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## New Bulgarian Protection of Competition Act

In the end of 2008 a new Protection of Competition Act (**"PCA"** or "**the Act"**) entered into force in Bulgaria.

Along with a number of substantive and procedural amendments to Bulgarian competition law, the new Act significantly escalates the level of sanctions, which can be applied by the local competition authority – the Commission for the Protection of Competition (**the "Commission"** or **the "CPC"**), which are now at par with the levels under European law.

The Act extends the application of these substantial sanctions, also to cases of unfair competition and misleading and illegal comparative advertising.

It also provides an array of new tools to the competition authority, including the possibility in impose interim measures on undertakings in infringement proceedings, and regulates the application of Articles 81 and 82 of the EC Treaty by the Commission for the Protection of Competition.

Below is a brief outline of the major changes:

### I. Merger Control

### 1. New Merger Control Threshold

The previous Bulgarian merger control turnover threshold, whose amount remained unchanged for more than 10 years at BGN 15 million (approximately EUR 7.6 million) of aggregate Bulgarian turnover, was largely criticized by merging parties for failing to provide an appropriate level of significance or a justifiable jurisdictional nexus. This was the case, because the threshold did not require a minimum turnover of each of the merging parties, and therefore the notification obligation would formally be triggered even in cases where one of the parties had none or very little turnover in Bulgaria, provided the other party had sufficient turnover to pass the BGN 15 million mark. In spite of several limited attempts of the Supreme Administrative Court to remedy this by interpretation, the issue remained open until the adoption of the new Act.

The new Act in addition to raising the turnover mark, requires a minimum turnover to have been achieved by each of at least two of the undertakings concerned, or by the acquired undertaking.

Where the combined aggregate Bulgarian turnover of the undertakings concerned exceeds BGN 25 million[1] in the latest complete financial year, the proposed merger must be notified to the Commission, provided it answers at least one of the following two additional criteria, namely: (i) the turnover of each of at least two of the undertakings concerned in the territory of Bulgaria during the previous financial year to exceed BGN 3 million; **or** (ii) the turnover of the target company in the territory of Bulgaria to exceed BGN 3 million.

[1] approximately EUR 12,8 million;

The first hypothesis is similar to the provision of Art. 1 (2) of the EC Merger Regulation[2]. The second one, in fact translates into a filing obligation where the target alone or predominantly achieves the BGN 25 million threshold, even though the acquirer has not had turnover in Bulgaria or its Bulgarian turnover was below BGN 3 million in the preceding financial year.

**2. Changes to the Definition of a Concentration**

Similarly with the previous law and with European law, a concentration is defined in the new PCA as a merger of two or more previously independent undertakings or the acquisition, by a person or persons, already controlling one or more undertakings, of direct or indirect control of the whole or part(s) of another undertaking.

The addition to this classic definition introduced in the new Act notes, that the operation must bring about a *lasting* change in the control of the undertakings concerned. This requirement is in line with the concept of a concentration, contained in the European Commission's Consolidated Jurisdictional Notice and with some of the previous decisional practice of the Bulgarian Commission, however it does remove a degree of uncertainty that existed previously due to the lack of specific regulation, on whether certain limited steps would, in fact, represent an accomplishment of the concentration.

**3. New Phase 1 and Phase 2 Deadlines**

A Phase 1 merger proceeding must complete within 25 business days, following initiation of proceedings. Proceedings are to be initiated within 3 business days following submission of the notification, provided the notification is declared complete. If the notification is declared incomplete, the proceedings will start after any deficiencies are rectified.

The deadline will be prolonged by 10 business days, where the parties have offered remedies (called "proposals to amend the concentration"). The parties may request an extension of the original timeframe by 10 business days to allow them to prepare the remedies offer itself.

The deadline to complete an in-depth (Phase 2) proceeding has been increased to 4 months from the publication of the decision to open in-depth investigation proceedings in the Electronic Register kept by CPC. The term can be prolonged by an additional 25 business days in complex cases, and by a further 15 business days if remedies are offered, as of the day the Commission receives complete information concerning the remedies offered.

