Office of Competition and Consumer Protection

CLARIFICATIONS ON ISSUING THE COMMITMENT DECISION IN CASES OF COMPETITION RESTRICTING PRACTICES AND PRACTICES INFRINGING COLLECTIVE CONSUMER INTERESTS

I. Introduction.

The Act of 16 February 2007 on competition and consumer protection (Journal of Laws No. 50, item 331 as amended)[1] provides for a possibility of concluding the proceedings concerning competition restricting practices and practices infringing collective consumer interests by means of a commitment decision. This decision allows the President of the Office of Competition and Consumer Protection[2] to settle the above-mentioned administrative proceedings carried out pursuant to the Act on competition and consumer protection by way of conciliation. Following the initiation by the President of UOKiK of the proceedings on competition restricting practices or practices infringing collective consumer interests, the undertaking may propose a commitment whose implementation will allow to eliminate the practice or its effects and the President of UOKiK, recognizing that the proposed commitment will enable to achieve these objectives, may impose, by way of an administrative decision, an obligation to implement this commitment. Issuance of the commitment decision enables the faster conclusion of the proceedings and, consequently, the achievement of the objective resulting from the Act, by eliminating behaviours of undertakings infringing competition or collective consumer interests. At the same time, the faster conclusion of the proceedings is beneficial for the undertaking due to saving financial resources or the lack of a necessity to incur further labour inputs associated with taking measures in the course of the proceedings (involving employees in preparing letters or using legal assistance provided by legal counsels or defence lawyers). In addition, as a result of issuance of the commitment decision, the undertaking effectively avoids a fine which could be imposed by the President of UOKiK in case of finding that the undertaking applies competition restricting practices or practices infringing collective consumer interests.

At the same time, it should be stressed that a possibility of concluding the proceedings concerning competition restricting practices and practices infringing collective consumer interests by means of the commitment decision is the right rather than obligation of the President of UOKiK. In any case, the President of UOKiK, taking into account the whole of a given case

[1] Hereinafter referred to as the Act
[2] Hereinafter referred to as the President of UOKiK

under the administrative discretion, determines the validity of acceptance of the commitment made by the undertaking and, consequently, issuance of the commitment decision[3].

The purpose of these clarifications is to enhance the transparency of applying the provisions on competition and consumer protection and to present uniform rules of conduct regarding issuance by the President of UOKiK of commitment decisions on competition restricting practices and practices infringing collective consumer interests.

The clarifications are not legally binding, however, the President of UOKiK will apply the rules of conduct indicated in this document.

The provisions concerning issuance of the commitment decision in case of conducting by the President of UOKiK the proceedings on competition restricting practices, are included in Article 12 of the Act while those relating to practices infringing collective consumer interests are included in Article 28 of this Act.

The conditions for issuing the commitment decision, its content and the mode of conduct in the event of failure to implement this decision by a party to the proceedings have been regulated in Articles 12 and 28 of the Act in the same manner. Taking the above into consideration, in the further part of this document, these issues will be discussed jointly.

II. Conditions for issuing the commitment decision pursuant to Articles 12 and 28 of the Act on competition and consumer protection.

In the course of the proceedings on competition restricting practices or practices infringing collective consumer interests, the undertaking may submit to the President of UOKiK an application for issuance of the commitment decision pursuant to Article 12 or Article 28 of the Act. Issuance of the above-mentioned decision will be possible in a situation when two conditions are fulfilled jointly:

- in the course of the proceedings on competition restricting practices **it has been rendered plausible** that the prohibition referred to in Article 6 or Article 9 of the Act or in Article 101 or Article 102 of the Treaty on the Functioning of the European Union[4] has been infringed or it has been rendered plausible, in the course of the proceedings on practices infringing collective consumer interests that the undertaking applies the prohibited practice referred to in Article 24 of the Act,
- **taking an obligation by the undertaking** to take or discontinue specific actions aimed at preventing infringements.

