



eSAPIENCE CENTER FOR COMPETITION POLICY

RULES BY REGION:

The Bulgarian Competition and State Aid Law and Institutions

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The Bulgarian Competition and State Aid Law and Institutions

by

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The Bulgarian competition law dates back from the first years of legislative reforms following the political changes in 1989. The subsequent transition from planned to market economy brought about a competitive business environment and prompted the adoption of the first Act on Protection of Competition in 1991. It created both the regulatory and institutional framework in the field. Following the conclusion of the Agreement for Association with the European Union, legislative amendments in 1998 pursued further alignment of the Bulgarian antitrust and merger rules with the European ones. The latest major legislative amendments in force from January 1, 2007 brought the domestic state aid law into full accord with Community substantive and procedural norms. As a result, the Bulgarian competition legislation transposes, by and large, the EC competition rules while yet retaining a unique approach to certain matters.

I. INSTITUTIONS

The enforcement of the Bulgarian competition rules is vested in the Commission for Protection of Competition (the “CPC”) and the Supreme Administrative Court (the “SAC”). Whereas the former has watchdog functions, the Court solely scrutinizes the CPC decisions on merits of law and facts. In addition, the civil courts can be seized with claims for damages in accordance with the general civil law.

The Minister of Finance is the authority in charge of the preliminary assessment of state aid measures, their notification to the European Commission and follow-up monitoring of the measures’ implementation. The Minister of Agriculture is vested with identical functions with regard to state aid for agriculture and fisheries.

National Competition Authority

The CPC is a *sui generis* administrative agency whose powers extend in two directions. First, it investigates and sanctions anticompetitive agreements, decisions and concerted practices and abuses of a dominant position. Second, it monitors and—as occasion arises—clears concentrations of economic activities while applying the SIEC test.

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The CPC is an independent authority consisting of seven members who are elected and may be dismissed by the National Assembly (the Bulgarian Parliament). Their term of office is five years while re-election for another five-year period is admissible.

According to the case law of the Bulgarian Constitutional Court,² the CPC is an administrative authority and, as such, issues individual administrative acts. The CPC may not exercise powers vested, in principle, with the judiciary, e.g. declare agreements and decisions null and void. For the same reason the CPC may not intervene in the relations between private parties by amending their agreements or decisions.

The procedure before the CPC takes the form of administrative proceedings in the course of which the CPC investigates the matter at stake and collects evidence. The parties to the proceedings may intervene in so far as they may submit written evidence, make statements, and review the materials in the file.

Role of the National Courts

As noted earlier, the Supreme Administrative Court reviews the CPC's decision on merits of both law and facts. It cannot be directly seized with competition law infringements. The SAC steps in only when an administrative act—i.e. a CPC decision—is appealed. The Court sits in two panels. A panel of three judges scrutinizes the CPC decision itself and passes a judgment on merits of both law and facts. As a result, the Court may uphold the CPC decision, quash it or overrule it and return it to the CPC for further investigation. This judgment can be appealed before a panel of five judges which reviews the Court's decision (and not the CPC decision) on the merits of the law only. This panel may uphold the judgment of the three-member panel or overrule it and return it to the three-member panel for further review.

Apart from this, the national courts play a role in the private enforcement of competition law. In civil lawsuits, plaintiffs may claim damages on grounds of breach of antitrust rules.

National State Aid Authority

Following the latest amendments of the domestic state aid legislation,³ the Minister of Finance took up the functions of national state aid authority. Supported by a bespoke unit at the ministry, he accepts, reviews and takes a stand on state aid notifications before forwarding them to the European Commission for further

² Decision No 22 of 24 September 1998, Case 18/98.

³ Whereby the preceding state aid regime was scrapped and an entirely new State Aid Act was adopted. The latter was promulgated in State Gazette No. 86 of 24 October 2006 and became effective on 1 January 2007.

compatibility assessment under the Community state aid rules. The Minister assesses the aid intensity of regional aid measures and submits to the European Commission proposals for regional aid maps. The Minister also oversees the implementation of *de minimis* aid measures. He collects and processes all the information related to proposed or granted aid and draws up and submits to the European Commission annual reports on existing aid schemes. However, aid measures in the field of agriculture and fisheries fall outside the competence of the Minister of Finance. They are monitored by the Minister of the Agriculture and Forests who is vested with powers identical to those of the Minister of Finance.

