Question A: Abuse of a Dominant Position and Globalization: Is there any consistency between the recent approaches of the different jurisdictions to the notion of abuse? Are there too many restrictions on legal rights and business opportunities?

BULGARIA

Anton Petrov

Djingov, Gouginski, Kyutchukov & Velichkov, Sofia, Bulgaria

anton.petrov@dgkv.com

1. Introduction

The principal statutory instrument governing competition law in Bulgaria is the Protection of Competition Act[1] (PCA). The PCA comprises the substantive rules on restrictive horizontal and vertical agreements, abuse of dominance and monopoly, merger control, sector inquiries, compliance review of legislation and administrative acts, and unfair competition. In other words, the PCA regulates both restraints of competition (Chapter III and IV) and unfair competition (Chapter VII).

The PCA also constitutes the national competition authority - the Commission on Protection of Competition ("CPC") - and sets out the procedural rules for investigations, sector inquiries, enforcement and imposition of penalties for breaches of the applicable regulations. There are separate procedural routes for implementation of the various substantive rules (regulated in particular by PCA Chapters IX - dedicated to antitrust enforcement, and Chapter XII – dealing with review of unfair competition complaints).

Unilateral anticompetitive behaviour is regulated in Chapter IV PCA (Art. 19 – 21). The rule of Art. 21 aims to prohibit actions and behaviour of undertakings enjoying monopoly or dominant position, as well as the conduct of two or more undertakings enjoying a collective dominant position, that may prevent, restrict or distort competition and thereby adversely affect the interests of consumers.[2] The prohibition of Art. 21 PCA applies to unilateral behaviour which has actual or potential adverse effect on competition, while at the same time it requires actual or potential adverse effect on the interests of consumers. In this respect the national rule confirms completely with the requirements of Art. 102 TFEU.

According to the statutory definition provided in Art. 19 PCA, the position of an undertaking would be considered a monopoly where the law has endowed it with the exclusive right to carry out a specific type of economic activity.[3] In accordance with the provisions of the Constitution of the Republic of

[1] Promulgated in State Gazette no. 102/28 November 2008, in force as of 2 December 2008.

[2] Art. 21 PCA reads, as follows: "Prohibition against Abuse of Monopoly or Dominant Position. The conduct of undertakings enjoying monopoly or dominant position, as well as the conduct of two or more undertakings enjoying a collective dominant position that may prevent, restrict or distort competition and impair consumers' interests, shall be prohibited, such as those which: 1. impose directly or indirectly purchase or sale prices or other unfair trading conditions; 2. limit production, trade and technical development to the prejudice of consumers; 3. apply to certain partners dissimilar conditions for equivalent transactions, thereby placing them at a competitive disadvantage; 4. make the conclusion of contracts subject to acceptance by the other party of supplementary obligations or to the conclusion of additional contracts which, by their nature or according to common commercial usage, have no connection with the object of the main contract or with its performance; 5. unjustified refusal to supply goods or to provide services to actual or potential customers in order to impede their economic activity."

[3] Art. 19 PCA reads as follows: "Monopoly Position. (l) The position of an undertaking which by law has the exclusive right to carry out a certain type of economic activity shall be monopolistic. (2) A monopoly position may be granted only

Bulgaria, exclusivity may arise in case of concession over exclusive public property, such as the sea coast and beaches, national road infrastructure, ground and surface waters, forests and parks of national importance, the continental shelf and exclusive off-shore economic zone.[4] Furthermore, a monopoly position is permitted for a limited number of activities of strategic importance, including railway transport, the national postal and telecommunications networks, use of nuclear energy and manufacturing of radioactive products, armaments, explosive and toxic substances.[5] The conditions and procedure by which the State may grant concessions over units of exclusive public property and licenses for the strategic activities is established in the relevant sector specific legislation.

"Dominance", on its turn, is defined as a position of market strength enjoyed by an undertaking, which with view of its market share, financial resources, access to markets, level of technological development and business relation to other undertakings, is independent from its competitors, suppliers and customers and may hinder competition on the relevant market.[6]

The PCA also recognizes the notion of "collective dominance" although it does not set clear criteria for its assessment. In its official guidelines the CPC states that two or more undertakings on a specific relevant market taken together may be regarded as dominant, even if none of them individually could enjoy sufficient degree of independence from the other market participants, as long as the undertakings concerned are interrelated to such a degree or in such a way that (in some instances) they act in identical manner and have a common market conduct.[7] Collective dominance may arise when, from the point of view of the specifics of the relevant market, it is established that each of the undertakings concerned considers it possible and economically rational to adopt a common market policy with the other. Considering the CPC case practice, collective dominance could be found present due to close relations between undertakings resulting from (i) the oligopoly market structure[8], (ii) contractual arrangements for mutual representation[9], or (iii) other forms of interdependence[10], as a result of which the undertakings concerned were able to align their economic activities and market conduct.

Dominant position is most often found to exist in those sectors of the economy which were until recently almost entirely controlled by enormous state enterprises – unique provider monopolies, such as telecommunications, electricity and water distribution, rail transport etc.