**4. The Suspension Obligation**

In spite of the general expectation that there would be a change in regulation of the suspension obligation of parties in notifiable mergers, a lot of the old problems with the formulation of this obligation remain.

In the first instance, a provision which existed in the earlier drafts of the Bill that would have allowed the Commission to waive the suspension obligation in respect of particular cases, did not find its way into the Act.

The suspension requirement remains worded in the same vague and general manner, as in the previous Act, prohibiting all legal and factual actions related to the proposed concentration, before a clearance decision by the Commission is issued.

The new definition does provide an exemption, but only in respect of a tender offer, or a series of transactions in regulated markets, where stocks are acquired from different sellers, provided the Commission has been notified in advance in a timely manner and provided the acquirer does not exercise the voting rights attached to the securities, except to the extent necessary to preserve the value of the investment made.

**5. Introduction of Statement of Objections in Merger Control Proceedings**

In response to criticisms that the previous procedure was not sufficiently transparent

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation);

and that parties were often surprised by or uncertain about a negative outcome in a merger control proceeding, the new Act provides an obligation of the Commission, to submit a statement of objections to the parties, where it has concerns which do not allow it to clear the transaction.

**6. Remedies**

Remedies received more detailed procedural and substantive regulation, including an express provision which favours structural remedies only in cases behavioural remedies cannot provide equivalent effect, or where a behavioural remedy would be more onerous to the parties than a structural one.

**7. Sanctions**

The Commission may impose a monetary sanction in the amount of up to 10 per cent of the total turnover for the preceding finance year, to an undertaking where:

- A concentration is completed without a prior notification;
- A concentration is completed under conditions and in a manner that differs from the ones notified to the Commission and on the basis of which its clearance decision was issued, including upon failure to honour commitments and obligations imposed;
- The concentration is completed in violation of an express prohibition of the Commission;
- The concentration is completed in violation of the general suspension obligation, that applies prior to a clearance decision.

In addition, the Commission is entitled to impose a sanction to the amount of up to one per cent of the total turnover for the preceding financial year in cases of:

- Failure to cooperate with the investigation;
- Delay in the provision of information or the provision of incomplete, incorrect, untrue or misleading information;
- Failure to notify the Commission of the performance of its decision in the term specified in it (if the decision provides for such an obligation).

The Commission may also impose periodic sanctions of 5 per cent of the average daily total turnover for the preceding financial year for each day of failure to comply with conditions and obligations attached to a Commission's decision, and up to 1 per cent of the average daily total turnover for the preceding financial year for each day of failure to provide complete, true and non-misleading information.

**II. Anti-trust Provisions**

**1. Prohibited Agreements, Decisions and Concerted Practices**

**1.1. Abolition of Individual Exemptions**

In line with the anti-trust reform package introduced by Regulation (EC) 1/2003[3], the new PCA abolishes the possibility for individual exemption of agreements which fall under the general anti-trust prohibition.

It is now upon the parties to such agreements to prove that where their agreement falls within the general prohibition, it is capable of being exempted by reason that it contributes to the improvement of the production or distribution of goods or the provision of services or to the promotion of technological and/or economic progress, while ensuring a fair share of the resulting benefits to the consumers and it does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives and does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the relevant market.

**1.2. Change of *De Minimis* Thresholds**

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

The new Act brought the Bulgarian *de minimis* thresholds in line with the EU standard – from 5 to 10 per cent for horizontal agreements, decisions and concerted practices and from 10 to 15 per cent for agreements, decisions and concerted practices the parties to which are not competitors.

**1.3. Provisions on Withdrawal of the Benefit of Block Exemptions**

The new Act contains express provisions on withdrawal of the benefits of both local and EU block exemptions in individual cases.

Where the Commission, as a result of an investigation, finds that an agreement, decision or concerted practice, falling within the scope of a block exemption under Bulgarian national law, or under EU law, does not meet the requirements specified in Article 17 of the PCA, respectively under Art. 81 (3) of the EC Treaty, it may rule that the block exemption will not apply to that particular case, but will not impose the sanction provided for in the Act and must specify a period within which the parties should bring their agreement into compliance with Article 17 of the Act, respectively with Article 81 of the EC Treaty.