II. ANTITRUST

Anticompetitive Agreements, Decisions and Concerted Practices

Article 9 of the Act on Protection of Competition (the “APC”) prohibits, as anticompetitive, all agreements between undertakings, decisions of associations of undertakings and concerted practices which have as their object or effect prevention, restriction or distortion of competition on the relevant product and geographic market and, in particular, those which:

- (i) directly or indirectly fix prices or other trading conditions;
- (ii) share markets or sources of supply;
- (iii) limit or control production, trade, technical development or investments;
- (iv) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- (v) make the conclusion of contracts subject to acceptance by the other party of additional obligations or to the conclusion of additional contracts which, by their nature or according to commercial usage, have no connection with the subject of the main contract or with the performance thereof.

This list is, however, not exhaustive.

Nullity

Anticompetitive agreements and decisions are null and void *ex lege*, i.e. the nullity does not need to be proclaimed in a decision but occurs by operation of law.

***De Minimis* Rules**

Agreements, decisions or concerted practices having an inappreciable effect on competition escape the above prohibition. The effect is inappreciable when the parties

hold an aggregate market share of up to 5 percent (if they are competitors) or 10 percent (if non-competitors) on the market affected by the restrictive arrangement.

Hardcore Clauses

Clauses directly or indirectly fixing prices or other trading conditions or sharing markets or sources of supply are considered to be “hard-core” restrictions. Limitations of output or sale are not, however, among the blacklisted ones.

Notification

If parties to an agreement, a decision, or a concerted practice consider that (some of) their arrangements entail restrictive object or effects, they may seek clearance from the CPC within thirty days from the conclusion of the agreement, the adoption of the decision, or the application of the concerted practice, respectively. To this end, the parties submit a notification which contains information about the agreement/decision/concerted practice and a request for exemption from prohibition under Article 9 of the APC.⁴

Exemption from Prohibition

Agreements, decisions, or concerted practices which (i) contribute to increasing or improving the production of goods and the provision of services or promoting technical and economic progress, (ii) while allowing consumers a fair share of the resulting benefits, and which do not (iii) impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives set, and (iv) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the market concerned, may be exempted from the prohibition under Article 9 of the APC. By contrast to the European antitrust rules, the Bulgarian legislation still abides by the concept of “exemption” and does not provide for a directly applicable exception. An exemption is granted by a decision of the CPC. The Commission may adopt block exemption regulations.

Monopoly/Dominant Position

Article 16 of the APC defines a monopoly position as “the position of an undertaking which has been granted by law the exclusive right to carry out certain type of economic activity.” A monopoly position is vested by law only and may relate to one of the following activities: railway transport; national postal and telecommunication networks; use of nuclear energy; manufacturing of radioactive products; armaments; explosives; and strong toxic substances.

⁴ Pursuant to Article 11 of the APC.

An undertaking holds a dominant position when, given its market share, financial resources, access to the market, level of technology, and economic relations with other undertakings, it is independent from its competitors, suppliers, or consumers in the market concerned. Subject to rebuttal by the undertaking concerned, dominance is presumed when the undertaking's market share exceeds 35 percent of the relevant market.

The APC prohibits any abuse of a monopoly or dominant position by one or more undertakings. Any action having as its object or effect prevention, restriction or distortion of competition is considered abuse of dominance. The following examples could constitute abuse of dominance:

- direct or indirect imposition of purchase or sale prices or other unfair trading conditions;
- limitation of production, trade, and technical development to the detriment of consumers;
- application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other party of supplementary obligations or conclusion of additional contracts which, by their nature or according to commercial usage, have no connection with the subject of the main contract or the performance thereof;
- unjustified termination of established long-term trade relations or unjustified refusal to conclude a contract when possibilities for production or supply are available.

If an undertaking enjoying a monopoly position does not comply with the prohibition above, the competent regulatory authority—and when there is no such authority, the Council of Ministers—may, upon a proposal by the CPC, set minimum, fixed, or ceiling prices for a certain period of time. The prices are compulsory for the infringer.

State Actions Susceptible to Competition Law Sanction

The APC applies also to actions of state authorities if they explicitly or tacitly prevent, restrict, distort, or may prevent, restrict, or distort competition.

Fines

The fine for a breach of the antitrust rules may vary from BGN 5,000 to 300,000 (EUR 2,556 to 153,387).

III. MERGERS

The Notion of Concentration

In accordance with the Europe-wide approach, the APC considers a concentration of economic activities to be any legal merger of two or more undertakings, as well as any transaction which brings about acquisition of control. The notion of control encompasses the possibility to exercise decisive influence by means of (i) ownership rights, or rights to use all or part of the assets of the undertaking, and (ii) acquisition of rights, including contractual rights, which provide a possibility to exert decisive influence over the composition, voting, or decisions of the undertaking's bodies.