Apart from the rules designed specifically to combat unilateral abusive practices by dominant undertakings, some of the rules against *unfair competition* (Chapter VII PCA) could also cover specific instances of unilateral anticompetitive behaviour. Pursuant to the statutory definition, "unfair competition" is any act or omission to act in the course of business activity that is inconsistent with fair business practices and harms or may harm the interests of competitors.[11] The PCA further defines and prohibits in its Chapter VII the following specific forms of unfair competition: (i) prejudicing the trade reputation and good will of competitors; (ii) misrepresentation with respect to goods or services; (iii) misleading and prohibited comparative advertising, (iv) imitations related to product appearance, trade names, trademarks or distinctive symbols, domain names or webpage design; (v) unfair

by law in the cases provided for in Article 18, paragraph (4) of the Constitution of the Republic of Bulgaria. (3) Any other kind of granting of monopoly position apart from the cases under paragraph (2) shall be null and void."

4 Art. 18 (1) Constitution of the Republic of Bulgaria.

5 Art. 18 (4) Constitution of the Republic of Bulgaria.

6 Art. 20 PCA read as follows: "Dominant Position. Dominant shall be the position of an undertaking which, in view of its market share, financial resources, possibilities for market access, level of technology and economic relations with other undertakings may hinder competition on the relevant market, as it is independent of its competitors, suppliers or customers."

7 http://cpc.bg/Competence/AbuseOfDominanceDescription.aspx

8 CPC decision no. 623/2009, upheld on appeal by decision no. 15031/2011 on case no. 10995/2009, SAC 7th Chamber.

9 CPC decision no. 331/2006, upheld on appeal by decision no. 8079/2007 on case no. 2408/2007, SAC 5th Chamber.

10 CPC decision no. 218/2004.

11 Art. 29 PCA.

solicitation of clients (e.g. promotional games with high rewards); and (v) use or disclosure of trade secrets in a way that is inconsistent with fair business practices.

Unfair competition is a form of commercial tort, which is subject to the presence of the following prerequisites, applicable to all forms of unfair competition, envisaged in Chapter VII of the PCA: (i) an act or omission to act within the course of business; (ii) the act or omission to act is inconsistent with fair business practices;[12] (iii) the parties involved are competitors on the relevant market; and (iv) the act or omission to act has harmed or may harm the legitimate interests of competitors. The general prohibition is regarded as subsidiary to the specific rules, but according to court interpretations, a violation of the latter must exhibit the general features of the former.[13] Thus even if a particular case does not qualify under one of the specific forms of unfair competition (Art. 30 – 37 PCA), it may still fall within the scope of the general unfair competition tort (Art. 29 PCA).

The primary aim of the Bulgarian unfair competition rules is to protect the individual interests of market players from such instances of unilateral behaviour of their competitors, which are regarded as inconsistent with good morals and fair trading practices. Therefore, some types of behaviour, such as for example predatory pricing, could in theory fall within the regulatory scope of both the antitrust provisions of Art. 21 and the unfair competition rule of Art. 36, Sec. 4 PCA[14]. There is no explicit CPC or court guidance how such collisions could be avoided. Judging from existing case practice, the CPC usually confirms with the scope of the original complaint and where the petitioner has limited their pleadings to unfair competition, the issue of dominance was simply never analysed.

From the point of view of the applicable sanctions, it should be noted that the PCA introduces a *uniform regime for all types of violations* falling within its regulatory scope – coordinated practices, abuse of dominant position or unfair competition. The fines for commercial companies and other legal entities may reach up to 10% of their annual turnover in Bulgaria, while fines for individuals are in the range of BGN 500 – 50,000 (approx. EUR 256 - 25,565). Indeed, according to the CPC practice the fines for unfair competition violations are comparatively lower than those in antitrust cases. Nevertheless, according to the Methodology on Sanctions[15] adopted by the CPC, the authority may impose fines up to the statutory limit of 10% of annual turnover even in unfair competition cases.

At first glance, unfair practices between undertakings operating on different levels of the supply chain seem to be left outside the scope of Chapter VII PCA. However, examples from case practice indicate that some types of unfair conduct between non-competitors (e.g. abuse of reputation and goodwill,[16] abuse of confidential information,[17] etc.) may also qualify as administrative violation under Art. 29 PCA. Moreover, the CPC has held explicitly that where proceedings are initiated without a petitioner (sua sponte) there is no need to analyse competitive relations in order to establish the existence of unfair competition.[18]

Notwithstanding the above it should be noted that the rules of Chapter VII PCA aim to prevent "unfair competition", and therefore they act primarily in the interests of "competitors", while the interest of

[12] According the statutory definition (Sec. 1, para. 2 of the Supplementary Provisions of the PCA), "fair business practices" means the rules regulating market behaviour, which originate from laws and common commercial usages and do not infringe the accepted principles of morality.

[13] Decision of the Supreme Administrative Court no. 7966/2006 on case no. 3345/2006, 2nd Grand Chamber.

[14] Art. 36, Sec 4 PCA reads as follows: "The sale to the domestic market of significant quantities of goods over an extended period of time at prices lower than the costs of their production and marketing, with the purpose to unfairly solicit clients, shall be prohibited."

[15] Which is more-or-less based on the Guidelines of the European Commission on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, at least as far as antitrust violations are concerned.

[16] CPC decision no. 846/2009.

[17] Decision of the Supreme Administrative Court no. 8730/2008 on case no. 5489/2008, 2nd Grand Chamber.

[18] See e.g. CPC decision no. 345/210 and CPC decision no. 375/2010.

consumers come second, if they are analysed at all. For this reason there is a marked difference between enforcement of the two sets of substantive rules (against abuse of dominance and against unfair competition). Moreover, unfair competition rules are not interested in the actual position of the alleged perpetrator on the relevant market or the general market structure. For this reason they will not be included in the outline provided hereinbelow, except where necessary to provide examples of peculiar or contradictory enforcement outcomes.

