COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by Poland --

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

1. This contribution provides an overview of the legal framework and the practice of the Office of Competition and Consumer Protection (UOKiK) relating to commitment decisions. It underlines recent changes UOKiK has made in adopting resolutions to address anticompetitive issues.

2. Commitment procedures in antitrust cases were introduced in Polish law in 2004, as part of the reform process following Poland’s accession to the European Union. That process was to a large extent modeled on a similar EU “institution”, which on the same date was introduced into Community law in Article 9 of the EC Regulation n. 1/2003. Poland’s commitment procedure was repeated with slight modifications in the Act on Competition and Consumer Protection of 2007. In January 2015 a number of changes relevant to the content of this contribution were introduced.

2. **Legal framework**

3. The statutory framework that UOKiK follows when accepting commitments is set out in the Act on Competition and Consumer Protection of 2007 as amended in 2015. Article 12 states that whenever in the course of antitrust proceedings, it is rendered plausible – on the basis of the circumstances of a given case, information given in the notification, or information forming the basis for instituting proceedings – that the provisions referred to in Article 6 (anti-competitive agreements/cartels) or Article 9 (abuse of a dominant position) of the Act, or in Articles 101 or 102 of the TFEU have been infringed, whereas the undertaking being charged with having infringed those prohibitions has agreed to take or cease certain actions in order to end such infringements or remedy the effects thereof, then UOKiK may, by issuing a decision, require the undertaking to fulfil such commitments. Where the undertaking has ceased infringing the prohibitions referred to in Article 6 or 9 of the Act or Article 101 or 102 of the TFEU, and agrees to remedy the effects of the infringement, the same provision shall apply accordingly.

4. In October 2015 UOKiK updated its Guidelines on issuing commitment decisions relating to the restrictive practices and practices infringing collective consumer interests („Guidelines”). The current version takes into account both the changes in legislation and the recent case law.

3. **UOKiK’s approach in deciding whether to accept commitments**

3.1 **When can commitment decisions be adopted**

5. Pursuant to UOKiK’s Guidelines, commitment decisions are not appropriate in the case of serious infringements—that is, when UOKiK deems it appropriate to impose a fine. In these cases, the deterrent effect (i.e., the need to punish the undertaking for its conduct) prevails over the possibility to accept commitments and bring proceedings rapidly to a close.

6. This principle has been generally recognized. In particular, in the majority of jurisdictions, most serious infringements of competition law are a priori not addressable by commitment decision.

7. However, to date it has not been clearly established what constitutes “serious infringements”, with the exception of cartels (i.e., Art. 101 TFEU hard-core restrictions). For example, in the past year UOKiK has generally excluded the possibility of commitments in RPM cases.
3.2 Substantive assessment of commitments offered by an undertaking

8. In general, as laid down in Article 12 of the Act on Competition and Consumer Protection, commitments should be accepted if they can be considered as resulting in ceasing the alleged infringements or remedying the effects thereof.

9. The 2015 amended Guidelines adopted a rather stringent (and innovative) approach to assessing commitments offered by an undertaking subject to antitrust proceedings, and held that commitments could not be accepted in relation to conduct that had already produced (allegedly) anticompetitive effects, unless such commitments could retroactively remove those effects. This is in contrast to the more traditional approach, according to which the ability to remedy the anticompetitive effects already produced by the contested conduct was not an essential requirement for accepting commitments and closing the investigation without formally finding an infringement.

10. UOKiK currently expects an undertaking not only to put an end to the infringement, but also remove its consequences. During the proceedings, the party is expected to declare the intention to do both. The proposed remedy can rely in particular on proposals to change the content of contracts with customers, lowering prices, or the return of inappropriately billed items. The undertaking is required to clarify how fulfilling the commitment will lead to the elimination of the alleged practice. The lasting effects of the practice should be identified and the undertaking should indicate how the commitment will remove them.

11. If the undertaking stops the alleged practices before UOKiK completes the proceedings against it, the proposed commitment should aim at removing the consequences of the infringement. If all the effects of the practice cannot be completely removed for objective reasons, the undertaking should propose measures that go as far as possible in removing the negative effects of anticompetitive practices (in particular to declare the intention to reimburse consumers).

3.3 Procedures governing the adoption of commitment decisions

12. In Poland, as in the EU, there is no procedural time limit for offering commitments. However, neither is UOKiK obliged to accept a commitment. When commitments are to be rejected, UOKiK shall inform the undertaking in writing, prior to issuing an administrative decision. This notice is not subject to a separate appeal. After being informed that UOKiK will refuse to accept a commitment, the undertaking may still choose to stop the practice or remove its effects. When the level of fine is established, the discontinuation of the practice and the removal of its effects is generally regarded as mitigating circumstances.