**1.4. Interim Measures**

In a major development, and in contrast to the former Protection of Competition Act, the Commission has been granted the right to impose interim measures in infringement proceedings for anti-trust violations.

If, during an investigation, there is sufficient evidence of an infringement, in urgent cases where there is a risk of serious and irreparable damage to competition, the Commission may, at its own initiative or on request of the persons whose interests are affected or threatened by the infringement, order the immediate termination of the practice by the undertaking or the association of undertakings, or impose other necessary measures, taking into account the objectives of the Act.

The interim measures may be ordered at any time during the course of the proceedings. The ruling imposing interim measures is subject to a one instance appeal, however the appeal would not suspend the application of the interim measure.

The term of effect of the interim measures can be up to 3 months, but it can be extended if necessary. The interim measures may have effect until the adoption of the Commission's decision on the merits.

**1.5. Sanctions**

Where undertakings have entered or engaged in prohibited agreements, decisions or concerted practices (either under Bulgarian or under EU law) the Commission may impose a sanction on the infringing undertaking amounting to up to 10 per cent of the total turnover for the preceding financial year. A sanction in the same amount can be imposed on an undertaking for failing to comply with a decision of the Commission.

The Commission may also impose periodic penalties in amount of up to 5 per cent of the average daily turnover for the preceding financial year, calculated on a daily basis for each day of non compliance with:

1. a decision of the Commission ordering the termination of an infringement, including by imposing the appropriate behavioural or structural remedies;

2. a ruling of the Commission, imposing interim measures.

The Commission may impose a sanction to the amount of up to one percent of the average daily turnover for the preceding financial year for each day of:

1. failure to comply with the obligation for assistance;

2. failure to furnish complete, accurate, true and not misleading information;

3. impeding an inspection of the Commission.

**1.6. Leniency**

The leniency procedure was introduced with the former PCA, although it was never

used, perhaps because sanctions were considered not sufficiently high by infringers to warrant a leniency application.

The new Act provides extended regulation. The PCA provides that leniency will apply to the cases of a secret cartel. A "cartel" is defined as an agreement and/or concerted practice between two or more undertakings – competitors in the relevant market, aimed at restricting competition through price fixing or fixing pricing conditions for purchase or sale, allocation of production quotas or sales or sharing of markets, including rigging of public bids or tenders or public procurement award procedures. Leniency is expressly stipulated to apply to both infringements under national law and under Article 81 of the EC Treaty.

Immunity from sanctions is no longer automatic. In order to obtain immunity from sanctions, a company which participated in a cartel must be the first one to inform the Commission of a secret cartel by providing sufficient information to allow the Commission to launch an inspection at the premises of the companies allegedly involved in the cartel, or where the Commission is already in possession of enough information to launch an inspection or has already undertaken one, the company must provide evidence that enables the Commission to prove the cartel infringement.

The company may not benefit from immunity if it took steps to coerce other undertakings to participate in the cartel.

In all cases, the company must also fully cooperate with the Commission throughout its procedure, provide it with all evidence in its possession and put an end to the infringement immediately.

The rules on partial reduction of sanctions are no longer regulated in detail by the law itself, but are supposed to be regulated in a separate leniency programme, which is yet to be adopted by the Commission.

## 2. Dominance

### 2.1. Presumption of Dominance Abolished

The new PCA no longer contains the refutable presumption that an undertaking having 35 per cent market share of the relevant market is in a dominant position. Dominance will be assessed in respect of each undertaking by reference to a variety of factors, including its market share, financial resources, possibilities for access to the market, level of technology and economic relations with other undertakings.

In its existing methodology on market investigation, the Commission places a safe harbour at 20% market share below which dominance is almost never present, and declares that it will consider market share alone as sufficient proof of dominance, in cases where it exceeds 70% of the relevant market for a sufficiently extended period of time.

