

REPUBLIC OF ALBANIA
-COMPETITION AUTHORITY-
COMPETITION COMMISSION

DECISION

No. 437, Date 05.10.2016

On approval of the regulation “On commitment procedures”

Competition Commission, with participation of:

- Mrs. Lindita Milo (Lati) Chairperson
- Mrs. Servete Gruda Vc. Chairperson
- Mr. Koço Broka Member
- Mrs. Iva Zajmi Member
- Mr. Eduart Ypi Member;

In the meeting dated 05.10.2016, addressed the issue with

Object: Review of the regulation “on commitment procedures”

Legal Framework: Law no. 9121, dated 28.7.2003 "On Protection of Competition", (amended), Article 45.

Competition Commission after reviewing the draft regulation “on commitment procedures” and the General Secretary report:

NOTES:

1. The regulation has been drafted by being adapted and approximated with the Regulation of the European Commission no. 1/2003, date 16 December 2002 on the implementation of the competition rules according to articles 81 and 82 of the Treaty, Manuals and Procedures, (March 2002) and the Commissions notification on improved practices according to articles 101 and 102 of TFEU (2011/C 308/06)
2. This regulation approximates the Albanian legislation with that of the EU in the field of competition in enforcing the main cases where commitments remove the competition issues identified by the Competition Authority

Regulation

“On Commitment Procedures”¹

Head I

General Provisions

Article 1

Object

This regulation is to set the rules and procedures that apply in cases of termination and closure of the investigation by making commitments, in accordance with article 45 of Law no. 9121, dated 03.28.2003 "On Protection of Competition" (as amended).

Article 2

Scope of Application

1. This Regulation shall apply in cases where commitments to eliminate the competition concerns raised, identified by the Competition Authority. Decision commitments, represents the commitments offered by companies, which are binding, create legal certainty, restore competitiveness in the market and ensure its effective conservation steadily.
2. In the event of a decision on commitments, it is not necessarily to apply the full performance of the investigative procedures. Decisions commitments apply do not require all the procedural steps that would apply in the case of a final decision. Cases of "settlement commitments" can make a difference quickly and effectively in the market.
3. Commitments are not determined by the Commission, but voluntarily deposited and determined only after discussion with the parties under investigation.
4. Procedures commitments lead to decisions on commitments, which become binding after approval for enterprises whose 'addresses this decision and leads to the conclusion of the investigation proceedings.
5. However, discussions regarding commitments also have disadvantages. This is because commitments can be withdrawn (not set) until a decision on commitments, or when it turns out that commitments are not appropriate, and in this case there is always the risk that the investigation regarding a possible violation of competition, delays in time, as a result of discussions regarding commitments, which result not successful. For this reason, it is important to ensure that the investigation will continue until reaching the conclusion that the commitments are unable to resolve the identified competition concerns.

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of competition rules under Articles 81 and 82 of the Treaty (OJ L 1, 1.4.2003, p. 1-25) (32003R0001) (Article 9) ; Procedures Manual (March 2012); Commission notice on best practices for proceedings under Articles 101 and 102 TFEU (2011 / C 308/06)

6. Evaluation, legal and factual analysis in the case of resolving competition concerns, through a decision with commitments, compared with a final decision, it is shorter in time.
7. A decision with commitments is not possible in cases where the Competition Authority considers the nature of the violation that requires imposition of a fine. Also, the procedure does not apply to the commitments in case of collusion, which can be implemented "fines leniency program."
8. A decision on commitments, usually intends to end a breach of anti-competitive behavior and to restore competitiveness in the market. Commitments may be inappropriate, if enterprises have not stopped their practice of presumed anti-competitive, before or during the investigation the Competition Authority.
9. The difference between a decision under Article 4 and 9 of the Law no. 9121, dated 03.28.2003 "On Protection of Competition" (as amended), the decision under Article 45 of this law commitments, is because in the first case detected a violation, and in the second place a binding commitment without reaching the conclusion whether or not there was a violation. The decision to bring commitments:
 - Approval of the commitments, which become binding on the parties and are subject to continuous monitoring and control to ensure their implementation;
 - Completion of the investigative procedures of the Competition Authority, which in any case could resume in the cases provided for in Article 20 of this Regulation
10. The required level of detail in a decision with commitments is lower compared with a preventive decision (Article 4 and 9 of Law no. 9121, dated 28.03.2003 "On Protection of Competition" (as amended), or decision conditions and obligations. However, the competition Authority should have available sufficient evidence to carry out an assessment of the concerns of competition. Competition Authority should have concluded that even on a preliminary basis, may either It may have been a violation of competition rules and principles which are addressed to the parties under investigation.

