

DECISION

Riga, 03.03.2015.

The Department of Administrative Cases of the Supreme Court of the Republic of Latvia composed of the justices J. Neimanis, J. Briede, A. Gulans in a written procedure examined the ancillary complaint of the Competition Council concerning the 06.11.2014. decision of the Administrative Court of Appeal.

Descriptive part

1. By the 17.06.2013. decision the Competition Council found an infringement of the Article 11(1) point 5 of the Competition Law in activities carried out by the applicant SIA “Aiviekstes energobuvnieks” and imposed a fine.
2. The applicant submitted application for the annulment of the decision.
3. In parallel to the main proceedings Jekabpils District Court by the 24.07.2014. decision closed insolvency proceedings of the applicant, and on 24.10.2014. the applicant was liquidated and excluded from the Commercial Register the Republic of Latvia.

4. As a result court proceedings in the present case were terminated by the 06.11.2014. decision of the Administrative Court of Appeal pursuant to the Article 282 point 6 of the Administrative Procedure Law as the legal person which was the applicant had ceased to exist and there was no successor in interest thereto.

5. The Competition Council submitted an ancillary complaint about the court decision. The ancillary complaint is supported by the following arguments.

5.1. According to the Article 283(1) of the Administrative Procedure Law the court is obligated to invite participants to the court proceedings to provide an opinion before taking a reasoned decision regarding termination of the proceedings. In the present case the court did not invite the Competition Council to give such opinion.

5.2. The court did not take into consideration existence of a *prima facie* successor of the applicant. Data available at the Commercial Register of the Republic of Latvia show that, before exclusion from the Register, the applicant underwent restructuring. Namely, part of the applicant was added to SIA "ENC Latvia" (Reg.No.55403032231) (here and after – "ENC Latvia"). Namely, "ENC Latvia" has been registered on 13.01.2012. by way of separation from the applicant. Partial overlap of ownership in both companies can be identified. Both Rolands Gutans and Kristaps Brutans were owners of both companies. Third owner of the separated company Dainis Dreimanis was an employee of the applicant. List of employees of both companies show that during 2012 to 2014 "ENC Latvia" took over at least 68 employees. 54 employees started to work at "ENC Latvia" on the next day after the termination of their employment with the applicant 31.05.2012.-01.06.2012. Some employees started to work at "ENC Latvia" within 2-6 weeks after it was established. Until submission of the ancillary complaint it is not possible to obtain full and complete

information in order to determine a successor in the present case and thus the Competition Council continues to gather relevant information. Article 275 point 1 of the Administrative Procedure Law in such circumstances would provide for sufficient time to determine a successor. At the same time it is already clear that the information obtained so far is sufficient to conclude that in the present case a successor can be determined and judicial proceedings should not have been terminated.

5.3. Obligation to observe the Competition Law and the European Union competition rules lies with undertakings. Concept of an undertaking must be understood broadly and may encompass several natural and legal persons. Liability of a successor can be attributed even if there is no formal legal acquisition of the direct infringer, but transfer only covers economic activity or assets of the direct infringer (*see the European Court of Justice 28.03.1984. decision in case No.30/83 Rheinzink, paragraph III-1*). For this reason decisions of the Competition Council do not solely refer to entities of a particular legal form with a certain name and registration number, but pursuant to the Article 8(7) of the Competition Law decisions of the Competition Council refer to undertakings, which are characterized by a single economic unit. Liquidation of the direct infringer does not extinguish liability of an undertaking, if another legal entity in part or in full is the same economic entity. Thus the mere fact that economic activity initially is organized through one legal entity and later is substituted by another does not affect existence of a single economic unit.

5.4. The Administrative Court of Appeal by the 05.07.2014. decision¹ stated, that in accordance with the Article 33(2) of the Administrative Procedure Law procedural rights of a direct infringer (addressee of the administrative act) can be acquired also at the enforcement stage of the decision. At the same time the Administrative Court of Appeal erred by narrowing

¹ IN ANOTHER CASE NR.A43011614 – NOTE OF THE COMPETITION COUNCIL.

application of the Article 33 of the Administrative Procedure Law within the Section “D” of that law by stating that the Competition Council may determine a successor at the enforcement stage of the decision if that decision was not challenged in court or it entered into force pursuant courts’ ruling dismissing the applicant’s application for the annulment of the decision. However, if the decision taken by the Competition Council becomes final pursuant different grounds: for example, court proceedings are terminated due to liquidation of the applicant – legal entity, that represents the undertaking in relations with state and the market – then the decision taken by the Competition Council addressed to the undertaking is deprived of any enforceability at its enforcement stage. Such interpretation is contradictory, because it makes application of the Article 33 of the Administrative Procedure Law at the enforcement stage of the decision dependent on the willingness of the undertaking to exercise its procedural rights for the judicial review the decision of the Competition Council. It directly effects possibility to determine a successor within the Section “D” of Administrative Procedure Law and does not match with the determination of a successor within the Section “B” of the Administrative Procedure Law. The concept of the undertaking and the principle of succession of liability stemming out of it must be applied universally at any stage of the administrative procedure.

Reasoning part

6. According to the Article 282 point 6 of the Administrative Procedure Law, the court terminates judicial proceedings if the legal person which is the applicant in the case has ceased to exist and there is no successor in interest thereto. In the administrative procedure law if the legal person ceases to exist, it should be understood within the Article 282 point 6 of the Administrative Procedure Law that the legal person has lost its capacity to exercise procedural rights. Procedural

capacity is connected to the legal capacity, i.e., ability to be a party to the legal proceedings and undertake rights and obligations. A limited liability company ceases to exist pursuant to the Article 312 of the Commercial Law, and loses its legal capacity upon the completion of the liquidation process, i.e., exclusion from the Commercial Register (Article 332 of the Commercial Law). In accordance with the Article 282 point 6 of the Administrative Procedure Law a ‘successor’ is understood as the acquiring entity, to which rights are assigned if a limited liability company undergoes reorganization.