The establishment of a full-function joint venture is considered to constitute a concentration as well.

Turnover Thresholds

The parties are to notify the CPC of a planned concentration when their aggregate turnover from activities in Bulgaria amounts to BGN 15 million (EUR 7.6 million) or more.⁵

Nature of the Filing Obligation

Bulgaria is a suspensory jurisdiction, i.e. the parties may not proceed to closing before the CPC clears the concentration. The APC does not provide for derogation from suspension.

Timetable

The parties should notify the CPC of their "intention to implement" the concentration. Therefore, the deal is to be notified before closing. The APC provides for a one-month Phase I investigation (considered as from the moment the filing is complete). The procedure may roll into Phase II when there are serious doubts that the transaction

⁵ The letter of law (Article 24 of the APC) suggests that the turnover figure is to be calculated by reference to sales in the relevant product market in Bulgaria. In its decisional practice, the CPC has, however, extended this threshold to cover turnover from all operations of the parties in Bulgaria. Although successfully challenged before the Supreme Administrative Court, this practice has remained largely unchanged.

will significantly impede effective competition by creating or strengthening a dominant position.

Responsibility for Filing

The notification is to be submitted by the undertaking acquiring control or by the undertakings which merge or set up a joint venture.

Grounds for Clearance

The CPC clears a concentration if it has passed the SIEC test, i.e. does not “significantly impede effective competition” by creating or strengthening a dominant position. If that is not the case, the merger may nevertheless be cleared if it will bring about modernization of production or of the economy as a whole, improvement of the market structures, investment, creation of new jobs, better protection of consumer interests, and, on balance, outweighs the negative impact on competition which the combination of the merging businesses would bring about. The CPC may make the clearance conditional upon certain commitments on the part of the undertakings concerned.

Fines

The fine for failure to notify may vary from BGN 5,000 to 300,000 (EUR 2,556 to 153,387). A fine for implementation ahead of local regulatory clearance is not envisaged.

IV. STATE AID

Incompatible State Aid

The State Aid Act (the “SAA”) proclaims as incompatible with the Common market any aid granted by the State or a municipality or through state or municipal resources, directly or through other entities, in any form whatsoever which distorts or threatens to distort the competition by favoring certain undertakings, the production of, or the trade in, certain goods, or the provision of certain services.

Compatible State Aid

The following categories of aid are considered to be compatible with the Common market:

- (i) aid having a social character and which is granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

- (ii) aid granted to compensate damage caused by natural disasters or other exceptional occurrences.

Aid Which May be Considered Compatible with the Common Market

An aid measure may be regarded as compatible under the SAA if:

- (i) it promotes the economic development of areas where the standard of living is low or where there is serious unemployment;
- (ii) the aid promotes the execution of projects of significant economic importance for the Republic of Bulgaria and the states with which it has established a regime of monitoring of state aid, or to remedy a serious disturbance in the economy of the Republic of Bulgaria;
- (iii) the aid facilitates the development of certain economic activities or of certain economic areas, whereas such aid does not adversely affects the trade between the Republic of Bulgaria and the states with which it has established a regime of monitoring of state aid;
- (iv) the aid promotes the conservation of the cultural and the historic heritage whereas it does not affect the trade and the competition contrary to the interests of the states.

Standstill Obligation

The aid measure cannot be put into effect ahead of an approval by the European Commission.

Notification Obligations

The notification obligation lies with the entity which intends to grant or alter the aid.

Procedure Before the National Authority

The aid measure is to be first notified to the Minister of Finance or—when the measure concerns agriculture and fisheries—to the Minister of Agriculture and Forests. The Minister reviews and takes a stand on the notifications and then forwards it to the European Commission for further assessment of compatibility. The Minister is the sole interlocutor in the relations with the European Commission and liaises with it on requests for additional information, implementation, and recovery of unlawful aid.

Recovery of Unlawful Aid

The recovery of unlawful aid is procured by the aid-granting entity but is supervised by the Minister of Finance. The SAA neither provides for a special recovery procedure nor refers to other, previously established enforcement procedures under the public or civil law which are to apply *mutatis mutandis*. The SAA simply notes that the aid is to be recovered in accordance with the decision of the European Commission.

Fine

The fine for failure to notify an aid measure prior its implementation amounts to BGN 4,000 (EUR 2,045). A breach of the standstill obligation triggers a fine in the range between BGN 4,000 and 10,000 (EUR 2,045 and 5,112). The sanctions are to be appealed before the district courts within whose jurisdictions the infringement has been committed.

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