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The biggest Bulgarian telecom operator A1, member of Austria Telekom Group, fined for abuse of stronger bargaining position

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A fine of slightly above EUR 400 000 was imposed to the biggest Bulgarian telecom operator – A1 Bulgaria, member of Telekom Austria Group (“**A1**”) for abuse of stronger bargaining position in its contractual relationship with its former sales representative – Handy Bulgaria (“**Handy**”).

The relationship between the two companies started back in 2005, when Handy started rolling a large store network across the entire country to distribute A1 products, mainly mobile telephone subscription plans and mobile phones. In 2017 the telecom operator decided to terminate the sales representation agreement. Handy, being almost fully dependent by the legal and economic relation with A1, saw this act as abuse of stronger bargaining position in the meaning of Art. 37a of the Bulgarian Competition Protection Act (“**CPA**”). In addition to the claim for the termination of the agreement, Handy arose allegations concerning the imposition of unjustified conditions under the agreements, i.e. unrealistic targets combined with coercion of Handy to divest part of its points of sales to A1 and termination of marketing activities of A1 in Handy’s shops.

The breach under Art. 37a CPA might be seen as specific for Bulgarian competition law. It has been introduced in the CPA in 2015 and is not yet much developed in the case-law of the Bulgarian Commission for Protection of Competition (“**CPC**”). The key procedures are these for A1, BTV (one of the private national TVs in Bulgaria), the pharma company AMGEN and Siemens. The breach basically comprises abuse of a stronger bargaining position under a specific relationship, where the economically weaker party may be or is harmed. The CPC sets a test for analysis when a company is considered in a stronger bargaining position., i.e.:

- The characteristic and the structure of the specific market (defined for the purposes of this breach);
- The characteristic and the structure of the relationship between the two companies;
- The characteristics of the activity of the companies and its scale;
- The possibility for alternative commercial partner, including alternative distribution channels, supply/delivery channels, etc.

First, the CPC had to deal with the period of the breach. As mentioned, Art. 37a was effective as from 24 July 2015, however the relationship between A1 and Handy dated back in 2005. The CPC decided that the relevant period starts in 2015 and finishes on the date of its decision (22 November 2018) and although the agreement between Handy and A1 was signed in 2005, it has

effect also after 25 July 2015 and will be analyzed for the purposes of Art. 37a CPA.

Second, the CPC had to deal with the presence of A1's stronger bargaining position that harms or may harm Handy. In this part, commission's analysis is predominantly economic and comprised:

- Definition of the product and geographic market (market of distribution of telecommunication services on the territory of the Republic of Bulgaria);
- Analysis of the structure of the market (CPC took the net turnover of A1, its position compared with the remaining two telecom companies (Telenor and BTK), the services its offers, etc.);
- The position of A1 and Handy in their contractual relationship (CPC found that Handy was almost fully dependent by A1 as its sales representative only to A1 and along with the presence of a clause prohibiting Handy's cooperation with A1's competitors, the former is seen as economic weaker party);
- Analysis of Handy's possibility to find a partner alternative to A1 (having in mind the prohibition to cooperate with A1's competitors and the limited number of telecom operators in Bulgaria, the CPC found Handy's possibilities to find alternatives to A1 as almost fully limited).

In light of the above criteria, CPC decided that A1 has a "stronger bargaining position" under the sales representation agreement with Handy.

Concerning the harm that is caused or may be cause out of the actions of A1, CPC decided as follows:

- The imposition of unjustified conditions under the agreement, i.e. increase of targets combined with coercion for divestment of point of sales from Handy to A1 and termination of marketing campaigns of A1 in Handy's shops cannot be seen as abuse actions by means of Art. 37a, since Handy agreed to the new targets (marked as confidential information in the decision of the commission), which the CPC does not found as abusive and simultaneously failed to prove in the course of the proceedings before the CPC that A1 coerced it to divest its point of sales to the latter.
- The termination of the sales representation agreement, however, is considered as breach of Art. 37a CPA, since the grounds for termination of the agreement with Handy (marked as confidential information in the decision) are abusive and cause harm to Handy, being the economically weaker party under the agreement with A1. The CPC found that the A1's reference to non-compliance with the targets under the agreement are wrong, since based on the excerpts form the systems of both A1 and Handy, the latter complied systematically with the set targets for performance for 2015, 2016 and 2017 (except for the last trimester of 2017). In addition, the CPC ruled that A1 groundlessly reduces Hady's performance by deduction form its results of the new activations that are terminated or unfinished.

In light of the above factual, legal and economic background and taking into consideration the termination of the business of Handy as result of the terminated agreement with A1, the CPC imposed a sanction to A1 in the amount of BGN 804 340 (approximately EUR 400 000). The decision is subject to appeal before the Supreme Administrative Court within 14 days as from party's notification and as from publication on the webpage of the CPC for any third interested party (who also make seek private damages by means of Art. 105 *et seq* CPA).

The decision was widely reflected by the Bulgarian media and discussed among competition law professionals. The particular interest derives from the fact that A1, being the biggest telecom

company in Bulgaria, is involved, from the fact that termination of a business of sale representative of a telecom company in Bulgaria due to agreement termination by the telecom is not a precedent and from the fact that the decision concerns Art. 37a, which as mentioned, is relatively new and poorly developed in our caselaw. It worth mentioning that this time the CPC conducted relatively structured and detailed factual, legal and economic analysis. The commission also provides a helpful overview on what the test for application of Art. 37a CPA, elaborated by the authority is.

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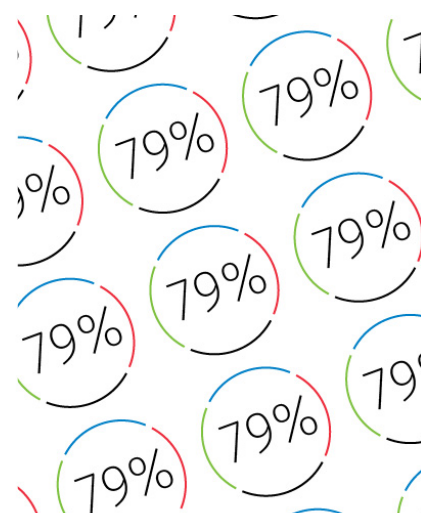
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