1. Rendering plausible of applying practices

The first condition necessary for issuing the commitment decision is rendering plausible in the course of the proceedings before the President of UOKiK, of applying the competition restricting practice or practice infringing collective consumer interests, on a basis of the circumstances of the case, information included in the notification received by the President of UOKiK regarding a suspicion of applying the practice by an undertaking or other information giving grounds for instituting the proceedings on competition restricting practices or practices

[3] Cf. the judicial decision of the Court of Competition and Consumer Protection of 25 May 2009 issued in the case with case file ref. XVII AmA 98/08.
[4] The consolidated version of the Treaty on the Functioning of the European Union (OJ EU C 83, of 30.03.2010).

infringing collective consumer interests, including, in particular, information collected in the course of the explanatory proceedings. In this case, the President of UOKiK is not obliged to conduct a comprehensive evidence proceedings aimed at demonstrating, in an unequivocal manner, that the undertaking applied the alleged practice but only to determine, with a high degree of probability, that the undertaking's alleged practice took place.

Taking into account that in order to apply Articles 12 and 28 of the *Act on competition and consumer protection*, it is sufficient only to render plausible the application of the alleged practice by the undertaking, the undertaking should make the commitment at the initial stage of the proceedings, therefore, in principle, just after its initiation. Consequently, it should be considered that it is not reasonable for the President of UOKiK to accept the commitment of the undertaking and to impose an obligation to implement it where the undertaking makes this commitment at further stages of the proceedings, i.e. after conducting evidence activities demonstrating the fact of applying the alleged practice.

The undertaking, making the commitment at the initial stage of the proceedings, thereby anticipates conducting by the President of UOKiK of the evidence proceedings aimed at demonstration of applying the alleged practice. Consequently, it should be considered that the undertaking should do so, in principle, in the first letter submitted to the President of UOKiK in the course of the proceedings, after receiving a notification of its initiation. Making the commitment at the later stage of the proceedings may be exceptionally considered as justified if supported by the circumstances of a given case.
Such circumstances should be as follows:

a) situation when from the first letter submitted by the party in the course of the proceedings it results that the party does not identify correctly the essence of the allegation being the subject of the proceedings (especially when it is not represented by a professional representative – i.e. legal counsel, defence lawyer), and consequently indicates that its activity does not constitute the competition restricting practice or practice infringing collective consumer interests. However, following receipt of clarifications from the President of UOKiK, the party modifies its position and undertakes the commitment.
b) change in the decision on the initiation of the proceedings as regards the subject matter of the undertaking's behaviour, **resulting in the change in the description of the alleged practice** (e.g. in case of competition restricting practices, the change may consist in recognition that the undertaking's alleged practice does not consist in abusing by it of its dominant position in the relevant market but in concluding a competition restricting agreement, the party to which it is, whereas in case of practices infringing collective consumer interests, the change may consist in recognition that the undertaking's alleged practice is not the unfair market practice consisting in misleading but it infringes the obligation to provide consumers with reliable, true and complete information, resulting from the specific Act, for example, the Act of 12 May 2011 on consumer credit (Journal of Laws No. 126, item 715, as amended).

However, there are no grounds for accepting the undertaking's commitment at the further stages of the proceedings, in case of other changes in the decision on the initiation of the proceedings. As examples of this type of changes, we may indicate:

- change in the legal classification of the practice, **without any change in the description of the undertaking's alleged practice** (e.g. change in the legal classification of the undertaking's behaviour as the practice infringing collective consumer interests, referred to in Article 24, paragraphs 1 and 2 of the Act (with the illegality derived from other acts), to the practice referred to in Article 24, paragraphs 1 and 2, point 2 of the Act),

- extension of the scope of the alleged competition restricting practice by recognition that the undertaking's actions being alleged may affect the trade between the Member States within the meaning of the provisions of the Treaty on the Functioning of the European Union, and, consequently, the extension of the legal classification of the competition restricting practice.

2. The undertaking's commitment to take or discontinue specific actions aimed at preventing infringements.

The second essential condition for issuing the commitment decision is making, by the undertaking being the party to the proceedings, the commitment to take or discontinue specific actions aimed at preventing infringements. This means that the undertaking against whom the proceedings on competition restricting practices or practices infringing collective consumer interests has been initiated, in case of recognition that the allegation of applying the specific practice by it is reasonable, may make use of a possibility of submitting to the President of UOKiK the commitment to undertake or discontinue specific actions aimed at preventing infringements.

Acceptance by the President of UOKiK of the undertaking's commitment and imposing on it, by way of a decision, an obligation to implement it, will be possible only when the implementation of the commitment proposed by the undertaking leads to elimination of the alleged practice or its effects.

