

With the adoption of the Competition Act and the new measures strengthening the competition authorities' powers and increasing staff numbers, it is expected that Belgian competition policy will play a more significant role in developing and maintaining the conditions for effective competition between companies.

The challenge now is for the Belgian competition authorities to enforce Belgian competition law in a more dynamic fashion.

## Chapter 4

# Bulgaria

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### 1 INTRODUCTION

#### 1.1 BASIS OF NATIONAL COMPETITION LAW

Bulgarian competition law and practice has seen dynamic development over the last decade. Based initially on the American litigation based system, the country's competition system underwent a major overhaul with the adoption of the 1998 Protection of Competition Act (PCA) (State Gazette Issue 52 of 1998, as amended). The PCA introduced competition regulations in line with the then effective Community Law on prohibited agreements and concerted practices, dominant and monopolistic positions, concentrations and state aid, along with provisions to prevent unfair competition.

Recently the Bulgarian competition authority – the Commission for the Protection of Competition (CPC) made an effort to clarify the interpretation and application of the law, by adopting a number of soft-law documents. Among the most important are:

- Methodology of the Conduct of Investigations and on Determining the Market Position of Undertakings in the Relevant Market,
- Methodology of Determining the Amount of Fines and Monetary Sanctions under the Protection of Competition Act,

Marjorie Holmes and Lesley Davey, *A Practical Guide to National Competition Rules across Europe*, pp. 113–133.

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- Rules of procedure for searches and seizures, and the collection of oral evidence under Article 41a of the Protection of Competition Act;
- Guidelines on the application of Chapter 6 of the PCA, dealing with the notification and clearance of mergers.

The CPC has gradually transposed to Bulgarian law the most important block exemptions effective in the European Union by issuing its own decisions on block exemptions, which cover vertical restraints, specialization and horizontal Cooperation agreements, research and development agreements and certain agreements in the motor vehicle sector.

### 1.2 INTERACTION BETWEEN COMPETITION LAW AND EUROPEAN COMMUNITY LAW

Bulgarian competition regulation is virtually identical, on a national level, with the relevant provisions of Community Law in areas such as dominance, prohibited agreements, and mergers, although in the latter case the regulation is still in line with the former European merger control regulation, using the 'creation or strengthening of dominance' test. While the CPC has not adopted most of the European Commission's guidelines and notices, it has readily taken guidance from them. A major benefit of local regulation following closely the Community Law is that significant practice and case law, developed over decades by the European Commission and the European Court of Justice, can easily be transposed to Bulgaria and ensure efficient application. The CPC has since accumulated significant practice of its own, mainly in line with European precedent.

### 1.3 RECENT CHANGES AND DEVELOPMENTS IN THE BULGARIAN COMPETITION ENVIRONMENT

In addition to trying to codify its case law by issuing soft-law documents summarizing its opinions, the CPC has recently taken a tougher sanctioning policy against violations of the PCA, particularly in the area of abuse of dominance and prohibited agreements. It has used creatively the current maximum amount of fines (BGN 300,000<sup>1</sup> for a first time violation and BGN 500,000 for a repeated violation), by fining the same offender several times on different grounds, thus increasing the total fines imposed. This approach is yet to be tested in the courts. In addition, in view of the expectation, following Bulgaria's imminent entry into the European Union, for the CPC to act as a national authority applying Community Law, the CPC has made clear its intention to make full use of the sanctioning apparatus available under Community Law.

1. €1 = 1.95583 Bulgarian Lev (BGN) on 31 December 2006.

## 2 COMPETITION AUTHORITY AND SECTOR REGULATORS

### 2.1 COMPETITION AUTHORITY/IES

#### 2.1.1 Main Areas of Responsibility

The CPC's main powers and responsibilities include investigating and establishing infringements under the PCA, imposing sanctions and ordering the termination of infringing activities, as well as issuing the clearances provided under the law. The CPC has certain regulatory powers, particularly in regard to the issue of block exemptions of certain categories of prohibited agreements, decisions and concerted practices. Additional powers include submitting proposals to executive authorities and to local government to revoke regulations issued which are incompatible with the PCA, appealing to the courts against administrative acts and decisions issued in contravention of the PCA, and conducting sector enquiries into relevant markets.

In addition, since the beginning of July 2006, the CPC acts as a complaints tribunal with respect to procedures relating to public procurement and public concession contracts. Essentially these additional powers were given to the CPC not so much due to the closeness of these procedures to competition law, but rather to utilize the CPC's investigation procedure and its capacity to investigate and reach a decision in a relatively short period of time.

#### 2.1.2 Organization and Structure

The CPC consists of seven members and decisions are taken with the favouring vote of at least four of the members.

The administration of the CPC is headed by a General Secretary, who is officially responsible for preliminary control of notifications and other requests (although being supported in this function by the relevant Directorates), and deals with a number of other internal administrative issues. The administration consists of two major directorates, which are involved in the exercise of the powers of the CPC in respect of competition matters – these are Antitrust and Unfair Competition, and Concentrations and Sector Enquiries.

