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Media Antitrust in Bulgaria – where do we stand after the media sector inquiry?

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By its *Decision ? 717 dated 28 June 2018* the Bulgarian Commission for Protection of Competition (*"the CPC"/"the Commission"*) adopted a sector inquiry of a number of markets within the media sector. The decision contains some intriguing stances by the CPC, especially against the background of its own previous case law or the decisional practice of the European Commission (*"the EC"*). In the present blog post we aim to summarize those key findings, along with some more general insight regarding the broader competition-law environment of the Bulgarian media sector.

The subsections of the present blog post follow the structure of the CPC sector inquiry as per the respective analysed markets.

1. **TV content**

In its sector inquiry the Commission acknowledged the typical EC differentiation between the submarkets of production of captive and non-captive TV programmes. Still, the Commission made the caveat that due to the specifics of the TV industry in Bulgaria such segmentation is not to be directly transposed into the Bulgarian competition-law landscape.

When analysing the market positions of the key players the CPC strangely referred to advertising revenues (being arguably relevant to the TV advertising market but not to the market of TV content as such). Actually, this is only a continuation of its previous case law, where the Commission has persistently (and, in our opinion, erroneously) taken audience shares and/or advertising revenues as market share benchmarks in virtually all markets where TV broadcasters participate. In the authors' opinion, such an approach is profoundly flawed. This is because the TV broadcaster with the largest audience share may well decide, for various reasons (such as possible fear of repealing viewers by airing too many TV ads), not to monetize all or even most of its available TV advertising slots (and instead rely on income from distribution of its channels as the main source of finance). Then, the TV advertising revenues of such a TV broadcaster would be medium to low compared to other TV broadcasters who sell almost their entire available advertising time. If we accept the logic of the CPC, then the TV broadcaster with the largest audience share would still be dominant despite being financially mediocre in terms of advertising revenues. In our opinion such an approach is as absurd as measuring the market share of Coca-Cola based on its social approval instead of its sales performance.

The CPC further noted that TV broadcasters face difficulties when operating on this market because of the obligation to enter into contracts with the dominant Bulgarian collecting societies (Prophon and Musicautor).

2. **Radio services**

Much like its approach to the TV content market, when determining the shares in the radio services market, the CPC once again used ratings instead of other truly relevant benchmarks.

The Commission opined that radio broadcasters also face difficulties when operating on this market because of the obligation to enter into contracts with the dominant Bulgarian collecting societies (Prophon and Musicautor). Notably, the CPC recently sanctioned Musicautor for abuse of dominance upon request of the state-owned Bulgarian National Radio (*CPC Decision ? 404 dated 5 April 2018*, currently under judicial review).

3. **Distribution of radio and TV content**

Although labelled as an analysis of the TV and radio distribution market, this section of the sector inquiry focuses almost entirely on the former, with radio distribution being marginally mentioned from time to time but never profoundly analysed.

Interestingly, the CPC does not distinguish between free-to-air (FTA) and pay-TV markets but defines the product market to encompass all types of TV channels. This approach does not correspond to the understanding of the EC which does distinguish separate products markets for wholesale supply of (i) FTA, (ii) basic Pay-TV and (iii) premium Pay-TV channels, respectively (for a recent example to that effect – see *EC decision in Case M.8665, para. 23*).

With reference to the *EC decision in Case ?. 4521*, the CPC agreed that TV broadcasters and platform (cable/satellite/IPTV) operators are mutually dependent. The Commission went on to underline that platform operators are key for distribution of the TV channels to the audience and for the participation of the TV broadcasters on the TV advertising market.

4. **Print media**

In its media sector inquiry the CPC confirmed its traditional approach (also found in its previous print media sector inquiry from 2013) of defining separate markets for newspapers and magazines due to the different purpose, features and prices thereof. The Commission further separates sport newspapers in a self-contained market in view of their specific subject matter and targeted audience. Additional segmentation resulted in defining separate markets for daily newspapers with national coverage, regional daily newspapers, national newspapers with regional add-ons, weekly newspapers and entertainment daily/weekly newspapers. Importantly, the CPC underlined the unique nature of each and any individual print media, which enables a broader or narrower market definition on a case-by-case basis.

Overall, the Commission found that the print media market is competitive but still characterized by some barriers to entry such as, among others, readers' loyalty and reader reorientation from print media to online information services.

5. **Print media distribution**

The CPC noted that, despite newspaper and magazines being distinct products, the distribution thereof should be viewed as a single market because it is being conducted in an identical manner. Within this market, the Commission logically distinguishes between the wholesale and retail levels as separate markets.

Although the CPC has historically treated the geographic print media distribution markets as local ones (within the confines of a certain town/region), in the sector inquiry it expressly left the issue open for future determination on a case-by-case basis.