Article 3

Definitions

In this regulation, the following terms of reference have the following meanings:

1. "Law" means Law No. 9121, date 28.03.2003 "On Protection of Competition" (amended)
2. "Commitment Decision" is a law implementation instrument that aims reestablishment of free and effective competition.
3. "Preliminary assessment" refers to the informing of the undertakings from the Competition Authority regarding competition concerns/problems.

Head II

Commitment Decisions

Article 4

Beginning of discussions for giving commitments

1. Undertakings can contact the Competition Authority, in the early stages of the investigation and proceedings to display their willingness to enter into discussions on commitments. However, even if the inquiry report was sent to the parties, commitments may be accepted again.
2. The authority or undertaking under investigation may decide at any moment during the proceedings to not continue their discussions, in particular if the Authority is not convinced of the real willingness of the company to propose commitments which will address the competition concerns. The Authority continues normal investigative procedures for the adoption of a prohibition decision.

Article 5

Preliminary meeting

1. The Competition Authority appoints a meeting with the parties under investigation, which show interest to discuss the possible commitments. At the meeting, in which participating members of the Working Group, the Commission presents the issues raised during the emerging and investigative procedures. Because the description of the case at the meeting place, is the main base for the company to decide whether to submit commitments or not, this review of competition concerns should be prepared with special care.
2. Even if competition concerns raised by the Commission, are only presented verbally to the parties, this presentation should be well-structured and allow the parties to understand the issues raised.
3. Parties should be given the opportunity to ask about the competition concerns in order to be able to report then these concerns / issues in their decision-making bodies.
4. The Competition Commission decides whether to take a decision with commitments or not. For this reason it is important to note that during the discussions on potential commitments, there is a final stand.

Article 6

Depositing an informal offer on commitments

1. The Competition Authority shall inform undertakings regarding concerns / problems of competition through the Investigation Report.
2. Investigation Report summarizes the key elements of the case and identifies the competition concerns which require the issuance of a decision which stipulates the prohibition of infringement.
3. Preliminary assessment of the Competition Authority that performs varies case by case, depending on the complexity of the case.
4. In cases where the investigation report has already been prepared for a special occasion, it is not necessary to send a preliminary assessment, because in this case the

investigation report itself constitutes the Preliminary Assessment. This is because of Investigation report contains a summary of key facts and an assessment of the concerns / problems identified competition.

5. The Report of Investigation / Assessment should not only include informal discussions on commitments and the commitments offered by the parties, but also specify the key elements required to eliminate the problems / concerns of competition and determine what issues are still being discussed parties.
6. For complainants, the issuing of the Investigation Report / Assessment does not mean that there will be certain procedural rights. The complainant has no right to any hearing or to take no confidential copy of the materials or to have access to information owned. The sole purpose is to inform the company formally under investigation, concerns / issues of competition. This assessment will not be published or made available to third parties.
7. However, in some specific cases, it may be advisable to inform the complainant about the content of this report. The working group may use this route if it hopes that the complainant would be able to provide important information for the discussion that will follow later and the scope of the precise commitments. This advantage should be well thought by balancing the risks that may be related to the progress and the failure of the discussions on commitments. Third parties should not be discriminated against if they are offered to provide information.

Head III

Deposition of a commitments text/document related to the market test

Article 8

Procedural framework

The Format of commitment decisions

1. The commitments should relate to the identified competition concerns. For those commitments that are not related to competition concerns or do not meet them, are not accepted by the Commission. The parties may offer commitments that have kind of behavior (eg obligation to provide / supply) or structural nature (p.sh sale of a part of the enterprise).
2. Commitments of behavior usually have the disadvantage that they require a long time to be monitored.
3. In principle, the commitments offered must be proportionate, meaning they do not go beyond what is necessary to fix / repair the competition concerns. However, compared with concentrations it should be borne in mind that commitments are voluntarily deposited whereas the concentrations are imposed by the Commission.
4. The Commission in any case must verify if:
 - a) The commitments are sufficient to address the competition concerns and;
 - b) The undertaking has offered the right commitments