2. History and potential future developments

The PCA currently in force (adopted in 2008) is actually the third instalment of Bulgarian regulation aiming to protect competition.[19] Bulgaria introduced competition legislation for the first time in 1991 with the adoption of the first PCA[20]. The regulatory scope of the first PCA was limited to unfair competition only. For this reason it was soon revised in 1998 in line with modern EU competition law doctrine, which served as basis for the development of national antitrust and merger control rules.[21] The rules on unilateral conduct in PCA 1998 were based on the respective provisions of Art. 82 of the EC Treaty, thus the substantive content of the regulation on national level has not changed significantly since its original introduction. Following Bulgaria's accession to the EU on 1 January 2007, the new PCA aimed to further harmonize Bulgaria's competition regime with EU law in line with the changes which were introduced with Regulation 1/2003 and Regulation 139/2004. The most significant change that came about with the revision in 2008 was related to enforcement procedure. First, the new legislation abolished the system of negative clearance in favour of self-assessment and ex post review. Second, compliance with due process requirements in CPC investigations was enhanced with the introduction of the intermediary stage of statement of objections (SoO) - prior to 2008 there was no procedural requirement for the CPC to inform the investigated undertakings about the nature of the charges brought against them before they face a final penalties decision.

The PCA in its current version does not prohibit abuse of market power or dependency outside the scope of dominance. However, in the last several years several draft bills for PCA amendment were discussed by the Bulgarian legislators with the stated purpose of countering unfair B2B practices in the retail supply chain resulting from "buyer power" and inequality of bargaining power.

In September 2012 a draft bill for PCA amendment was submitted to Parliament by the right-centre GERB party (in power at the time) with the idea to introduce the concept of "significant market power" (SMP) as a new category of market position (distinct from monopoly and dominance) that may support anti-competitive behaviour. According to the originally proposed definition, SMP is attributable to an undertaking that does not have a dominant position, which nevertheless may distort competition on the relevant market due to the fact that its suppliers or customers depend on it. But despite the fact that SMP was differentiated from dominance, the 2012 draft bill did not envisage specific rules for it. The intention was to expand the scope of Art. 21 PCA to cover both abuse of dominance and abuse of SMP. In addition, it was proposed to add to the current list of potential abuses (price fixing, output limitation, tying, and refusal to deal, etc.) "behaviour in violation of good faith commercial practices, which harms or may harm the interests of competitors". In short, the idea of the legislator was to impose on both dominant and SMP undertakings the obligation to refrain from unfair practices thus raising unfair competition to the level of antitrust violations.

The 2012 bill did not progress to actual legislation and died with the dissolution of the 41st National Assembly in May 2013. Following the elections that took place the same month, under its new

[19] PCA 2008 was drafted with the assistance of the Italian competition authority (Autorità garante della concorrenza e del mercato) and EU financial support under the PHARE programme.

[20] Promulgated in State Gazette no. 39/17 May 1991, in force as of 20 May 1991.

[21] Promulgated in State Gazette no. 52/8 May 1998, in force as of 11 May 1998, repealed as of 2 December 2008.

composition the legislative body was striving to cover a lot of diverse hot topics and the idea for amendment in the PCA disappeared until March 2014, when a new revised draft was presented by the Bulgarian Socialist Party (part of the majority coalition at the time), thus resuming discussions.

The new draft from 2014 contemplated introduction of enhanced control over grocery retail, the declared purpose being eradication of unfair business practices by commercial chains. (The bill itself was publicized in the media as the "Act against Commercial Chains".) The public campaign mounted by various business organizations was not sufficient to discourage the former majority coalition from proceeding with the plan, though between first and second reading significant changes were introduced in the text. The final version, as adopted by the 42nd National Assembly on 18 June 2014, contained the following three new types of rules: (i) prohibition against abuse of superior bargaining position, defined as a form of unfair competition; (ii) administrative oversight over general terms of large retailers and (iii) specific requirements and limitations for contracts concluded by large retailers.

The original idea to regulate abuses of SMP as a form of antitrust violation was replaced by new rules on unfair competition, introducing the regulatory category of "superior bargaining position" ("SBP"). According to the proposed definition for a new Art. 27a PCA, an undertaking would be deemed to have SBP where its commercial partners are dependent on it due to the characteristics of the relevant market, the specific relations between the undertakings concerned, the type of their activities and difference in their scale of business. The new regulation aimed to prohibit any act or omission of an undertaking with SBP, which contradicts good faith commercial practices and harms or may harm the interests of the weaker contractual party. The criteria for SBP analysis and precision of the forms of abusive behaviour were to be devised by the CPC in a special methodology. In case of violation, the CPC would be empowered to impose on the undertakings concerned fines of at least BGN 10,000 (approx. EUR 5,000), up to 10% of their aggregate annual sales in the affected product group for the preceding year (or up to BGN 50,000 in the absence of turnover).

On 30 June 2014 the President imposed a partial veto, motivated by concerns that the contemplated regulation neglects consumer welfare for the benefit of selected businesses, while at the same time lack of precise legislative definitions providing broad authority for the CPC to issue implementing regulations was regarded as violation of the principle of separation of powers. The bill was discussed again in the Parliament on 11 July 2014, but sufficient majority was not present to overcome the presidential veto.[22] Following dissolution of the 42nd National Assembly in the summer of 2014 and the subsequent return to power of the right-centre GERB party in the October 2014 elections, this legislative initiative also entered into oblivion.

