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Abuse of Stronger Bargaining Position in Bulgaria – Initial Trends in Judicial Review

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On 24 July 2015 an amendment to the Bulgarian Protection of Competition Act (***"PCA"***) was promulgated, introducing a novel type of infringement – abuse of stronger bargaining position.

Article 37a of the PCA reads as follows:

Paragraph 1: "Any act or omission of an undertaking with a stronger bargaining position, which contravenes good-faith commercial practice and impairs or may impair the interests of the weaker contracting party and the interests of consumers, shall be prohibited. Bad-faith shall be those acts or omissions which have no objective economic justification, such as unjustified refusal to deliver or purchase goods and services, imposing unjustifiably burdensome or discriminatory terms or unjustified termination of commercial relations."

Paragraph 2: "The existence of a stronger bargaining position shall be ascertained in view of the characteristics of the structure of the respective market and the specific legal relationship between the affected undertakings, while taking into account the degree of dependence between them, the nature of their activity and the difference in its scale, the probability of finding an alternative trade partner, including the existence of alternative sources of supply, distribution channels and/or clients."

The Bulgarian Commission on Protection of Competition (***"CPC"/"the Commission"***) has since rendered a number of decisions under Art. 37a PCA, some of which were then appealed.

To date, there have been only four court judgments reviewing decisions of the CPC under Art. 37a PCA. Three of those judgments were rendered in the period between 20 February 2019 and 27 March 2019. In all these three cases the three-member panels (different in each case) of the Supreme Administrative Court (***"SAC"***), acting as first instance in judicial review, annulled the respective CPC decisions.

The purpose of the present post is to provide an overview of the respective court judgments since they arguably contain key takeaways as to how Art. 37a of the PCA must be applied in practice.

1. **Cable operators v. Nova TV**

1.1. **The CPC decision**

In their application to the CPC, three cable operators alleged that the TV broadcaster Nova TV abused its stronger bargaining position by imposing a guaranteed minimum number of subscribers and using unclear methods to determine this number. The CPC found that Nova TV had stronger bargaining position due to the high rating and audience shares of its channels. As to the conduct at issue, the Commission concluded that there was no bad-faith/unjustified conduct by Nova TV since the guaranteed minimum number of subscribers was renegotiable and the methods used to determine this number were clearly formulated in Nova's general terms and conditions. Based on those considerations, the CPC found that no infringements were committed by Nova TV vis-à-vis the applicant cable operators.

1.2. **The SAC judgment**

In its judgment dated 20 February 2019 the SAC disagreed with the definition by the CPC of the relevant market as national and noted that the market is actually regional. The court reproached the Commission for not investigating the presence or absence of alternative sources of supply for the Nova TV channels and how that would influence consumers. According to the court panel, the CPC must have examined the various components of the remuneration due by the cable operators to Nova TV in order to assess the economic justification of the price increases. The SAC disagreed with the conclusion of the CPC that the price was renegotiable, as the actual negotiations led to no renegotiation. Further, the court noted that the CPC failed to analyze the impact on consumers of the conduct at issue.

Based on the above considerations, the SAC annulled the CPC decision and remanded the case to the CPC with mandatory instructions to collect evidence regarding: the relevant regional markets; the possibility for the cable operators to find alternative suppliers for the channels of Nova TV; the good-faith commercial practice for TV distribution contracts by way of comparative analysis of contracts of other TV broadcasters; the price components and changes therein throughout the relevant period (2017-2019); the impact of the price increases between the TV broadcaster and the cable operators on the prices payable by consumers.

2. **Cable operators v. BTV[1] and Nova TV**

2.1. **The CPC decision**

In its decision the CPC found that the two respondent TV broadcasters – BTV and Nova TV, had stronger bargaining position vis-à-vis the four applicant cable operators because of the high rating and audience shares of their respective TV channels. The Commission, based on the wording of BTV's General Terms and Conditions and the contracts with the applicant cable operators, found that BTV had applied unclear methods when determining the actual number of subscribers as basis for the remuneration due to BTV by three of the four cable operators. The CPC thus found three separate infringements by BTV and imposed a sanction of nearly EUR 500,000 for each infringement (i.e., a total of approx. EUR 1,500,000).

2.2. **The SAC judgment**

In its judgment dated 15 March 2019 the three-member court panel of the SAC criticized the CPC

for using rating and audience share data as indicators for market power on the market of wholesale supply of TV channels, whereas those numbers are relevant for another – the TV advertising – market. The court further reproached the unclear finding of the Commission that the applicant cable operators were "small regional operators" despite one of them being even in the national top 8 in terms of number of subscribers. According to the SAC, the CPC failed to analyse the dependence between the TV broadcasters and the cable operators (the latter being the means for the TV broadcasters to reach the targeted audience). Further, the Commission incorrectly viewed the two respondent companies together instead of treating them as mutually interchangeable – and thus alternative – trade partners for the cable operators.