7. However, within the context of the competition law regard is given to the notion of the undertaking, not the form or the status of the legal person. In competition law concept of the undertaking is interpreted broadly – undertaking may not only be a combination of separate natural or legal persons or their associations, but also any entity engaged in an economic activity, irrespective of its legal status and the way it is financed.
8. According to the Article 8(7) of the Competition Law the addressee of decisions taken by the Competition Council is an undertaking. A decision taken by the Competition Council imposing liability is an administrative act, in which the addressee of the decision is indicated according to the Article 67(2) point 2 of the Administrative Procedure Law, i.e., a person, its address and registration No, personal identification No or other information that may help identification. This is in line with the reasoning of the European Court of Justice, which stated, that when imposing liability for the infringement, it is necessary to identify a concrete person, which will be held responsible for the infringement committed by the undertaking (*Court of First Instance 20.04.1999. decision case No.T-305/94 Atochem/Enichem, paragraph 953*). Thus an addressee in the administrative act identifies the undertaking at the time of the adoption of the administrative

act, the addressee is also the applicant in the judicial proceedings for the annulment of the decision of the Competition Council (entity identified as the undertaking at a particular point in time).

9. After termination of the infringement, during the investigation process or after imposition of liability legal persons involved in the infringement can be reorganized, sold, their activity can be terminated, ect. However, the concept of liability of the undertaking ensures that in case of the infringement of the competition law liability follows the undertaking (*on the principle of personal liability see European Court of Justice 13.06.2013. decision in case No.C-511/11P Versalis paragraph 51 and case-law cited*). For example, when the undertaking already consists of several legally separate companies, fine can be imposed on a direct infringer, parent company or other, for example, sister company, if the direct infringer does not determine its conduct on the market independently and is dependent from the parent/sister company. Direct participation in the infringement by a parent or a sister company is not necessary for it to be jointly and severally liable for the infringement of the competition law committed by the direct infringer – its daughter or sister company. Similarly liability for the infringement of the competition law may be imposed on a company that has acquired the direct infringer. Liability follows the successor of the economic unit not only within a single undertaking (internal restructuring), but also if the economic activity is acquired by an independent undertaking. Responsibility to impose penalty for competition law infringement arises both if the direct infringer has ceased to exist in law or economically and if the direct infringer continues to exist in law.

Thus changes in the legal form (including liquidation) of the legal entity does not extinguish liability of the undertaking, if economically another entity in part or in full constitutes the same economic unit.

10. Such changes in legal form of the undertaking should not affect administrative process before the court. If undertakings could escape liability by way of changing their identity through restructuring, sales or due to other legal or organizational changes, this would jeopardize the objective of combating conduct that infringes competition rules and preventing its reoccurrence by means of deterrent penalties (*see European Court of Justice 11.09.2007. decision in case No.C-280/06 ETI paragraphs 41, 42 and case-law cited*). Thus the Supreme Court holds, that if the undertaking has changed its legal identity by liquidating its legal form, then from the point of view of administrative procedural rights and pursuant to the Article 286 point 6 of the Administrative Procedure Law the undertaking has discontinued litigation in this particular legal form. Identification of the successor or the “run-away” undertaking during the judicial review of the decision of the Competition Council would be a cumbersome process, which would undermine effective judicial review irrespective whether the Competition Council has already gathered information on the new entity of the undertaking or not. It is in the interest of the undertaking to fully examine all the circumstances of the case and review the decision before the court. Since the undertaking is well informed about the ongoing judicial proceedings, it cannot claim breach of the right to a fair trial, if it has not been identified and invited to accede to the administrative litigation before the court.

11. It must be pointed out that discontinuation of judicial proceedings against an undertaking in one legal form does not prevent enforcement of a valid decision adopted by the Competition Council against that undertaking existing in another legal form. Thus the decision taken by the Competition Council and which has entered in force will be enforced against the legal entity, i.e., the addressee that is identified as the undertaking at the moment of enforcement of the decision. Responsibility to impose liability for the payment of the fine to an entity, which is not the direct infringer, prevents undertakings from escaping penalties for competition law infringements by

simply changing their identity through restructuring, sale or other legal, contractual or organizational changes. Thus liability can be imposed even on an entity that is not the direct infringer or that has not exercised its right to challenge the decision taken by the Competition Council. In this respect regulation of the administrative procedure law, commercial law or insolvency law is not decisive, including in part on the changes in the legal structure of undertakings and effect of such changes on the succession of liability pursuant those laws.

12. Accordingly the court had sufficient grounds to terminate proceedings in the case in question, because SIA “Aiviekstes energobuvnieks” lost its legal capacity. Circumstances indicating that SIA “Aiviekstes energobuvnieks” has changed its identity currently is of no importance. That does not preclude the Competition Council to enforce the decision against the changed entity of SIA “Aiviekstes energobuvnieks” (legal entity currently representing the undertaking). Dispute, whether the Competition Council has correctly identified an addressee of the enforcement order, is subject to a judicial review, when reviewing a complaint regarding a warning about the enforcement.

Operative part

Pursuant to the Article 323(1) point 1 of the Administrative Procedure Law, the Department of Administrative Cases of the Supreme Court

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to leave the 06.11.2014. decision of the Administrative Court of Appeal unvaried, and dismiss the ancillary complaint of the Competition Council.

The decision may not be appealed.

The Justices:

J. Neimanis

J. Briede

A. Gulans