Continuing political turmoil in Bulgaria did not result in the complete death of the idea to amend existing competition legislation. Recently, in March 2015, a new bill for PCA amendment was submitted to Parliament by the Socialist Party, again pushing forward the idea for SMP regulation in parallel with existing rules against abuse of dominance. The draft is an exact replica of the document introduced in March 2014, almost to the last letter. (The only innovation is the proposal to expand the exemplary list of abuses under Art. 21 PCA by a new prohibition against "unreasonable direct or indirect influence over an undertaking, having the object or effect of its elimination from the relevant market".) Initially it was opposed by the present majority coalition and both supervising parliamentary commissions (on economy and on agriculture) issued negative opinions. Surprisingly, however, on 30 April 2015 the bill was passed on first reading, which indicated a change of heart in the majority coalition. As of the time of submission of this report there is a heated on-going discussion and many MPs declared that the bill will undergo severe changes in the following weeks, before it enters a

[22] According to the Bulgarian Constitution, an absolute majority of all MPs is required to overcome a presidential veto.

plenary session for second reading. However, it seems that there is sufficient consensus among all parties that some new kind of regulation against retail market power should come into existence. The problem is that none of the legislative proposals is accompanied by impact analysis and the discussion focuses only on the business of commercial chains and potential effect on retail prices, leaving behind the bigger problem that any general modification in the PCA will affect all business sectors and the entire economy of Bulgaria.

3. Relevant Market and Dominance Criteria

Determination of dominance (as well as any analysis of market power) depends in the first place on the definition of the relevant market. In Bulgaria the criteria for market definition are set out in the Market Assessment Methodology adopted by the CPC and are further developed in its case practice. The relevant product market is defined by reference to substitutability of products and services from the point of view of consumers, as well as by the pressure exercised by competitors. In its practice on relevant product market definition the CPC traditionally laces the focus of the analysis on demand side substitutability, which is assessed by reference to consumer preference, intended use of the affectd products/services, their prices and characteristics. Consumer preference is usually given significant weight in the assessment of demand side substitutability, as well as intended use and characteristics of the product. Price sensitivity of consumers is not always considered in length although the CPC occasionally applies the SSNIP test in its analysis.

Supply side elasticity is assessed by reference to the ability of market participants to switch production to substitute products within short period of time without incurring substantial cost. In that respect the CPC considers various barriers to entry or expansion, which are usually categorized as structural, strategic, administrative and legal where the first two are usually given more weight in the assessment.

The relevant geographic market comprises the area where the undertaking concerned is active in the supply or demand of the products and where the conditions of competition are similar with view of the existing market structure, legal and administrative requirements to entry and operation, consumer habits and preferences, etc. In most cases the CPC confines the relevant geographic market to a particular region (if the ability of the product to travel is limited or due to regional licensing regimes or other legal or administrative requirements) or to national borders (in the absence of legal or logistic limitations).

The test of dominance under the PCA is effects based[23] and requires in-depth investigation of the market power of the undertaking under review, the market structure and the position of competitors and other market participants. The PCA itself does not provide for market share thresholds, but in CPC practice market shares are a key element in the assessment of market position. According to the Market Assessment Methodology, existence of dominance is unlikely where the market share does not exceed 40%.[24] A market share exceeding this threshold may be indicative of dominance, but the CPC would still analyse the market shares in view of the conditions on the relevant markets and in particular the dynamics of the market and the extent to which products are differentiated.

In addition to market shares the CPC has considered a number of factors, which taken alone or in conjunction, suggest the existence of a dominant position. Such indicators include among others: (i) substantial financial resources of the undertaking; (ii) vertical integration and access to own supply from the upstream market; (iii) strong position on neighbouring markets, which may reinforce the position of the same undertaking on the market under review; (iv) access to downstream markets either

[23] In contrast, the abolished 1998 CPA relied on a rebuttable presumption for the existence of dominance where the market share on the relevant market was 35% of more.

[24] Para. 3.2 Market Assessment Methodology.

because of the existence of own distribution network with deep penetration in downstream markets or existence of exclusive distribution arrangement which bars competitors from ready access to distribution; (v) de facto control over an essential facility; (vi) existence of high barriers to entry which impede new entries on the market, etc.

4. Definition of 'Abuse'

Art. 21 PCA provides a general open-ended definition of "abuse", referring to "*conduct that may prevent, restrict or distort competition and thereby adversely affect the interests of consumers*". The law further highlights some of the most common forms of abuse, but the list is not exhaustive:

(i) direct or indirect imposition of unfair prices, or other unfair trading conditions;

(ii) limitation of production, marketing, and technical development to the detriment of consumers;

(iii) application of dissimilar conditions to equivalent transactions with different trading parties thereby placing them at a competitive disadvantage;

(iv) making the conclusion of an agreement conditional upon an undertaking by the other party of additional obligations or entering into other agreements that—by their nature or according to the settled trade practice—have no link to the main agreement or its performance;

(v) refusal to sell goods or provide services to an actual or a potential customer and thus hindering the activities carried out by the customer, which may prevent, distort, or eliminate competition.

