary power, the court also verifies compliance by the administrative authority with the limits and objective of the power, and with other rules which govern the exercise of discretion. The court does not conduct a separate assessment of the expediency of a discretionary decision. When verifying the lawfulness of an administrative act the court does not engage in an exercise of the discretionary power in the place of the administrative authority. There have been no appeals on commitment decisions yet, therefore, there is no case-law as to the standard and extent of review. Judicial review of the commitment decisions is theoretically possible but as the commitment decisions are discretionary in nature the possibilities to successfully appeal the decision (e.g. by third party) are rather limited. Even upon success the court can only annul the commitment decision but has no power to give any guidelines to the authority as to the subsequent proceeding. The Competition Authority does not consider the limited possibility of an appeal to be problematic. The rules and principles for review are exactly the same as they would be in case of any other types of decisions the authority might adopt.

13. As the commitment decisions do not establish an infringement of competition law we assume the value of the decision in private action for damages proceeding to be rather low or even non-existent. There have been no follow-up proceedings to date, so, there is no actual case-law to confirm this assumption.

14. There have been too few commitment decisions to evaluate the benefits of the type of decision. It seems that the assumption of commitments have not remarkably reduced the average duration of the proceedings because the negotiations have sometimes taken quite long time (more than 6 months). At the same time the commitment decisions as such have avoided lengthy court proceedings an infringement decision would likely have caused. The commitment decisions have also proved to be rather useful in the cases where it would be complicated for the Authority to exhaustively prescribe required action for improving the competitive situation in precept due to the specific circumstances of the market or business activity. So it may be said that commitment decisions have saved resources and improved quality of remedies.

15. The Competition Authority considers that the introduction of commitment decisions has not had significant impact in the number of enforcement actions. The undertakings have become more aware of the possibility to offer remedies that as a result may be more suitable and easy to comply with, comparing to the remedies imposed by the authority. Still, there are cases that cannot be solved by way of commitment decision for the reason or severity of the infringement and call for imposition of punishment.