5. However, it is important for the implementation of the commitments that they are clear and executable itself. This means that their applicability should not depend on the willingness of third parties. Also, should the implementation process should be designed in such a way that the company has implemented to promote proper engaging. Structural commitments which provide a specific timeframe for the restructuring procedures and gives the trustee the right to strip / sell the respective business should be followed closely until it comes to a certain case competitive father. It is therefore in the interest of the company to sell / structure the business within the time limit. Contradictory or incomplete commitments, may result in a failure to eliminate the competition concerns and can be difficult to correct at a later stage. However, the Commission may reopen the investigation procedure if a company acts in contradiction to the commitments.
6. If necessary, a trusted administrator can be appointed to assist the Commission in the implementation of commitments (monitoring and / or structural administrator²).
7. There is a special significance to register and maintain records / minutes of the discussions, taking into account in particular the fact that the implementation of the commitments may occur at a later stage and this may require an interpretation of the text of the commitments for which records maintained would be very necessary. This is very important, especially when it comes to commitments that have outdoor behavior, since they can persist for several years and may require a long time to be monitored.
8. The final commitments are signed from the respective undertakings.

Article 10

Time-lapse of commitments

1. The duration of commitments can be limited in time. Commitments must ensure that a market structure improvement is achieved within the time limit prescribed. This varies from market to market, depending on market responsiveness or investment required to be performed to achieve these improvements. Again, the principle of proportionality must be taken into consideration, meaning seriousness of the violation and the need to adapt to the effects properly.
2. Other provisions including provisions that foresee extending the deadline commitments only apply to certain circumstances. These circumstances, which are likely, or at least be possible to occur, should be well defined from the beginning.

Article 11

Market test of issued commitments

² The rights and responsibilities of the Administrator are set out in Chapter 5, "Requirements for the implementation of commitments" Instruction "On the conditions and obligations in case concentrations"

1. Where the Authority considers the commitments offered as sufficient, in accordance with the competition concerns raised, can conduct a market test on these commitments.
2. The authority has the right to test the market informally or discuss the offered commitments with interested third parties.
3. If the authority is not satisfied that the commitments offered "prima facie / at first sight" addressing the identified competition concerns, should not proceed with the preparation of market testing, but to discuss on the further progress of proceedings.

Head IV

Market test

Article 12

Form of market test

1. The Authority may publish on its official website, a brief summary of the case and the main content of the commitment proposal and give third parties an opportunity to submit their observations before decisions could be adopted under Article 45 of Law no. 9121, dated 28.07.2003 "On Protection of Competition" (as amended). This is the so-called "market test".
2. For this purpose, "market test notification" is published on the official website, and contains a short summary of the case (the alleged conduct and the alleged violation of competition law) and the main content of the proposal on commitments, while respecting the obligations on professional secrecy. The summary must allow third parties to understand the essential elements and how commitments eliminated the competition concerns identified by the Authority.
3. Notification of market testing usually invites interested third parties to "submit their comments" on the proposed commitments.
4. The full text of the commitment proposal in its non-confidential version, is published on the website of the Competition Authority.
5. If the case is based on a complaint, market testing should be sent to the complainant. The Commission is also right to send notification to other third parties concerned, which are known to the concerned regarding the outcome of the case (eg third party admitted to the proceedings, consumer associations, etc.) and require their comments, clearly. This ensures full involvement of the companies in this process.
6. In market testing, the Commission must invite interested third parties to submit their observations within a specified time limit, which may not be less than a month.

Article 13

Information of further discussions

1. Undertakings, which provide commitments should be informed of the results of market testing. This can be done orally or in writing. Third party identity cannot be revealed.

2. Upon receiving the results of the first market test, a meeting should be organized with the parties concerned.
3. The obligation to perform a market test, should not be misunderstood as approval from the market research, of the proposed commitments. Market testing is not an opinion poll, which determines the fate of these commitments. The Commission may take a decision with commitments, even in cases in which the participants in the market testing, have sought the rejection of the commitments proposed by the parties. Market test of the commitment decisions, often provides the Commission useful information on how efforts can be improved.
4. Depending on the case, significant modifications or less important commitments can be made after testing the market. These changes should be discussed with the parties. Small changes ("technical") in the text of engagement do not require new procedural steps.
5. Also, it is not necessary to conduct a new market test, in the case of commitment to review unless the review of commitments is essential. An essential difference is only if you change the nature or purpose of the commitments.