A third Directorate deals with the regulatory powers of the Commission – the directorate responsible for 'competition policy.' In addition two directorates are involved in the application of the CPC's powers in respect of concessions and public procurement. Finally two additional directorates have the function of supporting the activities of the CPC, including the general counsel's office which represents the CPC before the courts.

#### 2.1.3 Participation in the European Competition Network (ECN)

At the time of writing the CPC is not yet a member of the European Competition Network.

## 2.2 SECTOR REGULATORS

### 2.2.1 Energy Supplies and Water

#### 2.2.1.1 Role

The Bulgarian sector regulator in the field of energy supplies and water is the State Commission on Energy and Water Regulation (SCEWR). SCEWR is responsible for the regulation of activities relating to production, transmission and distribution of electricity, transmission and distribution of natural gas, trade in electricity and natural gas, production and trade in thermal energy. It issues, amends and terminates licenses, proposes draft regulations and approves general terms and conditions. When mandated by the law, it supervises compliance, regulates prices in cases provided for under the law, determines rules on trade in electricity and natural gas and establishes rules for access to transmission and distribution networks of electricity and for gas. It reviews requests from energy undertakings for compensation for stranded costs, issues renewable energy and green certificates and approves division, spin-off, legal merger and amalgamation of energy undertakings.

In respect of water and sewage SCEWR regulates the quality and prices of water and sewage services, proposes drafts of regulations, provides guidelines on the application of such regulations and approves general terms and conditions applicable to the supply of water and sewage services to consumers. It also supervises compliance with the law and participates in concession procedures.

#### 2.2.1.2 Organization and Structure

SCEWR consists of 13 members – a chairman, two deputy-chairmen and ten members. Five of the members have experience in energy and five in water. The decisions of SCEWR are taken by a majority of seven votes, and, where they concern energy, at least five of the votes need to be of members having experience in energy; where they concern water, at least five of the votes need to be of members having experience in water. The administration of SCEWR is headed by a Secretary General and consists of seven directorates. The directorates involved directly in the regulatory activity include Legal, Economic Inquiries and Consumer Affairs, Electricity, Thermal Energy, Gas, and Water Supply and Sewage.

### 2.2.2 Financial Services

#### 2.2.2.1 Role

The Financial Supervision Commission (FSC) is an independent state regulatory body that oversees all financial markets and financial activities other than banking.

The objective of the FSC is to protect the interests of investors and participants in the regulated markets by ensuring their integrity, transparency and credibility.

To implement this objective, the FSC is provided with a wide range of powers, among which are:

- Regulation – The FSC is authorized to establish statutory regulations, instructions and guidelines relating to the implementation of the relevant legislation.
- Licensing – The FSC is the body in charge of issuing various licenses in the field of securities, trading and investment, insurance and social security, including licenses and permits to stock exchanges, investment brokers, individual security brokers, investment companies, special purpose investment companies, trust funds, insurance companies, social security and pension funds, etc. The FSC is also authorized to approve prospectuses for public offerings of securities (initial public offering or listing of securities for trading on securities markets).
- Supervision – The following entities are subject to supervision on an ongoing basis by the FSC: regulated markets of securities (including the stock exchange/s); the Central Depository; investment and management companies; special investment purpose companies; securities brokers/dealers and investment advisors; public companies and other issuers of securities, insurance companies and insurance cooperatives, pension companies and funds, etc.
- Sanctions – Where a violation by the supervised entities and individuals is established, the FSC is empowered to impose sanctions. They include, among others, implementation of specific enforcement measures, fines or withdrawal of the license/permit issued.

The FSC keeps public registries available on the Internet, containing information about all the entities subject to its supervision.

#### 2.2.2.2 Organization and Structure

The FSC is composed of seven members and their respective administrations and is divided into three Departments which supervise various financial sectors:

- Department of Supervision of Investment Activities – responsible for supervision of securities markets, trading, brokers, etc.;
- Department of Insurance Supervision – responsible for supervision of insurance companies and brokers and health assurance companies;
- Department of Social Security Supervision – responsible for supervision of pension funds.

Its decisions are taken by a majority of four members. Heads of the individual departments also have certain regulatory powers.

## 2.2.3 Telecommunications and Postal Services

### 2.2.3.1 Role

Telecommunications and postal services are regulated by the Communications Regulation Commission (CRC).

The CRC has broad regulatory powers in all fields of telecommunications and with respect to all civilian telecommunications operators. Within the framework of frequency allocation set by the National Radio-Frequency Allocation Plan, the CRC allocates all civilian frequencies.

Other powers of the CRC include joint governance (together with the Council of Electronic Media) of radio and television broadcasting, the issue of all telecommunications licenses (including individual licenses and general licenses) under the Telecommunications Act (State Gazette Issue 88 of 2003, as amended), supervising the utilization of licenses by telecommunications operators and revoking these licenses, regulating the numbering and naming policy for Bulgaria, and allocating numbers and names, determining Significant Market Power (SMP) operators, etc. The CRC is also a national standardization organization before ETSI.

