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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by Romania --

15-17 June 2016

This document reproduces a written contribution from Romania 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*

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1. The legal framework

1. According to article 49 para. (1) of the Competition Law, during the investigation of an alleged infringement/anticompetitive practice the undertakings involved may submit commitments in order to remove the situation that led to the opening of the investigation.

2. According to paragraph (3) of the same article, to the extent to which the proposed commitments of the undertakings are sufficient to protect competition and if their fulfilment removes the situation that led to the opening of the investigation, the Romanian Competition Council (hereinafter referred as *RCC*) makes them binding by decision. In this respect, the *RCC* may adopt a decision for a limited period of time. In order to set out the conditions, the criteria, the time limits, the transparency measures and the procedure for the adoption of commitment decisions, *RCC* issued Guidelines (published on its website). The Guidelines include provisions regarding the selection of the trustee (as an independent third party) in order to monitor the party's compliance with the commitments and his obligation towards the *RCC* and the parties.

3. After the undertakings declare their availability to propose commitments in order to remove the competition concerns that led to the opening of the investigation, on the one hand and after the *RCC* accepts the starting of this procedure, on the other hand, the commitments procedure will begin.

4. Each involved party will individually send to *RCC* its proposed commitments. The *RCC* will assess the proposed commitments (including the amended commitments in a later stage) in order to verify if they satisfy the conditions provided by *The Guidelines* for their formal approval by the national competition authority.

5. The criteria for the assessment are the following:

- Whether the obligation or measures proposed by the parties are relevant and directly linked with the competition concerns that lead to the investigation;
- Whether the obligation or measures proposed by the parties are proportional to the competition concerns that led to the opening of the investigation, both in the respect of the assumed obligation and its duration;
- Whether the obligation or measures proposed by the parties are efficient, having a sufficient degree of certitude of their application and their effects on the market.

6. If after a *prima facie* assessment, the *RCC* found that the proposed commitments are very likely to remove the competition concerns that led to the opening of the investigation, it will submit the proposals to public consultation (minimum 30 days). At the end of public consultation, *RCC* will conduct the market test. In this respect, *RCC* will analyse the market responses (both from third parties and other parties involved).

7. *RCC* will communicate the results of the market test and will request the parties to modify their commitments proposals accordingly. If the results of the market test are negative (i.e. there is evidence regarding the inefficiency of the commitments), *RCC* will inform the parties about its intention to reject the commitments.

8. According to the legal framework, besides the market test, the *RCC* may use external expertise (i.e. experts, the regulator) in order to assess the commitments proposed by the involved parties. Before reaching its decision, the *RCC* will submit its draft decision to the European Commission according to the legal European framework in the field (i.e. *Regulation CE no. 1/2003*).

9. At the end of the procedure, the RCC will issue its decision to accept or to reject the commitments proposed by the involved parties according to the result of the consultations as specified above. By their formal acceptance through the RCC's decision the proposed commitments will become mandatory for each party and in the same time the investigation procedure will be closed.

10. The national commitments procedure was introduced in 2010 and became fully operational in 2011 (the first commitments case). It is worth mentioning that since the start of the commitments procedure, the RCC adopted 14 commitment decisions and 51 infringement decisions, approximatively ¼ ratio.

11. The commitment procedure is used for abuse of dominance and vertical agreements cases. For cartel cases, there is a separate procedure (the leniency program). RCC also used the commitment procedure in a case concerning the joint selling of commercial rights for football games played within national events (the RCC's decision no. 13/2011). This is in line with the practice of the European Commission and other competition enforcement agencies when dealing with joint selling of football rights.

12. There are not certain industry sectors which are prone to be subject to this type of decisions. RCC issued commitment decisions concerning the telecommunications sector, the media sector, the airport infrastructure, gas sector, production, commercialisation of the pastry and bread products and financial services. In RCC's case, until now, the commitment decisions prevailed in telecom and gas sectors.

13. Further, it's important to stress that the commitment procedure addressed cases that involved alleged discriminatory practices of a vertical integrated dominant companies on upstream markets (i.e. regarding prices and the condition attached to it) and refusal to supply practices.

2. Designing and monitoring of commitments

14. Until now, the RCC has accepted behavioral remedies: non-discrimination obligation, the obligation to supply, obligation to sell commercial rights for football games by observing certain conditions (the media rights are to be sold through an open and public tender procedure, the rights are to be divided into multiple rights packages, no single buyer rule) etc.