As to the conduct at issue in the proceedings, the court underlined that only negotiations/contracting which occurred after the entry into force of Art. 37a PCA fall within the temporal scope of the latter (as opposed to application/performance of general terms and conditions/contractual provisions which had already been adopted at the date of entry into force of the Art. 37a prohibition). When reviewing the actions of BTV undertaken after July 2015, the SAC found, based on various factual details, that there was no bad-faith/unjustified conduct on behalf of BTV.

For the above reasons, the SAC annulled the CPC decision in its parts whereby the CPC had found and sanctioned abuse of stronger bargaining position by BTV.

3. **Supplier of alcoholic drinks v Kaufland**

3.1. **The CPC decision**

In its application to the CPC, a supplier of low-price alcoholic drinks complained that Kaufland had systematically requested additional bonuses, which had led to reduction of the net supply price and resulted in sales at a loss by the supplier. Further, Kaufland had ultimately terminated the commercial relations with the supplier without objective economic justification.

The CPC adopted a narrow market definition encompassing *"the supply of alcoholic drinks in the low-price segment, distributed in the Kaufland retail chain"*. The Commission decided that Kaufland had stronger bargaining position vis-à-vis the supplier due to the former being part of an international economic group with many outlets and serious investment opportunities. The CPC took into account that a large portion of the supplier's turnover was formed by supplies to Kaufland and stated that the relocation to another trade partner would entail additional costs for the supplier. According to the Commission, Kaufland had unilaterally imposed on the supplier reduction of the supply prices by charging bonuses/discounts with no economic justification and through unclear mechanism to determine the amount thereof. The termination of the commercial relations between the parties was found to be part of an overall bad-faith model of conduct by Kaufland. The CPC concluded that the reduction of supply prices not accompanied by a respective decrease in the prices to consumers harmed consumer interests. The latter were also impaired by the blocking of sales of certain products from the supplier's portfolio, which limited the available product variety.

Based on the above considerations, the CPC found that Kaufland had abused its stronger bargaining position and imposed on Kaufland a sanction of BGN 157,981 (approx. EUR 80,000).

3.2. **The SAC judgment**

In its judgment dated 27 March 2019 the SAC criticized the Commission for its abstract declaration that switching to a different channel of distribution is a process entailing lots of additional costs and time. According to the court, although this stance is theoretically true, such finding must have been made *in concreto* for the applicant. The CPC however had not examined what risky long-term investments the supplier must make in order to switch to another retailer, how the production must be restructured and what impact this would have on the production costs of the applicant supplier. The court concluded that the analysis of the market should have also covered other retail chains apart from Kaufland when deciding on the probability of finding an alternative trade partner. The SAC further underlined that the Commission had not investigated the good-faith commercial practice on the market, whereas it must have established what the customary commercial practice of other retail chains was in order to reach the conclusion that Kaufland's conduct indeed contravened good-faith commercial practice on the relevant market.

Based on the above considerations, the SAC annulled the CPC decision and remanded the case to the CPC with mandatory instructions to conduct an economic analysis of the market of low-price alcoholic drinks sold in retail chains by inquiring into the commercial policies of the retail chains, in order to properly examine the probability of finding an alternative trade partner by the supplier and to establish what exactly the good-faith commercial practice on the market is.

4. **Key takeaways**

Although the above SAC judgments are subject to cassation appeal, they arguably indicate the following initial trends in the judicial review of CPC decisions regarding abuse of stronger bargaining position:

- market definition should be prudently done so as not to define the relevant market too narrowly (as in the Kaufland case) or too broadly (as in the Nova TV case);
- the CPC must apply the Art. 37a prohibition only to negotiations/contracting which have taken place after the entry into force of Art. 37a;
- when examining the alleged contravention of the respective conduct with good-faith commercial practice, the CPC must inquire into the actual practices by other market players – competitors of the respondent undertaking;
- the Commission must thoroughly examine the probability of finding an alternative trade partner based on empirical evidence instead of relying on general theoretical statements of its own;
- conclusions regarding the impact on consumers must also be made on the basis of actual data and not by way of mere assumptions.

After all, the ultimate outcome of the above cases as well as future CPC decisions and court judgments in other proceedings regarding alleged abuse of stronger bargaining position will show whether the aforementioned points would establish themselves as permanent trends in the application of Art. 37a PCA.

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[1] The author has been and is currently representing BTV in this case

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