6. **Advertising market**

Curiously, for the purposes of its media sector inquiry the CPC underlined that it need not narrowly segment the advertising market depending on the type of media used (TV, radio, print media, etc.). According to the Commission, the market should rather be viewed as a media advertising market in its entirety. This is a considerable departure from the previous case law of the CPC which was on the other end of the spectrum. For instance, in a dominance decision regarding TV advertising, the Commission defined the product market as advertising in FTA TV channels only (i.e. to the exclusion of Pay-TV channels). In the sector inquiry the CPC explained that this former approach was due mainly to the fact that FTA TV channels reach the largest number of viewers. All in all, as a matter of legal certainty the CPC should not extensively deviate from its own decisional practice even though market definition is a "case by case issue".

The Commission confirmed its findings from a previous case that there is no dominant undertaking on the TV advertising market. In an earlier section of the sector inquiry the CPC expressly pointed out that there exists an oligopoly structure between the largest TV broadcasters in Bulgaria. According to the consistent case law of the Commission, the existence of a dominant undertaking in an oligopoly market is highly unlikely.

Importantly, the CPC noted that there is a trend of lower trust in TV advertising to the benefit of online advertising with the latter enjoying steady growth.

7. **Online news and online advertising**

The Commission underlined that online advertising has considerable advantages vis-à-vis traditional forms of advertising in terms of target reach, measurement and greater variety of advertising forms.

Curiously, the sector inquiry points out a Bulgarian operator of websites as the market leader (incl. in terms of online advertising) without any assessment regarding the market positions of Google and Facebook (although the latter two notorious market leaders do operate in Bulgaria as well).

In its conclusion regarding online news, the CPC notes that *"[o]nline news services are being conducted in a digital environment, which on its part excludes the presence and establishment of a dominant player"*. Such an abstract statement could possibly be interpreted to cover also online advertising which would unexpectedly provide safe harbour to Google and Facebook before the Bulgarian competition authority in terms of dominance proceedings. Such an approach literally contradicts the recent EC findings and conclusions concerning digital markets and the leading market operators therein (reference being made to the proceedings against Google and Facebook).

8. **Recommendations of the CPC**

The CPC recommended the initiation of further policy measures for combating the key issue identified with regard to the TV distribution market – the underreporting of subscribers by the platform operators.

As a step to address market concentration issues, the Commission proposed the introduction of a registry containing information regarding the beneficial owners of all media providers and distributors. Apart from transparency, it remains unclear how such a registry would prevent or mitigate market deformations as a result of high market concentration. It is actually the prerogative of the CPC through *ex ante* merger control to prevent the creation of such high market concentration, instead of having a registry declare the latter when the damage is already done.

Last but not least, the CPC noted that self-regulation and co-regulation in the Bulgarian media sector function well and further dialogue would therefore be beneficial for the purpose of broadening their scope.

9. **Impact of the sector inquiry**

The media sector inquiry could have considerable impact on at least two pending merger proceedings. The first one is the acquisition by the Czech PPF group of Nova Broadcasting Group (one of the two largest TV broadcasters in Bulgaria) and Net Info (the market leader in online advertising in Bulgaria according to the sector inquiry). This merger notification is pending before the CPC, whereas the CPC recently started a phase II investigation of the notified transaction. The second one is the acquisition, again by the PPF Group, of the Telenor CEE business, incl. its Bulgarian subsidiary. This merger notification is currently pending before the EC (Case M.8883). Curiously, one of the acquired entities in those two transactions – Nova Broadcasting Group, pointed out in its reply to the CPC within the sector inquiry proceedings that competition could be affected by vertically integrated undertakings such as A1 Bulgaria (former Mtel) and Vivacom which, besides mobile telecoms, are also satellite TV operators who have their own TV channels. A situation which the PPF Group could find itself in should the two mergers be unconditionally cleared by the CPC and the EC, respectively.

There is also at least one pending antitrust proceeding before the CPC which could be significantly affected by the sector inquiry findings – namely the proceedings launched against Net Info and Nova Broadcasting Group regarding alleged prohibited agreements and/or abuse of dominance.

There are also pending judicial review proceedings regarding decisions of the CPC on alleged abuse of stronger bargaining position by the two largest TV broadcasters in Bulgaria in their relations with some Bulgarian cable operators. In those proceedings one of the key issues are the practices of the TV broadcasters in reaction to the above-mentioned issue of underreporting of subscribers. Now that the CPC has expressly recognized the latter as the main market problem, it is interesting to see how the Bulgarian court is going tackle the very same issues and whether the CPC decisions sanctioning self-regulation regarding number of subscribers are going to be quashed by the court.

Finally, the CPC seems to take the general stance that in the TV and online advertising market there is unlikely to be a dominant player. The future prospects of an abuse of dominance being found on those markets therefore appear to be rather limited.

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