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Estonian Competition Authority continues to resolve abuse of dominance cases by behavioural remedies

Decision 5.1-5/16-019 – Lääne-Viru Jäätmekeskus [Estonian only]

Decision 5.1.-5/16-021 – As Tallink Grupp [Estonian only]

Commitments by AS Tallink Grupp [Estonian only]

Recently the Estonian Competition Authority took two decisions that further outlined its approach at handling abuse of dominance cases. The two cases show the preference of the Authority to issue injunctions or accept behavioural commitments aimed at preventing potential abuses of dominance rather than penalise past infringements.

In May the Authority issued an injunction to a municipality-owned waste handling centre (Lääne-Viru Jäätmekeskus). The Authority established that the waste handling centre was the only service provider on the market and thus dominant on the regional market for municipal solid waste. The Authority further found that the Lääne-Viru waste handling centre had abused its dominant position by charging discriminatory prices for its services.

The injunction imposed by the Authority compelled the Lääne-Viru waste handling centre to reduce the prices charged for its services so that its margin of revenue gained from fees charged to consumers would not exceed 15%. Essentially, the Authority engaged in price regulation.

In June the Authority accepted commitments by AS Tallink Group. The Authority was alerted by the practice of AS Tallink Group restricting online ticket agents access to its online booking system.

Under the commitments, AS Tallink Group agreed to provide all ticket agents with access to its online booking system, as long as they met certain criteria, including:

- Technical capability of the agent's online information system to link up with the FerryGateway standard of AS Tallink Group;
- No history of delay in payments to AS Tallink Group by more than 30 days during

last two years;
- The behaviour of the online agent or its group company does not raise objective concerns of damage to the reputation of AS Tallink Group;
- No criminal record;
- No tax debts or delays in fulfilment of obligations towards public institutions.

AS Tallink Group further undertook to offer economically reasoned and non-discriminatory fees to the online agents as well as to develop its ticket system to accommodate the commitments.

After market test, the Authority made the commitments binding. However, the decision discloses that the Authority consulted with only two online agents involved in the proceedings.

Injunctions and acceptance of commitments indicates that the Authority continues to favour a “reeducation approach” when it comes to abuse of dominance cases. The lesson for companies is this:

- Dominant undertakings whose practices have attracted the attention of the Authority should consider issuing preliminary commitments as an option for ending proceedings initiated against them. This option affords the flexibility of being a part in shaping the solution;
- Other undertakings should be ready to actively demand market testing and suggest modifications to the commitments. Since the Authority`s practice in relation to commitments is still evolving, feedback continues to be important in achieving solutions which are workable for the market.

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Latvian Supreme Court: third parties have no standing to challenge a concentration

Latvian Competition Council decision No.1397 of 4 September 2015 [Latvian only]

Latvian Supreme Court decision SKA-1072/2016 of 14 September 2016 [Latvian only]

The Latvian Supreme Court has upheld Competition Council's refusal to examine a third party complaint that an alleged concentration of two other undertakings should have been notified and therefore is illegal due to absence of clearance.

A complaint was filed by BMS-Baltijas Marketing Serviss (BMS), a Latvian company which distributes various household goods. BMS requested the authority to initiate proceedings against a competitor for failing to notify an alleged concentration. BMS had been the distributor of Duracell batteries in Latvia, but Procter & Gamble, the owner of Duracell, terminated the distributorship and concluded a distribution agreement with Sanitex, another Latvian distributor. BMS argued that Sanitex had obtained a turnover generating business from Procter & Gamble, and that the acquisition should have been notified to the Competition Authority.

The Competition Council refused to examine the complaint. The authority argued that a third party does not have standing to request investigation of an alleged failure to notify.

The appeal brought by BMS was dismissed by the courts.

The Supreme Court reasoned that "the applicant does not have a legally protected right to object to the creation of a dominant position", and added that third parties are protected by the prohibition to abuse dominant position. Although the first instance court had "merely" dismissed the appeal on merits, the Supreme Court went a step further and formally "terminated proceedings" on the grounds that the appeal against Competition Council's decision was not even admissible.

On the face of it, Supreme Court's decision also seems to preclude any future appeals against merger clearances. This would be an odd result, and hardly reconcilable with the approach taken elsewhere in the EU, especially in cases where the applicant has

participated in the clearance procedure. One may speculate whether and to what extent the outcome was influenced by the fact that BMS' case seemed flimsy on the merits. Presumably, courts will find a way to argue that they do have jurisdiction to hear appeals against merger clearances where there are genuine issues to be examined, but expect uncertainty until the Supreme Court revisits third party standing.

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Lithuanian Competition Council blocks merger after *ex-post* merger review

Decision of the Lithuanian Competition Council of 6 May 2015 in case No. 1S-59/2016

Lithuanian Competition Council press release regarding case No. 1S-59/2016 [Lithuanian only]

Lithuania is one of the few EU countries whose merger control regime provides for *ex-post* merger review, in addition to the *ex ante* control when turnover thresholds are reached. The Competition Council may request undertakings to submit a notification even though the turnover thresholds are not reached, where it is likely that the concentration will result in the creation or strengthening of a dominant position or a substantial lessening of competition. Notification may be requested if no more than 12 months have passed from the implementation of the concentration in question.

In May the Lithuanian Competition Council prohibited a transaction whereby Eesti Meedia AS had already acquired 100 per cent of AllePAL OÜ shares. The case is one of the very few in which the Competition Council has requested an ex post notification, and, among these, the first in which the merger has been declared impermissible.

Eesti Media and AllePAL manage the most popular classified ads websites for real estate and vehicles in Lithuania. Upon examination of the merger notification, the Competition Council concluded that the merger implemented in 2014 eliminated competition among classified ads websites, and increased prices of classified ads for real estate and vehicles. The authority ordered the merging parties to restore the pre–transaction state of affairs within 3 months from the date of the decision, and to eliminate all consequences of the merger in the relevant markets.

During the merger review, the Lithuanian Competition Council received Eesti Meedia's application whereby the company asked to terminate the procedure, since on 26 April 2015 Eesti Meedia had transferred the shares of the company to third parties. The request was not granted because the Competition Council was informed about the transfer only six days prior to the end of the merger review period, and consequently was not able to collect the necessary data and assess whether the transfer of shares

eliminated competition concerns.

The case demonstrates that companies subject to the Lithuanian merger control regime should assess merger control risk even in cases where statutory turnover thresholds are not met, if there is likelihood that the merged entity may have market power. Currently Lithuanian law does not provide for the possibility to voluntarily notify or obtain formal waiver prior to the implementation of a transaction if turnover thresholds are not reached. Therefore, in order to mitigate uncertainty, the parties to a transaction should consider informal consultation with the competition authority, and include provisions dealing with the risks of ex post merger review in transaction documents.

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