The CRC has broad supervising and control powers over the compliance with all regulations in the field of telecommunications, the principles of price formation, the quality of services offered by telecommunications operators, the compliance of operators with their licenses and the provision of the universal telecommunications service. It can act as an arbitrator and as a complaints authority in disputes over refusals for interconnection and collocation, refusal for granting of access to leased lines, specific access and unbundled access to the local loop.

In respect to postal services, the CRC is responsible to ensure the conditions for the provision of the universal postal service within the entire territory of the country, overseeing the conditions of competition in the postal services market and the conditions of equality between postal operators. The CRC further issues, amends and terminates postal licenses, and registers undertakings involved in non-universal (including courier) services, supervises compliance with privacy of postal communications and determines standards of quality and efficiency for the universal postal service. Jointly with the CPC it develops a methodology to deal with the deficit resulting from the provision of the universal postal services under economically non-feasible conditions and approves the prices for the universal postal service, etc.

### 2.2.3.2 Organization and Structure

The CRC consists of five members. The administration of the CRC is headed by a General Secretary, and consists of seven Directorates, four of which are directly involved in the regulation of telecommunications and postal services: Supervision of Communications, Licensing and Frequency Planning, Technical Regulation and Electronic Signature, and Market Regulation.

## 2.2.4 Rail Regulator

### 2.2.4.1 Role

The Executive Agency, 'Railroad Administration,' is responsible for regulation in the railways sector in Bulgaria. Its authority includes controlling access to the railroad infrastructure and the fulfilment of its obligations for the provision of public services. It checks the licensing requirements for carriers and technical operation and railroad-worthiness supervision entities, issues licenses for railroad personnel, and maintains the registries of all railroad rolling stock.

### 2.2.4.2 Organization and Structure

The Executive Agency is headed by an Executive Director, who is supported by an administration consisting of three Directorates – two of which – 'Railroad Inspectorate' and 'Carriage by Rail' are involved in its regulatory activities.

## 3 CARTELS AND ABUSE OF THE DOMINANT POSITION

### 3.1 CARTELS AND RESTRICTIVE AGREEMENTS BETWEEN COMPETITORS

#### 3.1.1 Legislative Provisions

The regulation of prohibited agreements, concerted practices and decisions of undertakings is contained in Article 9. of the PCA. Prohibited are all types of agreements between undertakings, decisions by associations of undertakings, as well as concerted practices of two or more undertakings having as their object or effect the prevention, restriction or distortion of competition within the relevant market. Based on the field of application of the PCA, as laid down under Article 2 of the PCA, this should be interpreted to include relevant markets within the territory of Bulgaria. With respect to any agreements, decisions or concerted practices by undertakings operating outside Bulgaria, they would fall under the ambit of the PCA where they have as their object or effect the restriction, distortion or prevention of competition within Bulgaria.

The definition of prohibited agreements is essentially in line with the definition laid down under Article 81 (1) EC. The PCA lists certain examples of prohibited agreements, decisions or concerted practices, such as those which

- directly or indirectly fix prices or other trading conditions;
- share markets or sources of supply;
- limit or control production, trade, technical development or investments;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

- 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.

The Supreme Administrative Court, the court responsible for judicial review of CPC's decisions, has formulated (*see* Judgment No. 1248 of 12 February 2002) three cumulative elements for a violation of Article 9 to exist:

- the existence of an agreement, decision or concerted practice among undertakings;
- such agreement, decision or concerted practice to have as its object or effect, restriction, distortion or prevention of competition;
- such agreement, decision or concerted practice to have significant effect (by reference to the *de minimis* rules which exclude the applicability of Article 9).

### 3.1.2 Assessing Cartel Behaviour

#### 3.1.2.1 Horizontal Agreements

With respect to horizontal agreements, the PCA provides a *de minimis* threshold of 5 per cent aggregate share of the undertakings participating in the market of goods or services forming the subject matter of the agreement, decision or concerted practice. Below this threshold the horizontal agreement (defined as an agreement between competitors) is considered to have insignificant effect, and therefore does not fall within the prohibition of Article 9.

#### 3.1.2.2 Vertical Agreements

As with horizontal agreements, for vertical agreements the PCA provides a *de minimis* threshold of 10 per cent aggregate share of the undertakings participating in the market of goods or services, forming the subject matter of the agreement, decision or concerted practice. Below this threshold the vertical agreement (defined as an agreement between non-competitors) is considered to have an insignificant effect, and is accordingly excluded from the application of Article 9.

Hard core restrictions, having as their object or effect, the direct or indirect fixing of prices or other trading conditions, and/or sharing of markets or sources of supply are not excluded from the application of the prohibition under Article 9, even if the *de minimis* threshold applies.

### 3.1.3 Exemptions

Horizontal or vertical agreements, where the aggregate share of the participating undertakings in the market/s of the goods and services which form the subject

matter of the agreement exceeds the *de minimis* thresholds, fall within the scope of Article 9 and will be considered prohibited. The PCA provides that these agreements are null and void by operation of law.