In the course of the proceedings, after analysing the commitment made by the undertaking, the President of UOKiK may recognise that the commitment is imprecise or incomplete. In such case, the party to the proceedings may make appropriate changes in the content of the commitment. The changes should take place, in principle, in response to a letter from the President of UOKiK containing reservations with respect to the content of the previously made commitment. Only the particular circumstances of the case may support acceptance of a possibility of further submission by the undertaking of the changed (final) commitment.

III. Issuance of commitment decisions with regard to competition restricting agreements.

In case of competition restricting agreements, due to the nature of these practices, issuance of the commitment decision pursuant to Article 12 of the Act may take place in exceptional situations.

In case of applying this type of practices by the undertaking, as a rule, their effect on competition in the market is relevantly negative, and participants in the agreement derive considerable economic benefits.

The most serious infringements of competition are agreements to which the exemption referred to in Article 7, paragraph 1 of the Act, i.e. the exemption from the prohibition on the conclusion of competition restricting agreements, does not apply, due to the small market share of participants in this agreement. Thus, the most serious infringements of competition are agreements whose subject is:

1. direct or indirect fixing of prices and other conditions for purchase or sale of goods (so-called price fixing),
2. restricting or controlling production or sale and technical progress or investment (so-called contingent agreements),

3. division of output or purchasing markets (so-called sharing agreements),
4. agreeing, by undertakings joining a tendering procedure or by those undertakings and the undertaking that organises the tendering procedure, the conditions of submitted tenders, in particular, the scope of works or prices (so-called bid rigging).

The conclusion by undertakings of the above-mentioned types of competition restricting agreements inevitably entails the infringement of competition rules, therefore, it was recognised that they may not be exempted from the prohibition on the conclusion of competition restricting agreements referred to in Article 6 of the Act, only for this reason that the market power of participants in such an agreement would be relatively small (so-called agreement of minor importance).

Taking the above into account, it should be assumed that with regard to this type of competition restricting agreements, in principle, application of Article 12 of the Act will not be reasonable.

In carrying out, as part of the administrative discretion, the assessment of the validity of issuing the commitment decision with respect to other competition restricting agreements, the President of UOKiK will also take into account the gravity of infringement, determined as part of rendering it plausible, and effects that have occurred or might occur in the market in connection with the conclusion of the given agreement by undertakings.

At the same time, it should be noted that with respect to competition restricting practices, the Act provides for the possibility to refrain from the imposition of a fine or to reduce it, after the fulfilment of the relevant conditions as referred to in Article 109 of this Act (leniency procedure). In connection with that, in case of undertakings concluding competition restricting agreements, this legal institution should be applied, in principle.

IV. Content of the undertaking's commitments

When applying for issuance of the commitment decision, the undertaking should undertake the commitment whose implementation will eliminate the alleged practice or its effects.

The undertaking's commitment should be formulated in a clear and precise manner allowing to assess whether its implementation allows to achieve the intended purpose, which is elimination of the alleged practice or its effects. It should be stressed that the undertaking's proposed commitment must be verifiable by the President of UOKiK, by imposing of applicable reporting obligations on the undertaking. Only in this case, will it be possible for the President of UOKiK to determine whether the objective of the proceedings has been achieved, thus, whether the alleged practice or its effects have been eliminated.

The type and scope of the undertaking's commitments should be dependent on the type of infringements. The content of the commitment must be directly related to the practice being the subject of the proceedings. In other words, the subject of the undertaking's commitment should directly correspond to the content of the allegation made by the President of UOKiK regarding applying the practice. Simultaneously, from the formulated commitment covering the specific behaviour of the undertaking it should result clearly that its implementation will lead to elimination of the alleged practice. Moreover, the undertaking making the commitment to eliminate the effects of the practice, when justifying its request for issuance of the commitment decision, should specify what, in its judgement, effects the alleged practice causes and how the implementation of the commitment proposed by it would lead to their elimination.

The undertaking's commitment may cover several different actions aimed at preventing infringements provided that they remain in direct connection with the practice which is the subject of the proceedings.

If the undertaking was alleged to have applied several practices, then the undertaking's commitment should be defined separately for each of the alleged practices. From the commitments made by the undertaking and relating to the particular questioned practices, it should result clearly that they will lead to elimination of the alleged practices. If specific commitments aim at eliminating the effects of specific practices, then the undertaking, when justifying its application for issuance of the commitment decision, should determine what effects, in its judgement, the specific practice causes as well as how the commitment proposed by it will lead to its elimination.