Article 14

Complainants

In the case of a formal complaint, before the adoption of the decision with commitments, the applicant is informed that the Commission has accepted commitments that is considered appropriate and therefore there are no grounds to proceed further with the case.

Head V

Approving the decision

Article 15

Content of the commitment decision

1. The working group prepares a draft decision with commitments based on the preliminary assessment. Decision commitments must contain a summary of the facts of the case and legal assessment. The decision must contain commitments identified competition concerns. The decision should describe the commitments submitted by the company / companies, to explain why the commitments resolve the competition concerns identified in a proportionate manner. Also, there may be provisions in the justification of why it is not necessary to establish a fine.
2. A commitment decision is usually shorter than a decision which determines a violation of competition rules. However, it varies case by case, depending on the complexity of the case.

Article 16

Complaints and informing the complainant

1. Where, after making a decision with commitments, complaint is deposited at the Competition Authority, and the institution is informed about new signs, which require a reassessment of the situation, a reassessment of the case can be carried. After this review, the applicants will receive a letter explaining the reasons for taking such a decision.
2. If the complainant has not made any comments, the complaint is considered withdrawn. If the complainant has made comments, but those comments are not essential and important, as the commitments lead to revaluation, the proceedings may continue without any change in commitments given and the appeal will be rejected.
3. Rejection of complaints is made immediately after the decision of commitments that describes that after the commitments, there are no reasons for the Competition Authority to continue the investigation. If the complaint sets forth many arguments as those discussed in the decision to engagement, then it is necessary to explain the reasons for rejecting the complaint.

Article 17

Decision publication

1. In terms of competition, the successful implementation of the decision with commitments, after adoption of the decision is crucial to the ultimate success of the Competition Authority's intervention in the market. For this reason, it is very important careful monitoring of the implementation process of the commitments given.
2. Monitoring to be carried out depends on the nature of commitments. In most cases, but especially when it comes to structural commitments, commitments should foresee that a trustee be assigned, immediately after adoption of the decision with commitments. The trusted administrator, should be independent and qualified to perform the task of monitoring. He will monitor the various steps of the implementation of commitments and report regularly on this, the Competition Commission.
3. In the case of the structural commitments, it must be verified whether the buyer meets all the criteria laid down in the decision commitments. The Competition Authority should oversee this process and remain in regular contact with the trusted administrator and his team, in order to avoid or address any possible problem, which has implications for commitments and makes them less effective how they are anticipated.

Article 19

Advantages of commitment decisions

1. First is the restoration of the free and effective competition in the market, to the benefit of consumers and the public interest.
2. Second is efficiency, because the decision is not based on commitments to conduct investigations in full scale and does not reach conclusions on the facts of the case or

law enforcement. Moreover, they usually include fewer procedural steps, allowing the most appropriate use of resources of the authority.

3. Thirdly, the commitment decision is preferred from the undertaking under investigation for the faster procedure to be followed and lack of a sanctioning decision on the finding of a violation of competition rules, as well as the fact that the commitments are submitted voluntarily and not imposed.

Article 20

Reopening of investigation procedures

The Competition Authority based on a request or on its own initiative, may reopen investigation procedures in cases:

1. New facts have emerged regarding the case;
2. The undertakings involved act in contradiction to the commitments issued;
3. The decision is based on information given by the parties that is either incomplete, irrelevant or false

Article 21

Basic steps of commitments procedures

The basic steps of commitment procedures usually involve:

1. The depositing of the commitments proposed by the enterprise in order to address the concerns raised by the Competition Authority
2. Discussions between the undertaking and the Competition Authority to propose commitments and possible changes to the commitments
3. The possible involvement of third parties or integrated complainants
4. A final assessment of the proposal, usually followed by a formal decision.

Article 22

Monitoring mechanisms

The effective monitoring mechanisms may involve:

1. Monitoring the implementation of commitments by the Competition Authority ex-officio;
2. Monitoring based on a complaint or information obtained from participants in the market that provide information about possible non-compliance with the commitments (on their own initiative or at the request of the Competition Authority);
3. Regular reporting by companies which are parties to the commitments participating decision to the Competition Authority;
4. Monitoring based on cooperation with regulatory bodies and / or other public bodies;
5. Monitoring based on cooperation with the Trustees and / or external experts;
6. The combination of the means mentioned above.

Article 23

Approval

This regulation comes to power immediately.

DECIDED:

1. To approve the regulation “On commitment procedures”, according to the attached text above this decision
2. This decision comes to power immediately