Such agreements, decisions or concerted practices may not be effected unless they are exempted, either by way of an individual exemption decision of the CPC, or automatically, based on a block exemption decision issued by the CPC.

An exemption from the prohibition may be granted with respect to agreements, decisions or concerted practices, which contribute to increasing or improving the production of goods and the provision of services or promote technical and economic progress, while ensuring a fair share of the resulting benefits to the consumers, and which do not:

- impose on the relevant undertakings restrictions which are not indispensable to the attainment of the objectives set, and
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the relevant market.

The CPC may also exempt from the prohibition agreements, decisions and concerted practices of small and medium-sized enterprises, which lead to enhancement of their competitiveness.

At the time of writing the possibility for exemption is still applied only after a decision of the CPC is issued, allowing such exemption. Therefore two forms of exemption exist under Bulgarian law – individual exemption, whereby the CPC, based on the above rules, grants an exemption with respect to a specific agreement, decision or concerted practice, or a block exemption, applying to a category of agreements, decisions or concerted practices.

#### 3.1.3.1 Individual Exemptions

Undertakings may (but are not obliged to) notify to the CPC the existence of agreements, decisions or concerted practices which may fall within the prohibition of Article 9, within 30 days after the day of their conclusion, adoption or application. The notification is suspensory – the agreements, decisions or concerted practices may not be effected during the period of the investigation.

The notification should contain information about the participating undertakings, the legal form of the agreement or decision, or the type of concerted practice, and the overall share of the participating undertakings in the relevant market.

Within two months after receipt of the notification, the CPC must issue a decision declaring that no grounds exist for the application of the prohibition, or issue a prohibition of the agreement, decision or concerted practice or exempt the relevant agreement from the prohibition. Exemption may be granted subject to conditions and obligations.

The PCA grants the CPC the power to oversee the implementation of the exempted agreement and to withdraw the exemption, should there be a significant change of the facts, a breach of conditions or non-fulfilment of obligations or

incorrect or misleading information having been provided during the investigation leading to the exemption, or an abuse by the parties of the license granted with the exemption decision.

It should be noted that in recent years individual exemptions have been requested but are rarely granted. This is, perhaps, understandable given the extension of the system of block exemptions, which covers the great majority of agreements. The CPC has recently relaxed its approach on issuing comfort letters with respect to agreements that do not fall within the prohibition of Article 9, thereby relieving undertakings of the burden of filing a full notification in cases where they are in doubt as to whether the agreement, decision or concerted practice they intend to enter into, falls within the scope of the prohibition. Such comfort letters, however, are not issued in cases within the scope of Article 9, where the full procedure of notification and decision of the CPC is required.

### 3.1.3.2 Block Exemptions

The CPC has the power to adopt decisions declaring that the prohibition under Article 9 will not apply to certain categories of agreements which satisfy the requirements for exemption listed above. The CPC has adopted the following decisions on block exemptions:

*Vertical Agreements*<sup>2</sup> – agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, relating to the conditions under which the parties may purchase, sell or resell certain goods or services.

This block exemption also covers non-reciprocal vertical agreements where:

- the buyer has a total annual turnover not exceeding BGN 15 million;
- the supplier is a manufacturer and a distributor of goods, whereas the buyer is a distributor not manufacturing goods competing with the contract goods;
- or
- the supplier is a provider of services at several levels of trade, whereas the buyer does not provide competing services at the level of trade where it purchases the contract services.

*Specialization Agreements*<sup>3</sup> – agreements entered into between two or more undertakings which relate to the conditions under which those undertakings specialize in the production of products. These are:

2. Decision No. 44 of 10 April 2001 on block exemption from the prohibition under Art. 9 (1) of the Protection of Competition Act of certain categories of agreements when they correspond to the requirements under Art. 13(1) of the same Act.
3. Decision No. 118 of 8 July 2003 on block exemption from the prohibition under Art. 9 (1) of the Protection of Competition Act of certain categories of specialization agreements when they correspond to the requirements under Art. 13(1) of the same Act.

- the unilateral specialization agreements, by virtue of which one party agrees to cease production of certain products or to refrain from producing those products and to purchase them from a competing undertaking, while the competing undertaking agrees to produce and supply those products; or
- the reciprocal specialization agreements, by virtue of which two or more parties agree on a reciprocal basis to cease or refrain from producing different products and to purchase such products from the other parties who agree to supply them; or
- the joint production agreements, by virtue of which two or more parties agree to produce certain products jointly.

*Research and Development Agreements*<sup>4</sup> – agreements entered into between two or more undertakings which relate to the conditions under which those undertakings pursue:

- joint research and development of products or processes and joint exploitation of the results of such research and development;
- joint exploitation of the results of joint research and development of products or processes carried out pursuant to a prior agreement between the same parties; or
- joint research and development of products or processes but excluding joint exploitation of the results.