The statutory prohibition does not apply to situations where the dominant undertaking acted (or reused to act) as a result of objective external circumstances, preventing it from adhering to its commitments. In other words, the PCA permits "objective justification" defences and the CPC in its practice has agreed that certain efficiency considerations (such as economies of scale and consumer benefits) can exonerate conduct that formally runs contrary to the law.[25]

5. Exploitative and Exclusionary Abuse

Apart from the non-exhaustive list of specific forms of abuse, the PCA does not provide a clear classification and does not differentiate between exploitative and exclusionary conduct. The CPC however does distinguish in its guidelines[26] two basic types of abuse - exploitative and structural:

Exploitative practices are related to conduct through which large profits are derived without justification due to the absence of effective competition on the relevant market. Usually this happens when the dominant undertaking is imposing unjustifiably high prices on its customers. In most of the cases such abuses can be observed in markets characterised by the presence of natural monopoly, such as supply of heating and electricity. According to the CPC, exploitative abuse harms primarily end-customers and undertakings active on adjacent downstream or upstream markets – customers and suppliers, direct trade partners of the dominant undertaking. Moreover, since market entry could be hindered because trade partners become tied to the dominant undertaking, exploitative abuses can create additional structural problems to competition.

Structural (exploitative) abuses, on the other hand, are not aimed at gaining direct profit, but at using a dominant position to eliminate competitors and push them out of the market. According to the CPC, structural abuse is not aimed directly at customers and suppliers and it harms primarily undertakings active on the same relevant market – i.e. competitors of the dominant undertaking.

A dominant undertaking would be liable for exploitative abuse if it imposes unilaterally prices and

[25] CPC decision no. 1133/2007, *Gedeon Richter.*
[26] http://cpc.bg/Competence/AbuseOfDominanceDescription.aspx#4.

other trading conditions which have no objective economic justification. The CPC guidelines indicate only one form of exploitative abuse – imposition of prices (aka abusive pricing) and other trade conditions, but according to jurisprudence discriminatory pricing and (some cases of) tying and bundling could also fall within the same category.

5.1. Imposition of prices and other terms

The most common example of exploitative abuse from CPC decisional practice are situations where the dominant undertaking forces prices upon its trading partners by negotiation techniques that leave them with no bargaining options[27], implements uniform standard terms without attention to the peculiarities of the specific commercial relationship[28] or sets prices that do not reflect the actual value of the offered goods or services[29]. The CPC has indicated on a couple of occasions that existing price regulations (e.g. in the telecom and energy sectors) would normally prevent analysis of price setting schemes which are considered acceptable by the relevant sector regulator.[30] However, where existing regulations leave the dominant undertaking with sufficient manoeuvring space for its pricing policies, its conduct would be susceptible to competition law scrutiny.[31]

Generally, the CPC has the burden to prove that prices imposed by the dominant undertaking are not cost-oriented. Still if such prices were determined (i) without the application of clear and transparent cost-oriented criteria, (ii) the price is not subject to negotiation, and (iii) customers are forced to pay the price because they do not have any alternative source of supply, the CPC would not undertake an in-depth economic analysis and would simply assume that prices are unjustified or excessive. The burden of proof then shifts to the dominant undertaking to justify the level of prices it charges and to show that such prices are cost oriented, or that such prices are comparable to the prices on neighbouring geographic or product markets.

Exploitative abuse with respect to other commercial terms (unrelated to price) can take many forms, such as export prohibitions and restrictive selling conditions, found most often in the sectors of gas[32], electric and heat distribution, auto transport[33], etc. Application of the so called "Most Favoured Customer clause" is also regarded as suspect. It refers to the situation where a dominant undertaking requires a customer to report all "better" offers which the customer may receive from a competitor and permits the customer to accept such an offer only when the dominant undertaking cannot match it.[34] The presumption is that MFC clauses have the same effect as exclusivity clauses, since the dominant undertaking will only have to reduce its prices in case it faces substantial risk of losing customers. According to the CPC, the same situation would exist if a supplier is obliged to extend to a dominant buyer any better procurement conditions offered to a competitor.[35]

5.2. Discrimination

Discriminatory pricing exists where a dominant undertaking applies dissimilar prices to similar transactions and discriminatory application of trading conditions exists where a dominant undertaking treats differently its customers as a result of which customers are placed at competitive disadvantage.[36] However, price differentiation among customers would not be regarded as discriminatory, if it is based

[27] CPC decision no. 628/2007, *Kremikovtsi Trade*, confirmed on appeal by decision no. 10980/2008 on case 9451/2007, SAC 5th Chamber.
[28] CPC decision no. 641/2014, Sofia *Heating*.
[29] CPC decision no. 820/2007 *Pleven Transport*.
[30] Nikolov, P. at al. The New Regulation of Protection of competition (Trud & Pravo, 2009), p. 223.
[31] CPC decision no. 1398/2014, *Steneto waters*.
[32] CPC decision no. 1054/2014, *Bulgargas*.
[33] CPC decision no. 470/2013, Pleven transport.
[34] Nikolov at al, p. 244.
[35] CPC decision no. 121/2011, *Retail chains*.
[36] CPC decision no. 628/2007, *Kremikovtsi Trade* and CPC decision no 280/2014, *Bus transport*.

on objective criteria and such criteria are equally applied to all customers of the dominant undertaking. For example, in an investigation of the discount scheme applied by a dominant distributor of audio records, the CPC held that transparent and uniformly applied volume rebates do not amount to price discrimination.[37] Application of different prices and other terms to different customer categories is also permissible, as long as customer differentiation is not arbitrary. For example, in a case involving distribution of video games the CPC ruled that a refusal to apply a more beneficial dealer price to a company which had lost its dealer status due to its own refusal to prolong the relevant agreement was not a form of discrimination.[38]

