

Kluwer Competition Law Blog

The Bulgarian Competition Authority Settles an Alleged Cartel Case

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On 19 July 2012 the Bulgarian Commission on Protection of Competition (“CPC”) handed down a commitments decision and closed an investigation against six retailers for alleged horizontal coordination of their pricing and marketing policy (the “Commitments Decision”). This post highlights some issues and policy concerns stemming from the Commitments Decision and the preceding statement of objections.

Background

The CPC launched investigation in 2009 and on 3 February 2011 issued a statement of objections. The authority based its allegations exclusively on the following types of provisions present in the supply agreements of the retailers:

- Most favoured customer clauses (“MFC”) pursuant to which a supplier is obliged to extend to the retailer a reduction in the supply price, which has been offered to another retailer;
- Product promotion exclusivity clauses (“PPE”), which prevent suppliers to launch simultaneous promotions of one and the same product in different retailers;
- Access charge clauses (clauses pursuant to which suppliers make payments for listing of products and making shelf space available by a retailer); and
- Clauses for reporting of net supply prices, which oblige suppliers to report to the retailer a lower net supply price granted to another retailer.

Each of the retailers had some but not all of the above provisions in its supply agreements while none of the above clauses were present in the supply agreements of all retailers. On that basis the CPC formulated the following specific objections:

- (i) through the combined application of the MFC and the PPE clauses the retailers exchanged information through their suppliers about the future marketing and promotional policy of their competitors;
- (ii) the combined application of the MFC clause with clauses relating to supply prices and clauses relating to the level and amount of access fees resulted in coordinated price fixing;

(iii) the parallel existence of the MFC and PPE clauses in the supply agreements resulted in horizontal coordination of prices of goods in promotion.

Eventually, all six retailers offered to abolish MFC and PPE clauses from their agreements with suppliers. The Commitments Decision, which was published in a 116 page non-confidential version, substantially reproduced the statement of objections, set out the settlement proposals of the retailers and provided brief arguments in support of the proposition that the proposed commitments were fit to alleviate its competition concerns.

Comments

To the best of my knowledge the statement of objections is unique in that the horizontal theory of harm built by the CPC was based exclusively on clauses contained in vertical agreements between the retailers and their suppliers. It did not allege any horizontal communication or exchange of information among the concerned retailers, thus inviting questions as to whether it had met the standard of proof required in cartel cases. The theory applied by the CPC is even more vulnerable to criticism because some of the vertical agreements, which were singled out, were block exempted and their use as evidence of a horizontal cartel raises policy concerns about legal certainty in competition law enforcement. It appears that the CPC considered that the existence and implementation of the suspect clauses in agreements between the retailers and their suppliers had “network effects” that had allegedly increased the transparency on the supply market, and in effect had allowed the retailers to obtain current information about the supply costs and planned promotional activities of the competitors. However, instead of dealing with those concerns under the framework of the applicable vertical block exemption regulation (by either declaring that the block exemption shall not apply to the suspect clauses or by withdrawing the benefit of the block exemption) the CPC brought cartel charges.

Against this backdrop, the adoption of the Commitments Decision raises further questions about the handling of the case by the CPC. By way of background, Bulgaria introduced a framework for commitments settlements with the adoption of the 2008 Law on Protection of Competition and the 2010 Guidelines on Commitment Decisions (the “Guidelines”). Since then settlements are not rare in Bulgaria however, the Commitments Decision is the first one involving allegations of the existence of a cartel. The LPC and the Guidelines do not allow the adoption of commitments in cases of cartels and hard core horizontal restraints, however in settling the case the CPC did not provide any meaningful explanation to reconcile the apparent contradiction between the law and its acceptance of the proposed commitments. The authority merely stated that the alleged horizontal coordination did not constitute a hard core violation of competition law and the adoption of commitments was fit to redress competition concerns. Thus, without any further elaboration on this point, the position of the CPC undermined its own cartel allegations.

Another point to note is that the scope of the commitments did not address all allegations raised in the statement of objections – concerns stemming from the application of access fees were left outside the scope of the commitments. In that context a strange but telling feature of the settlement was that since it was limited to MFC and PPE clauses and one of the retailers never had such clauses in its supply contracts while another one had abolished those clauses a few years before, the commitments offered by those two retailers were simply limited to a negative undertaking not to introduce MFC and PPE clauses in its supply contracts in the future.

The conclusion which the Commitments Decision invites is that it was a welcome but potentially

damaging way out for the authority from a case where it had a wrong take on the issues at hand. Perhaps, from public relations perspective the CPC may have some short term benefits from the outcome of the investigation. However, in the long run competition enforcement would have benefitted if the authority had dropped the cartel charges and had sought to remedy its concerns through the appropriate competition enforcement procedure.

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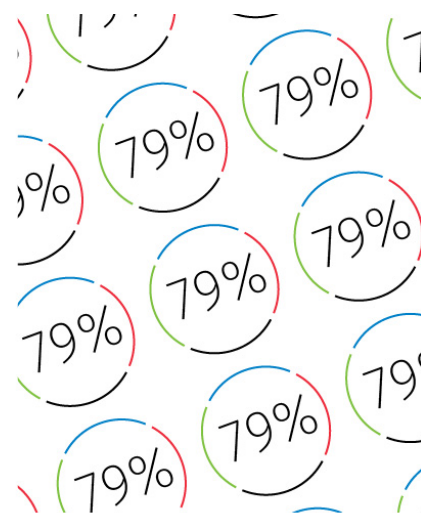
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