The undertaking's commitment cannot be limited only to a general statement of the undertaking regarding elimination, in the future, of the undertaking's behaviours questioned by the President of UOKiK. The subject of the proceedings before the President of UOKiK is the specific precise behaviour of the undertaking (alleged practice) and, consequently, the commitments should apply to this action of the undertaking.

For example, the subject of the commitment may not be a general statement regarding no future application in consumer trading of:

- clauses of standard contracts regarded as prohibited,
- advertising misleading consumers, which causes or may cause an average consumer makes a decision on the agreement, which they would not have made otherwise.

With regard to competition restricting practices, for example, this may not be a general statement by the undertaking that in the future it will not abuse its dominant position, by imposing onerous agreement terms which bring unfair benefits to it.

In case when the undertaking's alleged practice has been discontinued and thus from this moment the undertaking's behaviour does not have a negative effect on competition or on collective consumer interests, the commitments made by the undertaking pursuant to Article 12 or Article 28 of the Act should refer to elimination of the ongoing effects of the infringement committed by the undertaking. In this case, the commitments should include the actions whose purpose is to eliminate the ongoing effects of the infringement. In view of the above, when justifying its application for issuance of the commitment decision, the undertaking should specify (according to its judgement) ongoing effects of the practice applied by it, as well as how the commitment proposed by it will lead to their elimination.

With regard to the practices infringing collective consumer interests, this means making by the undertaking the commitment, whose implementation will ensure redressing the damage suffered by consumers, caused by unlawful conduct of the undertaking.

V. Elements of the commitment decision.

Should the President of UOKiK consider issuance of the commitment decision valid, pursuant to Article 12 or Article 28 of the Act, then by way of this decision they impose on the undertaking the obligation to implement the commitment made by it.

In the commitment decision, the President of UOKiK may determine the time limit of implementing the commitment by the undertaking. In connection with the above, the party to the proceedings, in the application for issuance of such a decision should declare the possible time limit of its implementation which will allow the President of UOKiK to consider its proposal in

this regard. If the undertaking makes several commitments, then, it should indicate separate time limits for the implementation of each of them.

When specifying the date of implementing the commitment, the President of UOKiK takes into account the nature of the practice and the need to eliminate it as fast as possible as well as the real possibilities of its implementation by the undertaking.

The mandatory element of the commitment decision is imposing by the President of UOKiK on the undertaking of the obligation to submit, in due time, information about the degree of the implementation of commitments. The aim of imposing the above-mentioned obligation is to allow the President of UOKiK to control the implementation of the commitments that were imposed in the decision. Depending on the nature of the practice, application of which has been rendered plausible and actions to which the undertaking was obliged, the reporting obligation may have a form of periodic informing or be a one-time activity.

The President of UOKiK specifies also the type of information (evidence) to be submitted by the undertaking within the set time limit, which enables effective control of the implementation of the decision.

VI. Failure to implement the commitment decision.

Should the commitment decision be not implemented, the President of UOKiK may:

- *ex officio*, repeal this decision (Article 12, paragraph 5 or Article 28 paragraph 5 of the Act) or
- impose a fine for failure to implement the decision (Article 107 of the Act).

We deal with failure to implement the commitment decision in case of:

- failure to make by the undertaking the commitment to take or discontinue specific actions aimed at preventing infringements, resulting from the commitment decision issued by the President of UOKiK (Article 12, paragraph 1 or Article 28 paragraph 1 of the Act);
- infringement by the undertaking of the date of implementing commitments (Article 12, paragraph 2 or Article 28, paragraph 2 of the Act);
- failure to submit by the undertaking, within the set time limit, any information about the degree of the implementation of commitments (Article 12, paragraph 3 or Article 28, paragraph 3 of the Act).

In case of repealing the commitment decision, the President of UOKiK shall rule as to the substance of the matter. This means that the proceedings concerning competition restricting practices or practices infringing collective consumer interests will continue. If applying the alleged practice by the undertaking is proved, the President of UOKiK issues a decision on recognising this practice as competition restricting or infringing collective consumer interests and orders to discontinue its application or issues a decision on recognising the practice, respectively, as the competition restricting practice or the practice infringing collective consumer interests and determines its application be discontinued. Issuing the above-mentioned decisions, the President of UOKiK has also the right to impose on the undertaking a fine of up to 10% of income achieved in the financial year preceding the year of imposing the fine.

Warsaw, 26th July 2012