3.4 Sanctions for non-compliance

13. In the case of failure to comply with commitments, UOKiK may revoke its commitment decision and impose a fine on the undertaking(s). This fine can run up to 10% of the undertaking’s total turnover in the preceding business year. It is also possible to impose periodic penalty payments to compel undertakings to comply with commitments made binding by an Art. 12 decision. This provision was applied last year against natural gas provider PGNiG, one of Poland’s largest companies.
4. **The agency’s experience regarding the adoption of commitment decisions** removing the negative effects of a practice (by reimbursing customers)

4.1 **Decision**

14. In 2010, UOKiK issued a decision which alleged that *Cyfrowy Polsat* (pay-TV operator) had abused its dominant position by selling rights for the public broadcasting of Euro 2008 conditional on purchasing a decoder and technical support service. As a behavioural remedy, *Cyfrowy Polsat* committed to removing the detrimental effects of the practice and not to apply it in the future.

15. UOKiK initiated antimonopoly proceedings against *Cyfrowy Polsat* after having analyzed multiple complaints as well as the information available on the TV operator’s website. The complaints concerned the terms and conditions for sublicensing the rights to publicly broadcast Euro 2008 in Poland. The Union of European Football Associations (UEFA) has the exclusive rights to grant a license for broadcasting the European Championship, which is organised every four years. The UEFA grants the rights each time as an exclusive license for a given country. It was *Polsat Television* (*Polsat TV*) which obtained the license on Polish territory to broadcast the European Championship in June 2008 (Euro 2008). The licensor granted the pay-TV operator, *Cyfrowy Polsat*, the right to sell non-exclusive rights to publicly broadcast the Euro 2008. *Cyfrowy Polsat* usually offers its services to consumers who are not engaged in business activities. However, with regard to Euro 2008, it put together a special offer directed specifically at business customers. Under the contract, purchasing the rights to publicly broadcast Euro 2008 was conditional on buying additional access equipment and technical backup service, with an added restriction, that the decoder would not enable transmission of any free-to-air packages after June 2008, unless registered for private use.

4.2 **Competitive assessment**

16. In UOKiK’s opinion, this constituted an abuse of a dominant position. It forced *Cyfrowy Polsat’s* business customers to enter into two contracts simultaneously *i.e.* a contract for selling non-exclusive rights to publicly broadcast Euro 2008 and an additional agreement for the purchase of decoders and technical backup service. This meant that undertakings willing to acquire rights for the public broadcasting of Euro 2008 were obliged to buy additional access equipment.

4.3 **Commitments**

17. *Cyfrowy Polsat* proposed to directly remove the negative effects of its conduct *i.e.* to buy back the decoders from its customers and to reimburse the cost of the technical backup service. UOKiK’s view was that a commitment decision was appropriate under the circumstances. UOKiK emphasised that in this specific case, the abovementioned commitments were deemed insufficient. Acting in the public interest, UOKiK found itself in the position to introduce additional behavioural remedy to ensure that competition is not distorted in the future. UOKiK accepted *Cyfrowy Polsat’s* commitment not to apply such unfair conditions regarding selling the rights for broadcasting licensed sport events in the future.

4.4 **Comment**

18. The practice of competition authorities highlights a number of possible approaches which, separately or in combination, have been used in order to address competition concerns pertaining to exclusive sports media rights. It is important to note that the remedies adopted in previous decisions are not exhaustive or binding for future cases. They merely represent possible options to deal with competition issues arising in this area. UOKiK ensured that the company’s unjustified profits would be directly refunded and guaranteed third parties’ future access to the rights for licensed sport events bought by *Cyfrowy Polsat* under fair, reasonable and non-discriminatory conditions.
Conclusions

19. The modernisation of Article 12 and the new approach stemming from the Guidelines facilitate the acceptance of commitments by UOKiK in cases where the infringement has ceased. At the same time, this enables UOKiK to require the undertaking to remove negative effects from the market, if any have occurred. UOKiK’s experience illustrates that competition enforcement benefits from close scrutiny of market behaviour and identification of its detrimental effects, as it allows for remedies that remove those effects from the market. In their essence, the new Guidelines constitute an attempt to impose on undertakings the types of behaviour that maximise social welfare while dispensing with an approach in which we are satisfied with merely putting an end to a violation.