5.3. Tying and bundling

The last form of abuse that falls (partially) in the exploitative category - tying - is explicitly mentioned in Art. 21 PCA. The prohibition covers all attempts to make an agreement conditional on assumption of additional obligations by the other party or entering into other agreements, which by their nature are not related to the main agreement and its performance. Tying violations would be deemed present in any case where there is no reason of technical, technological or other nature, which requires the joint sale of products or services.[39] Tying exists where products or services are provided to customers only together, or even if provided separately their bundled price is lower than the sum of their individual prices. In this latter case, however, bundling would be in breach of competition regulations only if it has foreclosure effects.[40]

6. Price-Based and Non-Price-Based Abuse

According to the CPC guidelines, the distinction between price-based and non-price-based abuses is applicable primarily to structural (exclusionary) violations - depending on the way of pushing competitors out of the market.[41] (However, indicia from CPC case practice proves that this theoretical distinction cuts across all forms of conduct.) The most common non-pricing exclusionary abuses are: tying and bundling, refusal to deal and refusal of access to an essential facility, while examples of pricing exclusionary abuses are: predatory pricing, margin squeeze, and loyalty rebates.

6.1. Tying and bundling

The exclusionary effects of tying and bundling practices are observed in situations where a dominant undertaking tries to leverage its market power in one product by demanding from customers to also purchase other products, with respect to which it is not a market leader and faces strong competition. As a result of the tying in order to acquire the desired product (which is not available from other reasonable sources) customers are forced to buy the tied product from the same supplier, thus their choice is restricted artificially despite the presence of sufficient alternatives.[42] Formal evidence of tying offers without objective justification would be sufficient for the CPC to find a violation without entering into detailed effect analysis.

6.2. Refusal to deal

The second type of exclusionary violation, refusal to deal, in most of the cases boils down to a refusal to continue to supply goods to an existing customer[43] (with or without termination of contract) or refusal to enter into contractual relations with a potential customer[44]. Refusal by a dominant

[37] CPC decision no. 268/2008, *NMC*.
[38] CPC decision no. 623/2008, *Pulsar*.
[39] See e.g. CPC decision no. 1023/2007, *BTC ADSL*.
[40] CPC decision no. 1201/2008, *BTC*.
[41] http://cpc.bg/Competence/AbuseOfDominanceDescription.aspx#4
[42] CPC decision no. 1023/2007, *BTC ADSL*.
[43] CPC decision no. 506/2013, *EnergoPro Sales*.
[44] CPC decision no. 1576/2013, *Haos Invest*.

undertaking to deal with a partner would be abusive only where (i) there is no justification of objective nature about the refusal, (ii) the refusal to deal is long lasting and not temporary, and (iii) the refusal has foreclosure effect for the partner.[45] Refusal to deal may be justified where it is a result of transparent policy of the dominant undertaking, equally applied to all its counterparties.[46] However, if there is evidence that the refusal to supply or threat of termination of relations serves as an instrument for enforcement of other commercial conditions the CPC would not engage in effects analysis and the defendant would face a much higher burden to prove the presence of an objective justification.[47]

6.3. Essential Facility

Refusal of access to an essential facility can be regarded as a variation of the general refusal to deal. The PCA does not refer to the concept of "essential facility", but in its guidelines the CPC indicates that in its scope fall various types of tangible and intangible assets, located on an upstream market (often a wholesale market), which are used by the customers of the asset owner in order to supply goods or services on the related downstream (retail) market.[48] The CPC has a comparatively rich case practice concerning different types of assets that can be regarded as indispensable, including waste disposal facilities[49], transport hubs[50], telecom networks[51], intellectual property[52] etc. The refusal of access as such may take the form of an explicit or tacit rejection – e.g. in the form of tacit rejection or inaction,[53] stalling negotiations or setting cumbersome conditions for accessing or using the facilities.[54]

CPC case practice indicates a three-prong test for assessment of suspect behaviour, which includes: (i) control over an essential facility, (ii) competitors on a secondary market do not have access to alternative facilities and lack of access would prevent or distort competition, and (iii) the owner of the facility refuses to grant access or use of the facility.[55] Access should be granted on equal and non-discriminatory terms[56] and should be effective and not hindered by the owner (including by way of failure to act).

The facilities are regarded as indispensable if no viable alternative in terms of characteristics, use, and application exists. If using other facilities is possible but less cost-efficient, they still represent a viable alternative.[57] The refusal must eliminate competition on the downstream market, but it is not necessary that the dominant company competes on that market with the undertaking requesting access. The refusal may only be justified by objective limitations of technical or legal nature[58], and by economic efficiency considerations[59].

