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Latest Amendments To The Bulgarian Protection Of Competition Act: Three Steps Forward, One Step Back

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The Bulgarian parliament recently adopted a number of significant amendments to the Bulgarian Protection of Competition Act (**PCA**). The amendments transpose into law *Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market* (the **ECN+ Directive**) and *Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain* (the **UTP Directive**). In addition, the previously applicable concept of (cross-sectoral) abuse of a superior bargaining position was abolished and a conceptual shift was introduced in the area of merger control.

1. Transposition of the ECN+ Directive

In line with the requirements of the ECN+ Directive, the amendments to the PCA aim to strengthen the powers of the Commission on Protection of Competition (**CPC**). Now, the CPC may also carry out dawn raids in non-business premises and vehicles, including the homes of company directors, managers and employees, provided that there is reasonable suspicion that relevant business documents of or pertaining to the investigated undertaking are being kept there. In addition, the CPC will be able to impose sanctions on the infringer's controlling entity and on any legal or economic successor of the infringing undertaking, thus preventing liability avoidance by way of mergers and corporate restructurings. Additional rules aim to ensure the impartiality of the CPC and to prevent conflicts of interest. For example, for a period of one year after leaving the CPC, its former employees are prohibited from representing and consulting undertakings in pending proceedings under the PCA. The transposition of other aspects of the Directive concerning the guarantee of sufficient resources for the CPC seems less promising as the adopted rules are of a rather declaratory nature and it remains to be seen how these will be implemented in practice.

2. Transposition of Directive (EU) 2019/633

Further amendments transpose into law the provisions of the UTP Directive that aim to prevent unfair practices in the agricultural and food sector. The Directive's "grey list" of practices only allowed upon prior unambiguous agreement between the parties – e.g. the payment of

marketing/advertising costs by the supplier – has been fully implemented into national law. The “blacklist” of unfair practices that are prohibited *per se*, including for example the cancellation of orders of perishable products at short notice, certain unilateral changes of supply agreement terms, commercial retaliation, etc., has also been transposed. However, in this regard, the Bulgarian legislator went beyond the minimum requirements of the Directive, notably by adding to the blacklist exclusive supply agreements, most-favoured-customer clauses and unjustified termination without reasonable notice. The latter prohibition seems particularly problematic. It remains to be seen how the term “unjustified termination” will be interpreted in practice.

As the legislative process has shown, it proved quite difficult to extend the PCA to unfair trade practices in the agricultural and food supply chain. The evolution of the draft law is particularly interesting because it clearly demonstrates the thin line between unfair trade practices and “classic” competition law. The draft law submitted for public discussion in December 2020 originally comprised a mix-up between the scopes of the simultaneously transposed ECN+ and UTP Directives. It extended the enhanced powers of the CPC, as defined in the ECN+ Directive, to “simple” breaches of UTP prohibitions in the agricultural and food sector. This would have led to rather disproportionate outcomes such as the admissibility of dawn raids at the homes of buyers of agricultural and food products as well as the imposition of fines for breaches of UTP prohibitions amounting to up to 5 % of the buyer’s annual turnover. Following an outcry from the industry during the public discussions, the sanction thresholds and the powers of the CPC were substantially adjusted so that the approach adopted by the parliament was much more balanced. In its final version, the revised PCA clearly distinguishes between the scopes of both transposed Directives. This result reinforces the general understanding that the regulation on unfair trade practices does not overlap with the legal framework on infringements of Articles 101 and 102 TFEU due to both areas pursuing quite different objectives.

3. Repeal of the general rule on abuse of superior bargaining position

The Bulgarian legislator took the implementation of a sector-specific ban on unfair trade practices in the agricultural and food supply chain as an opportunity to repeal the PCA’s general prohibition on the abuse of a superior bargaining position. The rule in question was introduced in 2015 and prohibited undertakings with a stronger bargaining position from abusing their power to the detriment of their contractual partners and consumers (some background on this rule is provided in [this blog post](#)). The provision had a broad, cross-sectoral scope but the lack of clear criteria regarding its application caused confusion and legal uncertainty for supply chain stakeholders. This was aggravated by unusually high sanctions for breaches of the prohibition, compared to the extent of market distortion caused by such violations, as well as by the Supreme Administrative Court annulling a number of landmark decisions where the CPC sanctioned breaches.

The controversial provision has now been replaced by the sector-specific regime of the UTP Directive, providing for clear criteria concerning the assessment of unequal bargaining power and prohibited practices. This is indeed a welcome step forward towards both increasing legal certainty for businesses and promoting fair practices in the agricultural and food supply chain. However, the “replacement” of the general rule with a sector-specific only approach creates a certain gap in the regulation of unfair trade practices, since all instances of abuse of unequal bargaining power by non-dominant undertakings, aside from the agricultural and food supply chain, remain completely outside of the scope of the new PCA.

It is debatable whether such an outcome is desirable. Perhaps the lack of clear criteria and foreseeable, proportionate sanctions in the area of the abuse of a superior bargaining power could – and should – have been solved by modifying rather than striking the prohibition. Against the background of cross-sectoral rules on economic dependence/abuse of unequal bargaining power is found in a number of leading competition law jurisdictions (such as France, Germany, and Belgium) and given their constantly increasing relevance in the digital context (see this [blog post](#) on the Belgian rules), the Bulgarian approach rather seems to indicate a step back in the prevention of unfair trade practices.

4. Modernisation of the standard for merger control

Another significant change to the PCA is the amendment of the criteria for merger control. Up until now, the CPC followed the old two-tier approach by (i) assessing whether the merger would lead to the creation or strengthening of a dominant position and then (ii) examining whether this would significantly impede effective competition on the respective market. The revised law now adopts the SIEC (significant impediment of effective competition) test for merger control. This will allow the CPC to refuse authorization for a merger without necessarily establishing dominance of the entity on the respective market, provided that a significant negative effect on competition is likely to occur. The shift towards the SIEC approach is in line with the current practice of the European Commission and most Member State competition authorities.

In summary, the adopted changes to the PCA are generally to be welcomed. As far as the issue of regulating the abuse of a superior bargaining position is concerned, the topic is worth considering during the next reform of Bulgarian competition law. In this regard, the parallel developments and ongoing debates in other Member States could serve as an inspiration to the Bulgarian legislator.

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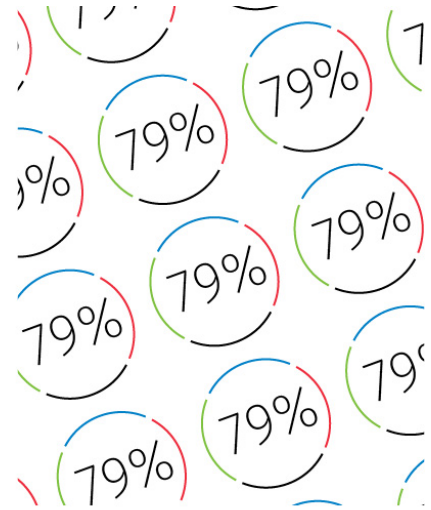
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