*Motor Vehicle Vertical agreements*<sup>5</sup> – relating to conditions under which the parties may purchase, sell or resell new motor vehicles or spare parts for motor vehicles or provide repair and maintenance services for motor vehicles.

This block exemption also covers vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are distributors of motor vehicles or spare parts for motor vehicles or repairers and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding BGN 100 million.

Vertical Agreements dealing with intellectual property rights will also benefit from the motor vehicle block exemption. In particular this will include agreements containing provisions which relate to the assignment to or use by the buyer of intellectual property rights, provided that such provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption will apply on condition that such provisions do not contain restrictions of competition relating to

4. Decision No. 119 of 8 July 2003 on block exemption from the prohibition under Art. 9 (1) of the Protection of Competition Act of certain categories of research and development agreements when they correspond to the requirements under Art. 13 (1) PCA.
5. Decision No. 221 of 29 July 2004 on block exemption from the prohibition under Art. 9 (1) of the Protection of Competition Act of certain categories of vertical agreements and concerted practices in the motor vehicle sector when they correspond to the requirements under Art. 13 (1) PCA.

the contract goods or services having the same object or effect as vertical restraints which are not exempted under the decision issued by the CPC.

Non-reciprocal vertical agreements are also covered by the block exemption where:

- the buyer has a total annual turnover not exceeding BGN 150 million; or
- the supplier is a manufacturer and a distributor of goods, whereas the buyer is a distributor not manufacturing goods competing with the contract goods; or
- the supplier is a provider of services at several levels of trade, whereas the buyer does not provide competing services at the level of trade where it purchases the contract services.

The decisions on block exemptions lay down the conditions under which the relevant categories of agreements and concerted practices may benefit from the exemption. The block exemptions closely follow the analogous exemptions provided for under Community Law. The CPC has pledged to be guided by the block exemptions adopted by the European Commission, where categories of agreements and concerted practices are exempt under Community Law, but do not benefit from a block exemption under Bulgarian law.

### 3.1.4 Exclusions

Please *see* Section 3.1.2. *above*.

### 3.1.5 Guidance Available

The CPC has not issued its own guidelines on the application of rules on cartels and prohibited agreements, other than the general guidelines contained in the Methodology on the Conduct of Investigation and on Determining the Market Position of Undertakings in the Relevant Market, and the Methodology on Determining the Amount of Fines and Monetary Sanctions under the Protection of Competition Act. Nevertheless it has readily taken guidance from the notices and guidelines issued by the European Commission in the area of prohibited agreements, decisions and concerted practices.

## 3.2 ABUSES OF THE DOMINANT POSITION

### 3.2.1 Legislative Provisions

Bulgarian law (Article 18 of the PCA) defines abuse of dominance as actions of undertakings enjoying a monopoly or dominant position, as well as the actions of two or more undertakings enjoying a collective dominant position that have as their object or effect the prevention, restriction or distortion of competition, and/or

impairing consumers' interests. Abuse of dominance is prohibited. The provision follows to a significant extent the provision of Article 82 EC.

Examples of abuse of dominance include:

- imposing directly or indirectly purchase or selling prices or other unfair trading conditions;
- limiting production, trade and technical development to the prejudice of consumers;
- applying dissimilar conditions to the same type of contracts with regard to certain parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other party of supplementary obligations or 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 the performance thereof;
- unjustified termination of established long-term trade relations or unjustified refusal to enter into a contract when the capacity for production or supply is available.

### 3.2.2 Assessing Dominance

The PCA defines dominance as the ability, in view of an undertaking's market share, financial resources, possibilities for access to the market, level of technology and economic relations with other undertakings, to impede competition in the relevant market, since it is independent from its competitors, suppliers or buyers. These are the main factors against which dominance will be assessed.

Article 17 of the PCA creates a presumption of dominance where the market share of an undertaking is higher than 35 per cent of the relevant market. This presumption is not absolute and may be rebutted if it is proved that the undertaking is not independent of its competitors, suppliers or buyers. However the presumption shifts the burden of providing evidence that in spite of its market share it is not independent of its competitors, suppliers and buyers, to the party which claims that dominance does not exist:

The Methodology of the Conduct of Investigation and Determining the Market Position of Undertakings provides that the existence of single dominance must be assumed where the undertaking enjoys a share exceeding 35 per cent of the relevant market, and collective dominance may be assumed where a group of undertakings enjoy a share exceeding 50 per cent of the relevant market. In the Methodology the CPC states that market dynamics should be taken into account when assessing market shares – thus in dynamically changing markets an undertaking enjoying a high market share may not be dominant, since such share may be temporary, i.e. existing only until the entry of new competitors. The CPC assumes that a market share of 70 per cent maintained for a sufficiently prolonged period of time is sufficient evidence of the existence of dominance. A market share between 20 per cent and 70 per cent may be evidence that an undertaking

is dominant. A market share below 20 per cent cannot ordinarily give rise to questions of dominance.