Finally, it should be noted that in its practice the CPC also discussed *the interplay between trademarks and the notion of "essential facility"*.[60] The case saga, that is exemplary in this respect, was triggered

[45] CPC decision no. 189/2014*, BTV Media.*and CPC decision no. 926/2014, *EVN.*
[46] CPC decision no. 1133/2007, *Gedeon Richter* and CPC decision no. 926/2014, *EVN.*
[47] CPC decision no. 28/2000, *Gypsum*.
[48] Nikolov at al, p. 276.
[49] CPC decision no. 54/2008, *Dionysius Varna*.
[50] CPC decision no. 139/2006, *Albena autotrans*, and CPC decision no. 740/2014, *Sofia Airport*.
[51] CPC decision no. 510/2007, *NetPlus*.
[52] CPC decision no.147/2005, *ABRO* and CPC decision no. 331/2006, *MusicAutor*, confirmed on appeal by decision no. 8079/2007 on case 2408/2007, SAC 5th Chamber.
[53] CPC decision no. 177/2013, *PMU/Toplo*.
[54] CPC decision no. 64/2014, *EnergoPro*.
[55] *See*, e.g. CPC decision no. 54/2008, *Dionysius Varna*.
[56] CPC decision no. 500/2008, *Poligrafsnab*.
[57] CPC decision no. 500/2008, *Poligrafsnab*.
[58] CPC decision no. 926/2014, *EVN.*
[59] CPC decision no. 1133/2007, *Gedeon Richter*.
[60] CPC decision no. 16/2006, quashed in part on appeal by decision no. 8397/2006 on case 1884/2006, SAC 5th Chamber, quashed entirely on cassation by decision no. 1402/2007 on case 10025/2006, SAC 2nd Grand Chamber.

by a complaint against the refusal of Ecopack Bulgaria ("Ecopack"), an undertaking providing collective waste recycling management services and a registered licensee of the "Green Dot" (Der Grüne Punkt) trademark in Bulgaria, to sublicense the use of the trademark to other undertakings providing collective waste recycling services. In its decision the CPC suggested that under certain circumstances objects of IP protection could be regarded as "essential facility" provided that they: (i) are not substitutable from the demand side and (ii) competitors/consumers do not have other viable alternatives. In light of the specific facts of the case, however, the authority concluded that the Green Dot mark could not be qualified as an essential facility - the sign had a purely symbolic function and did not oblige customers to dispose of specific waste only in containers managed by Ecopack, nor permitted Ecopack to refuse to manage waste not bearing the Green Dot mark once it was placed in its containers. Nevertheless, the CPC held that Ecopack had committed (i) exploitative abuse by obliging importers of products in packages bearing the Green Dot mark to use Ecopack's own waste management services by threating with IP enforcement and (ii) exclusionary abuse by refusing to sublicense the Green Dot mark to other waste management organizations. This decision was partially overruled on appeal as the Supreme Administrative Court (SAC) held that the Green Dot sign lacked distinctiveness and, therefore, could not be subject to protection and exclusive use. Accordingly, all interested parties could use the Green Dot sign freely and since a sublicense was not needed, the refusal to grant it could not have detrimental effect on competition. In the subsequent cassation appeal the SAC grand chamber quashed the CPC decision in its entirety ruling that use of any form of contestable IP rights cannot qualify as abuse under competition law and such disputes should be resolved by means of IP litigation.

6.4. Predatory pricing and dumping

With respect to price-based exclusionary abuse, the practice that is most often alleged (though rarely proven) seem*s to be predatory pricing. Accord*ing to the definition supported by the CPC, predatory pricing is a case where for a short period of time the respective goods or services are sold at a loss, with the aim of pushing competition out of the market or discouraging other competitors from entering the market.[61] The rationale behind this conduct being to achieve higher profits through a sudden price increase once competitive pressure is removed.

Predatory pricing is presumed to exist where a dominant undertaking tries to drive competitors out of the market by charging prices under production cost for a significant period of time. In its practice the CPC has distinguished between: (i) predatory pricing where the predator was selling below the variable cost of production, and (ii) predatory pricing where the predator was selling above the variable cost, but below the total production cost.[62] In the first case the anticompetitive purpose of the practice could be presumed. In the second case predatory pricing would be found to exist only where the pricing policy of the dominant undertaking was part of a plan to drive competitors out of the market – in other words, evidence of subjective intent also need to be evaluated. Predatory prices should be applied for such a period of time, which is sufficient to cause adverse effects on competition and competitors. The time period may be different depending on the specific market and circumstances.

It should be noted that *dumping sales are also prohibited as a form of unfair competition*.[63] "Dumping" is deemed to exist where the following requirements are satisfied: (i) goods or services are offered at prices lower than prime cost – i.e. below production and marketing cost, (ii) sales continue for a long term and (iii) must concern significant quantities – according to CPC practice, the relative

[61] http://cpc.bg/Competence/AbuseOfDominanceDescription.aspx

[62] *See e.g* CPC decision no. 88/2005, *Simid Group*; CPC decision no. 806/2009, *BTC*; CPC decision no. 1088/2008, *BTC/BTC Mobile*.

[63] Art. 36, Sec. 4 PCA.

share of goods dumped on the relevant market must account for more than one third of the overall turnover (but for high-value goods – over 10% may suffice), (iv) for the purpose of unfair solicitation of customers.

On the objective side, sales below prime cost must be maintained for a significant period of time and the overall quantities must be sufficient to "capture" customers. On the subjective side, the law requires that the seller acts with intention to drive competition out of the market. However, the violation does not require evidence of injury to competitors – i.e. the CPC does not investigate the result. It is deemed that maintaining unreasonably low prices, which do not cover the relevant production and marketing costs, is a form of bad faith behaviour in itself, unless an objective economic justification can be provided.

From a substantive point of view the two violations seem almost identical. According to the CPC, the main difference between predatory pricing, as a form of abuse of dominant position, and dumping sales, as a form of unfair competition, is in the market position of the infringer and the degree of impact on competition.[64] In other words, if dumping behaviour is exhibited by a dominant undertaking, it would qualify as predatory pricing. There are almost no published decisions where both violations were argued simultaneously, but it seems that due to the different procedural routes that are applied for antitrust investigations and for review of unfair competition complaints, the CPC would not prosecute them in parallel unless a petitioner expressly requests so (and pays the applicable fees).