15. The commitment procedure is a very complex process. Besides the involved parties, the RCC also uses the external expertise, especially the regulators (of course in regulated industries) and the results of the market test. In fact, in order to design efficient commitments, it is necessary to identify appropriate and proportionate obligations that entirely remove the competition concerns that led to the opening of the investigation. The concerns cover the existing time and a limited period of time in the near past, on specific existing circumstances on which the technological evolution could be foreseen.

16. It is possible that the developing technology (which increases the convergence phenomenon) is very disruptive for the dominant firm which makes the commitments unnecessary or, at least, limited in time. In the RCC's experience, in the fast-moving sectors, the commitments address upstream markets (the access to inputs, i.e. mobile call termination markets) where it is unlikely to arise problems for the competitors (i.e. access and interconnection) due to the fact that standardization and interoperability issues are dealt during the commitments procedure with the support of the regulator and the industry.

17. The RCC always conducts a market test before accepting the commitments proposed by the involved parties. The RCC will communicate the results of the market test and will request the parties to modify their commitments proposals accordingly. If the results of the market test are negative (i.e. there is evidence regarding the inefficiency of the commitments), the RCC will inform the parties about its intention to reject the commitments. In fact, there was a case (i.e. investigation on the mobile

call termination markets) when RCC informed the parties about its intention to reject the commitments. Subsequently, the parties informed the RCC about their intention to redesign their commitments in order to address directly and more efficiently the competition concerns. At the request of the parties, the RCC started a new commitments procedure. Each involved party sent its new proposed commitments to the RCC. After a *prima facie* assessment, the RCC found that the proposed commitments are very likely to remove the competition concerns that led to the opening of the investigation. In order to conduct the market test, these commitments has been submitted to public consultation on November 22, 2014. The public consultation period was ended on December 22, 2014.

18. Based on the observations and opinions formulated by some of the parties and the third parties during the public consultation, the RCC conducted the market test for the commitments proposed by the parties. Subsequently, it sent the results of the market test and asked the parties to modify their commitments proposals accordingly. After the analysis of the amended commitments RCC considered that the proposals of each of the parties satisfied the conditions provided by the Guidelines and issued a decision accordingly. By the RCC's formal acceptance decision, the proposed commitments became mandatory for each party and in the same time the investigation procedure opened by the Order no.403/2011 of RCC's president was closed.

19. Besides the market test, the RCC may use external expertise (i.e. the experts, the regulator) in order to assess the commitments proposed by the involved parties. In fact, in the telecom sector, the RCC used the expertise of the national regulator. Moreover, in the cases that involved the application of art. 102 TFEU, the RCC used the expertise of the European Commission, sometimes initiating informal consultations in order to determine suitable commitments, in addition to the mandatory consultation established by the legal European framework in the field (i.e. *Regulation CE no. 1/2003*).

20. RCC always monitors the compliance with its commitment decisions. In doing so, RCC uses both internal and external resources. RCC may use a trustee selected and empowered according to the provisions of *The Guidelines*. Nevertheless, the parties will send the information and relevant data both to the RCC and to the trustee (to conduct its analysis for its report to the RCC).

21. Also, the parties may submit, on their own initiative and on their own expense, relevant studies of independent third parties regarding the compliance with the commitments.

22. According to the assessment conducted by the RCC and the third parties for the ended cases, the remedies were successful. There are a number of cases where the monitor procedure is still ongoing. Until now there is no complaint or any other sign in the market (i.e. aggressive pricing policies or refusal to supply) that could raise concerns regarding the efficiency of commitments in question.

23. The decision for accepting commitments has a compulsory legal force. Thus, according to the national competition law, if the undertakings do not comply with the commitment decision the RCC will apply procedural fines for the breach of commitment decision (in amount of 0.5% - 10%), comminatory fines when the implementation of the compulsory obligations is delayed or it may reopen the investigation. The RCC will reopen the investigation, *ex officio* or following a complaint (i) when a major change of the facts and circumstances upon which relies its decision intervenes and (ii) when the parties submitted during the procedure inexact or false data and information that misled the RCC (in this last case, the penalty is fine in amount of 0.1% - 1% from the total turnover of the previous year).