Additional factors to be taken into account are the correlation between the shares of the market leader and those of its competitors, potential competition arising out of excess capacity, stability of the market share over a prolonged period of time, market share dynamics over a period of time and the existence of entry barriers.

Further points to be analysed include the existence of a technological advantage over competitors; commercial advantages, such as a well known trademark or a well organized distribution network; significant production capacity and investment capabilities in comparison to competitors; advantages in access to raw materials, financial resources and ability to spread risk over other production activities.

### 3.3 PENALTIES FOR CARTEL BEHAVIOUR AND ABUSE OF A DOMINANT POSITION

#### 3.3.1 Civil Penalties

In cases of cartel behaviour or abuse of dominance the CPC has the power to impose fines of BGN 5,000 to BGN 300,000 for a first time violation, and of BGN 100,000 to BGN 500,000 for a repeated violation or failure to honour an issued decision of the CPC (including a decision ordering the discontinuation of prohibited or abusive behaviour, or attaching conditions and obligations to an exemption decision). In addition the CPC can order the termination of violations under Arts. 9 or 18.

Bulgarian law does not provide the possibility of preliminary or interim relief in respect of competition violations. Nevertheless in view of the relatively short (two months) period during which an investigation must be finalized, such relief may not be absolutely necessary.

#### 3.3.2 Criminal Penalties

At this time no criminal penalties are available for cartel behaviour or abuse of dominance violations in Bulgaria.

## 4 ENFORCEMENT AND INVESTIGATION

### 4.1 POWERS OF INVESTIGATION

Under the amendments to the PCA in 2003, the CPC was given broad power to investigate and collect evidence including the right to enter premises and seize the requisite documents and information carriers. The CPC has gone further by

issuing rules of procedure for searches and seizures, as well as the collection of oral evidence under Article 41a of the Protection of Competition Act, but at the time of writing, they are yet to be applied in practice. Rather it has opted for the softer approach of investigating by means of sector enquiries into markets in which concern exists over cartel behaviour or abusive dominance practices. However these sector enquiries have not yet produced specific action against infringers of competition rules.

The investigative powers of the CPC exist only with respect to investigations of violations under Article 9 (prohibited agreements, decisions and concerted practices) or Article 18 (abuse of dominance). Where there is the possibility that any evidence of major significance to the investigation can be concealed or withheld by the undertaking, the evidence is collected by way of:

- search of premises and/or vehicles used for the business activity of the undertaking, or the site where accounting, commercial and other documents are kept;
- seizure of copies of or extracts from commercial correspondence and other documents, accounts or business books, including records on computer information carriers;
- collection of oral statements.

In principle the CPC should collect only copies of the relevant evidence but where it is not possible to do this, then originals can be collected.

Searches and seizures may be conducted following an order by a district judge at the seat of the undertaking, in cases where sufficient grounds are deemed to exist to assume that material relevant to the proceedings is at the premises or in the vehicle. The court order will be issued based on a request by the chairman of the CPC. The order may be appealed within three days after being issued, but this will not stop its execution, and will likely not prevent the conduct of the search and seizure.

The search and seizure must be conducted by the reporting member of the CPC, who acts on the case in the presence of:

- the person who uses the premises or vehicle or its representatives; and
- independent witnesses.

The CPC may enlist the support of the police during searches and seizures. Copies of evidence collected must be certified by the person who uses the premises or vehicle or his representatives and by the member of the CPC who conducts the search and seizure. If the former refuses to certify the copies, the independent witnesses may be requested to do this instead.

During the collection of oral statements, both within the framework of an investigative procedure and during a hearing at a session of the CPC, individuals cannot refuse to testify on the grounds of privilege with respect to production, trade or other secrets protected by law, except where the obligation relates to classified information, in which case the procedure under the Classified Information Act should be followed (State Gazette Issue 45 of 2002, as amended).

## 4.2 LENIENCY PROGRAMME

The PCA has given the CPC the power in cases of Article 9 violations (prohibited agreements, decisions and concerted practices, to reduce the fine imposed on the violating undertaking, where the undertaking voluntarily provides, during the course of the investigation, evidence essential to establish the fact of the violation, and where, by the time such evidence is provided, the undertaking has ceased its involvement in the prohibited agreement, decision or concerted practice.

The fines can be reduced from 30 to 50 per cent of the limits provided under the PCA for the first undertaking that has provided such crucial evidence, from 20 to 30 per cent for the second undertaking providing such evidence and from 10 to 20 per cent for the third undertaking providing such evidence.

According to the Methodology of the CPC the 'first undertaking' is the first one providing evidence after the evidence of the undertaking whose information initiated the proceeding, or, where the proceeding was initiated on the CPC's own initiative, the first undertaking providing evidence after the initiation of the proceeding.

The CPC can, moreover, fully exempt an undertaking from being fined for a violation of Article 9, if such undertaking, being a party to the relevant prohibited agreement, decision or concerted practice provides, before the other participants, evidence, which at the discretion of the CPC constitutes sufficient grounds for the initiation of proceedings in respect of the violation.