### 2.2. Addition to the Abuse of Dominance Definition

To the classic abuse of dominance definition, which existed under the former Act and under Article 82 of the EC Treaty, the new Act introduces an addition to the non-exhaustive list of abuses, formulated as "unjustified refusal to supply goods or to provide services to actual or potential customers in order to impede their economic activity". While this may be viewed as merely a description of the refusal-to-supply type abuses, in fact it may be an oversimplification of this complex area, which makes it open to an expansionist approach by the Commission. The Commission has had a history of exhibiting a much broader view of which refusals are abusive, than the one supported by the existing case-law of the European Court of Justice and the European Commission.

### 2.3. Sanctions

Where an undertaking in a dominant position commits an abuse (in cases covered either under Bulgarian and/or under EU law) the Commission may impose a sanction on the infringing undertaking amounting to up to 10 per cent of the total turnover for the preceding financial year. A sanction in the same amount can be imposed on an undertaking for failing to comply with a decision of the

Commission ordering the bringing of the infringement to an end.

The Commission may also impose periodic penalties in amount of 5 per cent of the average daily turnover for the preceding financial year, calculated on a daily basis for each day of non compliance with:

1. a decision of the Commission ordering the termination of an infringement, including by imposing the appropriate behavioural or structural remedies;

2. a ruling of the Commission, imposing interim measures.

The Commission may impose a sanction to the amount of up to one percent of the average daily turnover for the preceding financial year for each day of:

1. failure to comply with the obligation for assistance;

2. failure to furnish complete, accurate, true and not misleading information;

3. impeding an inspection of the Commission.

**2.4. Interim Measures**

Similarly to infringement proceedings in respect of prohibited agreements, decisions and concerted practices, if, during an investigation, the Commission finds that there is sufficient evidence of abuse of dominance, in urgent cases where there is a risk of serious and irreparable damage to competition, the Commission may, at its own initiative or on request of the persons whose interests are affected or threatened by the infringement, order the immediate termination of the practice by the undertaking, or impose other necessary measures, taking into account the objectives of the Act.

The interim measures may be ordered at any time during the course of the proceedings. The ruling imposing interim measures may be appealed, however the appeal would not suspend the application of the interim measure.

The term of effect of the interim measures can be up to 3 months, but it can be extended if necessary. The interim measures may have effect until the adoption of the Commission's decision on the merits.

**3. Proceedings for Establishment of Anti-trust Infringements**

**3.1. Dawn Raids**

The new PCA, provides more detailed regulation on dawn raids, which is largely in line with the European law and precedent.

The CPC has the power to visit the sites of the company or association under investigation for a suspected infringement of the PCA (including both anti-trust and merger control provisions) or Articles 81 and 82 ot the EC Treaty without a prior notice. An inspection requires, however, an authorisation by a judge from the Administrative court of the Sofia City.

The Commission may:

1. enter any premises, means of transport and other locations used by the undertakings and associations of undertakings;

2. examine all books and records, related to the business of the undertakings or associations of undertakings, irrespective of the medium on which they are stored;

3. seize or obtain information in hard, digital or electronic copy, copies of, or extracts from such books and records, irrespective of the medium on which they are stored or, where this is impossible, seize the originals, as well as any other material evidence;

4. seize or obtain electronic, digital and forensic evidence, including traffic data, from all types of computer data carriers, computer systems and other information carriers as well as seize the devices for transmission of information;

5. receive access to all types of information carriers, including information stored on servers, accessible by computer

systems or other means located in the inspected premises;

6. seal for a certain period of time any premises, means of transport and other sites, used by the inspected undertakings or associations of undertakings, as well as commercial or accounting books or other information carriers;

7. take down oral statements of any representative or member of the management and staff of the undertakings or associations of undertakings, on circumstances, related to the subject matter and purpose of the inspection.

During the inspections, the Commission's officers may be assisted by members of the police.

Any document or evidence found, may be seized if they contain data raising well-founded doubts of other infringements under the Act or under Article 81 or Article 82 of the EC Treaty.

Failure to cooperate may lead to fines. Fines can, for instance, be imposed if the investigated undertaking is found guilty of any of the following:

- Incomplete production of records (i.e. the production of books and records in incomplete form, the provision of incorrect oral information, a failure to provide clear explanations leading to relevant documents being overlooked, removal of relevant material, etc.);
- Incomplete access to company's premises;
- An unjustified refusal to comply with a request for oral explanation;
- Destruction of evidences during the investigation;
- Refusal to cooperate with inspectors.