24. In 2014, the RCC has sanctioned for the first time Avenir Telecom and Euronet Services companies and the Professional Football League (LPF) with fines totalling approx. Eur 156,340 for failure to comply with the commitments that have been assumed during the investigation by the companies involved. In the case of Avenir Telecom and Euronet Services companies, it deserves to be mentioned that in 2012, the RCC has completed two investigations on possible anticompetitive

agreements between Orange, Vodafone and Cosmote and all their distributors of mobile phone prepay products (approximately 150) pursuant to commitments assumed by the companies involved to conclude contracts that would include provisions on stimulating the competition. The companies have implemented their commitments and the studies made during the monitoring process showed that compared to 2012, in 2014 the users were very satisfied with the prepay products, including the price. However, Avenir Telecom SA and Euronet Services SRL did not change their contracts with their sub-distributors of prepay products within the deadline and, therefore, they were sanctioned with fines.

25. LPF was sanctioned with fines for failing to comply with the commitments assumed on the football matches broadcast rights in competitive seasons 2011-2012 2012-2013 and 2013-2014. The RCC found that LPF has violated the commitments not selling the television rights afferent to packages 3, 4, 5, 6, 7 and 9 through an open, transparent and non-discriminatory tender, but as a single package of the rights. Also, LPF has assigned certain categories of exclusive rights although the commitments assumed stipulated to assign not exclusively these categories of rights. LPF has assigned exclusively the direct radio broadcast rights to the Romanian Society of Radio through a contract concluded for a period of three (3) years, without any provision on packaging the matches. At present, the RCC runs a new investigation on how LPF sold the broadcasting rights of League I matches. This investigation was initiated following a complaint. The Professional Football League sold the television rights of football matches taking place within League I to Intel Sky Broadcast LTD for a period of 5 years. The company has decided to disseminate it through two TV pay channels. The investigation does not address the way Intel Sky Broadcast LTD disseminates the broadcasting rights, but the behaviour of LPF members.

3. Judicial reviews of commitment decisions and relationship with private enforcement

26. The judicial review of RCC's commitment decisions is very limited. Until now, there is only one RCC's commitment decision challenged in court (the Commitment Decision no. 34/2014 concerning the airport infrastructure). A final decision is still pending. Also, there has not been any damage action based on a RCC commitment decision yet.

27. In the commitment procedure, the companies do not acknowledge an infringement of competition law. Correspondingly, unlike infringement decisions, commitment decisions do not need to establish an infringement of the competition law. Therefore, RCC does not decide that the defendants abused their dominant position or that the undertakings engaged in an anticompetitive practice by a commitment decision. Accordingly, the commitments are design to remove the competition concerns, not to stop and prevent proved anticompetitive practices.

28. This is the reason why the RCC will apply procedural fines for the breach of the commitment decision and will reopen the investigation if the undertakings do not comply with the commitment decision. The plaintiff may use the infringement decision issued by RCC in order to file a damage claim against the defendant but he cannot rely on a commitment decision to open a damage lawsuit. In this respect, it is worth mentioning that the plaintiff has a very important role in the commitments procedure, especially in designing the commitments (after all, the plaintiff is directly interested in removing competition concerns, i.e. potential anticompetitive practice).

4. Benefits and risks associated with the use of commitment decisions

29. By accepting commitments, objectives such as ensuring compliance with competition rules, preventing the possibility of the recurrence of such anti-competitive practices, improving the competitive environment and achieving procedural savings by reducing the duration and costs of an investigation are also pursued.

30. Nevertheless, the RCC will not accept commitments in cases where: (i) there is strong evidence of anticompetitive behavior, (ii) there is significant distortion of competition on the relevant

markets or on related markets and (iii) the anticompetitive practice was stopped either due to the market intervention of the RCC or national regulatory authority in the sector. In fact, on these grounds, in 2010, RCC refused to open the commitment procedure at the request of Orange Romania S.A. and Vodafone Romania S.A. in an investigation following a complaint on the market of mobile call termination services. In these cases, the RCC decided that the defendants abused their dominant position and applied fines to both undertakings (Orange - EUR 34.8 mil. representing 3.60% from 2010 total turnover and Vodafone - EUR 28.3 mil. representing 3.45% from the 2010 total turnover). It is worth mentioning that due to the intervention of the national regulator supported by the RCC, there was no need to impose corrective measures.