Such exemption would be permissible, where:

- at the time the evidence was provided, the CPC did not have sufficient information for the institution of the proceeding;
- the undertaking effectively cooperates with the Commission during the entire investigation;
- at the time the evidence was provided the undertaking had discontinued its participation in the agreement, decision or concerted practice and was not coercing other undertakings to participate in it.

The exemption from fines is available only to the first 'whistle blower.' The CPC's Methodology provides guidance on the correct recording of the moment that evidence was provided. The reduction of fines or exemption from sanctions is made only with the final decision of the CPC on the case.

## 4.3 COMPLAINTS AND THIRD-PARTY RIGHTS

Proceedings before the CPC can be initiated pursuant to an application (complaint) by an interested party, a notification requesting clearance, or on the CPC's own initiative.

Third-party complainants have full rights to participate in the proceedings. They can provide evidence and make submissions on matters of law and fact. They have the right to review the case file. They further have the right to

be summoned to the hearings of the CPC at which the case will be reviewed, and give oral evidence and plead on the substance. Finally they have the right to appeal to the courts against decisions issued and actions taken during the proceedings.

## 4.4 MARKET INVESTIGATIONS AND SECTOR ENQUIRIES

The PCA has given to the CPC the power to conduct Sector Enquiries of relevant markets. When conducting Sector Enquiries the CPC has the power to request and receive information and evidence, and officials of undertakings are under an obligation to assist the CPC in the exercise of its powers, by providing access to premises, giving written and oral statements, submitting documents and other information carriers.

So far the CPC has conducted Sector Enquiries in the sectors of electricity, thermal energy, wheat, and pharmaceuticals.

## 4.5 APPEALING A DECISION OF THE COMPETITION AUTHORITY

The decisions of the CPC can be appealed by the parties to the proceedings within 14 days after being notified that a decision with the reasons therefore has been prepared. Decisions declaring that a concentration will not occur or clearing a notified concentration are published in the Bulgarian *State Gazette* and can be appealed by the parties to the proceedings, as well as by any interested third-party, even if such third-party was not a party to the proceedings. Interested parties in the latter case are considered to include competitors or organizations of competitors.

Judicial review of the CPC's decisions is conducted by the Supreme Administrative Court, acting in a three member panel. The judgment of the three member panel can be subject to cassational appeal before the same court acting in a five member panel. The judgment of the five member panel is final and cannot be appealed further.

## 5 SUBSTANTIVE LAW RELATING TO MERGERS

## 5.1 THRESHOLDS

Under the PCA a concentration is defined as the merger of two or more independent undertakings; or a case where one or more persons, already controlling one undertaking, acquire, whether by purchase of securities, shares or assets, by contract or by any other means, direct or indirect control of the whole or part of one or more undertakings; or the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity

A concentration is not considered to be present where:

- (a) banking or financial institutions or insurance companies, the normal activities of which include transactions with securities for their own account or for the account of others, hold on a temporary basis securities of a certain undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking, or provided that they exercise such voting rights only with a view to preparing the disposal of those securities, which should take place within one year of their date of acquisition; or
- (b) control is acquired by a person, which according to the applicable law discharges certain functions, related to the liquidation or the declaration of bankruptcy of the undertaking; or
- (c) the acquisition of control is carried out by financial holding companies, provided however that the control acquired by the holding is exercised only to maintain the full value of the capital invested, and not to determine directly or indirectly the competitive conduct of those undertakings in which the holding participates.

The parties to a concentration will be under an obligation to submit advance notification to the CPC of their intention to accomplish a concentration, if the combined aggregate turnover for the latest complete financial year of the participating undertakings exceeds BGN 15 million in the relevant market in the territory of Bulgaria.

According to the methodology adopted by the CPC, the turnover for the purposes of the calculation of the threshold should include the net income from sales, but should exclude indirect taxes, discounts and income from intra-group sales. For undertakings, established outside the country, the relevant turnover should include income from the products sold and services provided to customers in Bulgaria. If the concentration relates to parts of an undertaking, only the turnover relating to such part should be taken into account.

The notification threshold in cases where banks and financial institutions participate in a concentration, will be assessed by reference to their aggregate income (following deduction of tax) as per the financial statements for the latest complete financial year, and as regards insurance companies, the gross insurance premiums written, following the deduction of all taxes, charges and imposts provided by law should be used when assessing the notification threshold.

## 5.2 NOTIFICATION

A notification should be submitted before the concentration is completed, provided the notification thresholds are met. The parties to a transaction may submit a notification where they require certainty on whether the transaction they intend to accomplish will constitute a notifiable concentration.

The parties are under an obligation to notify their intention to accomplish a concentration. The ability to notify is not linked to the existence of a legally binding document, but the CPC would normally expect to receive a document outlining the terms of the transaction.

All legal and factual acts, relating to the planned concentration, are prohibited as of the moment the notification is submitted until a clearance decision is issued.