Where a party has impeded the collection of information in respect of certain facts, the Commission is entitled to assume that these facts have been proven, and base its decision upon them.

**3.2. Statement of Objections. Commitments**

Similarly to merger control cases noted above, the Act removes one of the major points of criticism in respect of Bulgarian anti-trust procedure, in that it did not allow the parties sufficient opportunity to react to an allegation of an infringement and often lead to the party accused finding the full facts of the alleged infringement only with the decision imposing a sanction, issued by the Commission.

The PCA provides for an extended protection of the right of defence of the parties participating in the proceeding, providing that where the Commission's investigation has shown that an infringement has likely been committed, the Commission must approve and present to the parties in the proceedings a Statement of Objections summarizing its findings and allowing the respondent a time limit not shorter than thirty days to respond to the allegations, during which the parties will also have the right of access to the file.

During this period the addressee may offer to undertake behavioural or structural commitments to remedy an infringement, except for hard-core infringements, which are not open to negotiated settlement. Where such commitments are accepted, with its decision to approve them, the Commission should terminate the proceedings, without imposing a sanction. This is, again, a radical diversion from the previous Act which provided no possibility for a negotiated settlement of an infringement proceeding[4]. However the proceedings may be reopened in three situations, the first of which is rather vague:

1. there has been a change in any of the circumstances on which the decision was based;

2. the undertaking concerned fails to comply with the commitments undertaken;

[4] Even though such a hypothetical possibility may have existed under the Administrative Procedure Code of 2006.

3. it is established that the decision was based on incomplete, inaccurate, untrue or misleading information.

**3.3. Range of Potential Appellants**

In a solution similar to the one provided in respect of merger control decisions under the former PCA, the new law has extended the range of persons which would be entitled to appeal a decision concerning an anti-trust infringement. All interested parties, even though they have not been party to the infringement proceedings, would be entitled to appeal the decision.

The Courts, however, have curbed significantly the range of persons who may be allowed to appeal a decision where they have not participated in the proceedings before the Commission, setting a very high standard of proof of specific interest affected by the decision, to allow an appeal.

**III. Unfair competition. Misleading and Comparative Advertising**

**1. Sanctions**

In an unprecedented legislative move, the sanctions that can be applied to infringements of Bulgarian and EU merger control and antitrust law, have been extended to unfair competition infringements and infringements relating to misleading and illegal comparative advertising.

This essentially means that each of these infringements could result in a sanction as high as 10 per cent of the undertaking's turnover for the latest complete financial year. It is yet to be seen what would be the sanctioning policy of the Commission for these infringements, but the mere possibility of such high sanctions sets these types of infringements high on the agenda of company compliance.

**2. New Types of Infringements**

**2.1. Immitation by Use of a Domain Name or Web Design**

The new PCA provides that the use of a domain name or web-site design identical or similar to those of other persons in a manner that may mislead and/or injure the interests of competitors shall be prohibited.

**2.2. Misleading and comparative advertising**

The provisions on the misleading and comparative advertising, which so far were regulated by the Consumer Protection Act, are introduced in the PCA. The definitions follow those of Directive 2006/114/EC concerning misleading and comparative advertising.

Both the advertiser and the advertising agency will be held liable for misleading and illegal comparative advertising.

The burden of proof has expressly been placed upon the defendants to prove that the advertising is not misleading, and where comparative advertising has been used this has been done in line with the provisions of the Act.

**2.3. Interim Measures**

The Commission, of its own motion or on the request of the parties, has been entitled to impose interim measures, whenever there is a risk of serious damage to the interests of consumers or competitors. The available measures in respect of misleading and illegal comparative advertising are limited to the following two types:

- Prohibiting the distribution of the advertising before it has become public, where its distribution is imminent;

- Stopping the distribution of the advertising.

The imposition of interim measures can be appealed, but the appeal would not suspend their implementation.