

Bulgaria: Nurts Digital EAD and Bulgarian National Television Avoids Antitrust Fine

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On 13.03.2018 the Bulgarian Commission for Protection of Competition ("BCPC") published a decision finding that the Bulgarian National Television ("BNT") and Nurts Digital EAD – a company operating in the sector of construction of networks and facilities in the TMT sector ("Nurts") did not commit a breach of competition law. The BCPC was seized upon a complaint by First Digital EAD ("First") – a broadcaster of radio and television programs of public operators. As at the date of the complaint, the only activity of First was broadcasting of the BNT channels via the electronic communications network for terrestrial digital radio and television broadcasting.

First argued that BNT and Nurts had concluded a prohibited agreement aiming to exclude First as competitor of Nurts and that Nurts abused its dominant position by refusing to grant access to Nurts' infrastructure and the services related to the use of that infrastructure.

The relationships between the parties

Nurts and First had an agreement for provision of an electronic information service, i.e. broadcasting via an electronic communications network for terrestrial digital broadcasting.

First and BNT had an agreement for broadcasting of TV programs via electronic communication network for terrestrial digital radio broadcasting.

Allegations for prohibited agreement

As from December 2015 until the date of the complaint, BNT and Nurts concluded numerous assignment agreements by virtue of which BNT acquired all receivables of Nurts towards First. As a result, BNT set off these receivables with First's obligations towards BNT. First claims that out of the set offs there was a positive difference in favour of First which as at the date of the complaint had not been paid by BNT. According to First, the non-payment of the positive interest was a tool used by Nurts and BNT for exclusion of First as a competitor of Nurts.

Allegations for abuse of dominance

In its complaint, First states that Nurts informed it about future termination of provision of all services under the agreement concluded between Nurts and First. Nurts' argument for termination of the provision of the services was the regular non-performance of First's pecuniary obligations under the agreement. In First's view, this behaviour represents refusal to provide a service and constitutes abuse of Nurts' dominant position on the market (96.2% share on the market for provision of access to facilities (networks) for digital distribution of TV programs as well as of services necessary for the use of the facilities on the territory of the Republic of Bulgaria).

The markets

The BCPC defined two relevant markets for the purposes of the proceedings, i.e.

- The market for provision of access to facilities (network) for digital broadcasting of TV programs as well as of services necessary for the use of the facilities on the territory of the Republic of Bulgaria;
- The market for digital terrestrial distribution of the public operator – BNT on the territory of the Republic of Bulgaria.

The decision of the BCPC

Following the analysis of the relationships between the parties involved in the proceedings, the BCPC ruled that:

- There is no prohibited horizontal agreement between Nurts and BNT because the undertakings do not operate on the same product market. BNT is the national public provider of audio-visual services, conducting TV activities, whereas Nurts performs activity of terrestrial digital broadcasting of TV programs;
- There is no prohibited vertical agreement or concerted practice between Nurts and BNT. Pursuant to the BCPC the assignment agreements are permissible agreements under Bulgarian competition law and in the case at hand, they do not aim to exclude First from the market but rather to settle the pecuniary relationships between the three undertakings.

The BCPC took into consideration the commercial relationship between BNT and Nurts as well. The BCPC, in a declarative manner, accepted that the memorandum of understanding and the agreement for broadcasting of TV programs via electronic-notification system for terrestrial digital radio broadcasting between Nurts and BNT do not constitute a prohibited vertical agreement or a concerted practice. No details related to the memorandum and the agreement are given.

The BCPC considered that Nurts had a 96.2% market share on the market for provision of access to facilities (networks) for digital distribution of TV programs as well as of services necessary for the use of the facilities on the territory of the Republic of Bulgaria, i.e. the company has dominant position on the relevant market.

However, the BCPC ruled that the unilateral behaviour of Nurts, i.e. the intention to terminate the provision of the services under the agreement with First, does not constitute an abuse of Nurts' dominant position. The behaviour of Nurts was commercially reasonable and the refusal to continue granting access to its service was justified by the regular non-performance on behalf of First. What is more, the BCPC accepted that Nurts' took all possible measures in order not to terminate its relationship with First, e.g. the assignment agreements were seen as an attempt by Nurts to remedy the unpleasant financial situation of First. In BCPC's view, the assignments helped First to settle its relationships with both Nurts and BNT. On one side, Nurts assigned its receivables to BNT which excepted First from paying to Nurts the price of the provided services. On the other side, BNT was able to set off its obligations towards First. At the end of the day, pursuant to the BCPC First pecuniary obligations were settled. As a consequence, BCPC concluded that Nurts did not abuse its dominant position. Quite the opposite – the company tried to help to its business partner by all means admissible in such a situation.

Conclusion

The decision is of importance since it provides product and geographic definitions in the TV broadcasting sector in Bulgaria. Second, it reveals BCPC's view on BNT as an undertaking, i.e. the commission accepted that BNT, despite its status of national television, can act as an undertaking under the Bulgarian Competition Protection Act. Third, the interpretation of such a standard contractual situation between three companies under competition law is also important for the Bulgarian practitioners.

What the decision is missing is:

- deeper analysis of the memorandum of understanding and the agreement between Nurts and BNT;
- analysis of the BNT's intervention in the relationship between Nurts and First;
- analysis of the fact that after termination of the relationship with First, the latter was substituted by Nurts itself;
- taking into consideration that First's only client was BNT;
- comment on the non-payment of the positive difference out of the set-offs by BNT to Nurts;
- comment on the system of relationships and the effect of parties' behaviour in their complexity and in light of the final result out of the situation.