The notification should contain information regarding:

- (a) the participants;
- (b) the nature and legal form of the concentration;
- (c) the products and services to which the concentration relates;
- (d) the undertakings controlled by the participants in the concentration;
- (e) the combined market share and the aggregate turnover of the participants in the concentration;
- (f) a list of the five biggest competitors, suppliers and buyers of the participants.

The standard form of notification, adopted by the CPC, requires certain additional information and documents.

## 5.3 MERGER FEES

A simple filing fee of BGN 2,000 should be paid before submitting the notification. Where a notifiable concentration is cleared by the CPC a proportional clearance fee is determined in the clearance decision, which is paid in addition to the filing fee. The clearance fee is equal to 0.1 per cent of the combined aggregate turnover of the undertakings concerned in Bulgaria for the previous financial year, but cannot exceed BGN 60,000.

## 5.4 SUBSTANTIVE TEST

After the investigation conducted by the staff of the CPC is completed, the panel of the CPC should adopt a decision by which it:

- (a) finds that the transaction is not subject to notification and clearance; or
- (b) permits the concentration; or
- (c) begins an extended three-month investigation; or
- (d) prohibits the concentration if the transaction would lead to the creation or strengthening of a dominant position, as a result of which effective competition will be significantly impeded in the relevant market in Bulgaria.

A concentration may still not be opposed, even though it will create or strengthen dominant position as a result of which effective competition will be significantly impeded, if it aims at:

- (a) modernizing production and the economy as a whole;
- (b) bettering market structures;
- (c) attracting investments;
- (d) creating positions of employment;
- (e) better satisfaction of the interests of consumers, and

the positive consequences predominate over the negative impact on competition on the relevant market.

The CPC may attach conditions and obligations to a clearance decision.

#### 5.5 TIMETABLE FOR NOTIFICATION

There are no set periods for submission, but taking into account the normal periods of investigation the parties should allow at least 45 days between the date of submission and the planned date on which the transaction will be completed.

After the notification is declared complete, the CPC conducts an investigation of the notified transaction within a period of one month. The failure to issue a decision within such period is not considered to constitute clearance of the concentration. If the transaction presents particular difficulties to the investigation, it may take longer than the prescribed one-month period.

#### 5.6 PENALTIES FOR NON-COMPLIANCE

In cases where a notifiable concentration was consummated in the absence of a clearance decision the CPC has the power to impose sanctions of BGN 5,000 to BGN 300,000 for a first time violation, and of BGN 100,000 to BGN 500,000 in the case of a repeated violation.

In cases of failure to act in accordance with the CPC decision, both with respect to completing a concentration prohibited by the CPC and with respect to failing to comply with conditions and obligations attached to a clearance decision, the CPC has the power to impose sanctions of BGN 100,000 to BGN 500,000.

In addition the CPC has the power to impose other appropriate restitution measures intended to restore the position of the undertakings concerned on the relevant market prior to the concentration, including ordering the combined capitals, shares and assets to be demerged and joint control to be discontinued.

#### 5.7 APPEALS AGAINST MERGER DECISIONS

Clearance decisions of the CPC, which either declare that a transaction does not represent a notifiable concentration, or declaring that a concentration will not be opposed, are subject to publication in the Bulgarian *State Gazette* and can be appealed within 14 days following the publication by the parties to the proceed-

ings, as well as by any interested third-party. An interested third-party that can appeal a clearance decision is considered any person, undertaking or association whose interests may be affected by a violation of the law (i.e. competitors or organizations of competitors). The notifying party may appeal a decision by which the CPC prohibits a concentration within 14 days after a notice of the decision is received.

#### 5.8 MERGER RULES APPLICABLE TO SPECIFIC SECTORS (E.G. MEDIA, NEWSPAPERS, FILM DISTRIBUTION SECTOR, ETC)

There are no specific merger rules for particular sector in Bulgaria.

#### 6 PRIVATE ENFORCEMENT FOR DAMAGES BEFORE NATIONAL COURTS

Bulgaria is yet to see any true private enforcement based on competition law infringements. This is perhaps due to the fact the procedure before the CPC gives sufficient opportunity for aggrieved parties to initiate and participate in the proceedings (*see* Section 4.3. *above*), and provides resolution within a relatively short period of time, whereas enforcement via the civil courts will normally extend over several years and is unlikely to provide quick remedies to competition violations. At the same time public awareness of the importance of competition rules is growing and we are certain to see private enforcement of competition cases for damages in the near future.

#### 7 CONCLUSION

Bulgarian competition law and practice has taken its first steps over the last fifteen years, helped to a significant extent by its alignment with Community Law and the case-law of the European Commission of the European Court of Justice. This has been a gradual learning process, both on the part of the competition authority, and on the part of legal professionals, the courts and business. We have seen over recent years, and are bound to continue to see, competition cases and analyses of ever increasing complexity and sophistication. At the same time the Bulgarian competition community is faced with the challenge of directly applying Community Law following Bulgaria's imminent accession. This means that competition law will have an ever increasing importance within the framework of business law in Bulgaria, and undertakings will be ever more active in pursuing their rights and interests under competition rules.