

Kluwer Competition Law Blog

Bulgaria: “Significant market power” soon to enter the stage

Anton Petrov (Djingov, Gouginski, Kyutchukov & Velichkov) · Saturday, August 25th, 2012

More than one year ago, in response to complaints from local suppliers alleging abusive practices in the distribution chain of FMCG, the Ministry of Economy set up a Joint Task Group (JTG) to investigate whether legislative intervention was required. The JTG was fast to conclude that competition is distorted due to the existence of undertakings with “significant market power” (SMP) which apply too much pressure on “weak” suppliers. The JTG dismissed without much discussion any soft approaches (as industry self-regulation and dispute settlement procedures) and started deliberating an amendment to the Law on Protection of Competition (LPC).

Over the past year, the JTG circulated for public consultation several proposals for an LPC overhaul. A draft bill was published on the ministry’s website in the middle of June proposing a set of fresh rules on prohibited use of SMP, which would be integrated into the LPC chapter on abusive unilateral behaviour. Later that month, the NCA also published its official opinion, which though critical of the drafting quality, is in support of the core ideas. Thus, it is expected that an amended bill will be soon submitted to Parliament and a law may emerge later this year.

SMP – the “little sibling” of dominance

The latest draft proposes to introduce the concept of SMP in Chapter IV of the LPC as a new category of market position (distinct from monopoly and dominance) that is inherently suspect and may allegedly support anti-competitive behaviour. The definition states that SMP is held by an undertaking having no dominant position, which nevertheless may impose unilaterally unfair contract terms on its dependent suppliers or customers and thus may distort competition on the relevant market. The existence of SMP is to be determined following analysis of the market position of the undertaking concerned, with regard to its market share, financial resources, technological development and established relations with other undertakings. The definition is fairly open and the NCA should adopt a separate methodology for SMP analysis.

A major pitfall of the draft is that it attempts to define SMP as something akin to “dominant position” but without “dominance”. A closer comparison of the two concepts would reveal that a „dominant position” is characteristic of an undertaking, which is independent from its suppliers, competitors and clients, while SMP is attributable to an undertaking, which holds suppliers and clients in a state of dependence. At first glance, these seem to be two different things, but the whole play with antonyms could only create confusion. Where clients are dependent on certain supplier, the same supplier would likely be regarded as independent from its clients. Thus it is unclear where the dividing line between SMP and dominance is.

Different form but the same substance

In addition to the definition, the draft proposes a revision of Art. 21 LPC, which currently contains an open prohibition and an exemplary list of abusive practices for dominant undertakings (similar to Art. 102 TFEU). The idea is to supplement and expand the prohibition to cover both abuse of dominance and abuse of SMP.

The principal and most obvious defect of this legislative approach is that it blurs completely all practical differences between dominance and SMP – although the two concepts are meant to represent different degrees of market power, the types and scope of obligations imposed on the undertakings concerned in both cases would be identical. If this approach materializes in the law, the investigation of dominance would most probably lose much of its practical significance, since it would be sufficient for the NCA to prove that an undertaking falls in the lower category of SMP to establish a violation.

And judging by the official position of the NCA, it seems clear that SMP is actually a stricter national version of dominance. Relying on the second sentence of Art. 3 (2) Regulation 1/2003, the NCA claims that the contemplated SMP rules would be in line with EU competition law. Curiously, that claim is made beside an acknowledgement that the heterogeneity resulting from the soft convergence rule met a lot of criticism in recent years and there are already talks about its amendment and harmonization of unilateral conduct rules throughout the EU.

Mixing antitrust with unfair competition

In addition to the prohibitions “borrowed” from dominance, the draft proposes to impose on SMP undertakings the obligation to refrain from “behaviour in violation of good faith trade practices, which harms or may harm interests of competitors”. Thus, the proposed legislative intervention would also push the debate on SMP into an unfair trading practices type of analysis. Moreover, the reference is extremely open and in practice any type of suspect behaviour can qualify as an infringement. It should be noted that the examples of “bad faith” behaviour provided by the JTG were not regarded until present as “unfair” practices – e.g. differed payment terms, buy-back agreements, restriction on delivery of private label goods, etc. In this respect, the NCA’s opinion is more conservative suggesting preservation of the original list of prohibitions, which in themselves are sufficiently wide.

The effect on established concepts

The adoption of an ambiguous concept of SMP, as currently set out in the published draft, could undermine the established institute of “dominance” and may potentially lead to disharmonious application of EU law. In addition, it could undermine the existing block exemption regime – some behaviour which falls within the scope of safe harbours under the applicable EU (and national) regulations could be regarded as a violation if the relevant market power exceeds the ambiguous SMP threshold. The result would be devaluation of legal certainty, which would negate the principal objective of the block exemption regime.

The draft leaves many issues open, which would need to be answered in implementing regulations adopted by the NCA. But due to the numerous imperfections of the statutory definitions, the NCA would have complete discretion to assess which situations fall within the purview of the prohibition for abuse of SMP and which do not. One may only wonder whether such broad delegation of competence is in line with the fundamental principles of separation of powers.

Certainly it would not enhance transparency of statutory requirements or foreseeability of administrative intervention.

The stated purpose of the published draft bill is to combat unfair practices in the retail sector. However, the rules are sufficiently broad to encompass any industry and every business in Bulgaria. Moreover, with this broad definition almost any undertaking can allegedly have SMP, as long as it has “dependent“ suppliers or customers. Thus, in practice, the contemplated restrictions will turn out to be not a special but universal prohibition, which will cover each and every market in its entirety.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Saturday, August 25th, 2012 at 12:54 pm and is filed under [Source](#):

UNCTAD

“>Dominance

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can skip to the end and leave a response. Pinging is currently not allowed.