6.5. Margin squeeze

The CPC has dealt with margin squeeze in situations where a vertically integrated dominant undertaking operates on both the upstream and downstream market. In order for a margin squeeze to exist the test established by the competition authority requires that the level of the price at which the dominant undertaking sells to customers on the downstream market is lower than the level of price at which the dominant undertaking sells to its competitors. Price squeeze would exist even if the level of price at which the dominant undertaking sells to its customers is not lower but does not allow competitors to meaningfully compete with the dominant undertaking on the downstream market.[65]

In a case involving a company operating exhibition facilities (essential facility operator), the CPC found the existence of margin squeeze with respect to a secondary downstream market for construction services within the exhibition area (on which both the essential facility operator and other companies were active). The decision was based on evidence that the price which competitors had to pay for access was such that it did not allow them to effectively compete on the secondary market with the essential facility operator.[66]

6.6. Loyalty rebates

The application of rebates and discounts by a dominant undertaking are generally in compliance with competition law where they are not aimed to achieve a loyalty (binding) effect. Loyalty effects would likely be associated with rebates, which are selective, linear (rather than quantitative) or are based on past purchase volumes or sales targets.[67] In one of its rare decisions on loyalty rebates the CPC held that target volume discounts offered by a gypsum manufacturer are abusive where customers are effectively prevented from working with alternative suppliers due to the large quantities they are

[64] http://cpc.bg/Competence/AbuseOfDominanceDescription.aspx

[65] CPC decision no. 624/2009, CPC decision no. 135/2006, CPC decision no. 210/2006 (all three decisions involve the Bulgarian Telecommunications Company - the incumbent fixed lines telecom operator).

[66] CPC decision no. 858/2008, *Plovdiv International Fair*.

[67] CPC decision no. 49/2005, *BNT/bTV*.

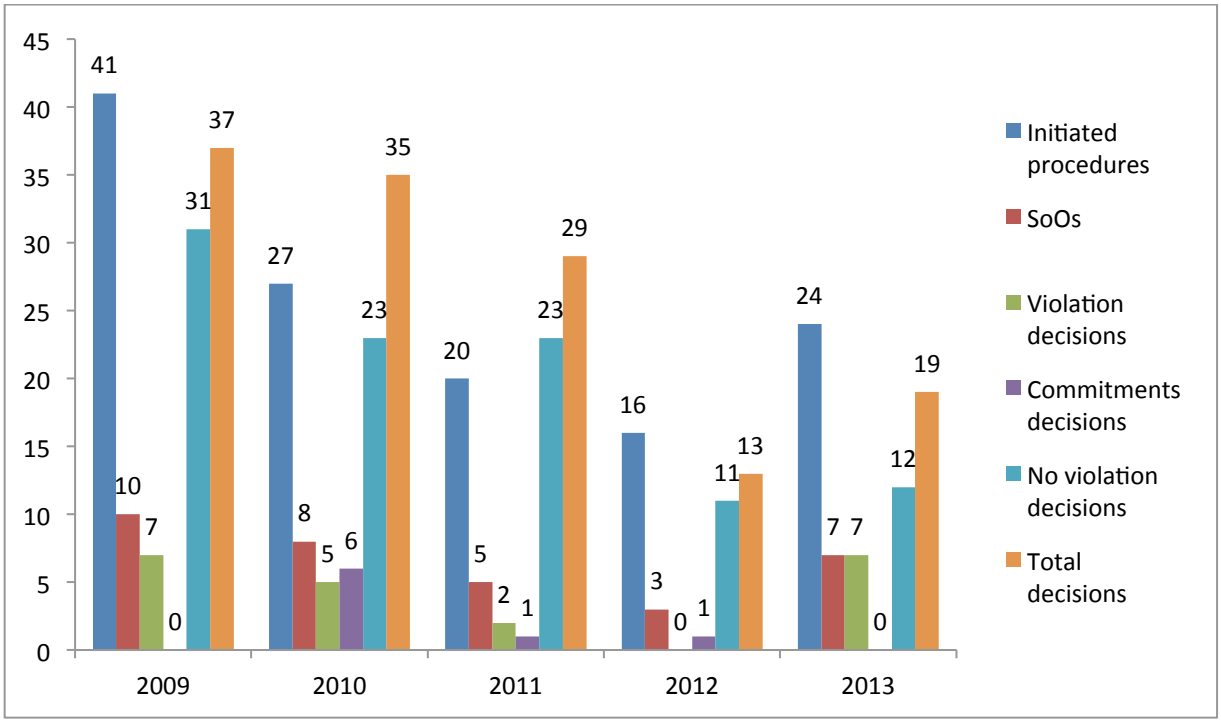
obliged to keep on stock even in periods of traditionally low demand (such as the winter months).[68]

7. Enforcement

7.1 Decision-Making Practice

According to the official CPC publications available until the date of this report, the statistics for the last 5 years look as follows:

Table 1. Public Enforcement Statistics



Source: CPC Annual Reports 2009 - 2013.

7.2 Competent Courts and Authorities

The principal mode of antitrust enforcement in Bulgaria is ex post review. At least on theory, there should be two procedural routes available for defence against restraints of competition and forms of unfair competition: (i) administrative review (by investigation conducted by and before the CPC) and (ii) civil litigation (before a court or administrative tribunal). However, as a standard practice in Bulgaria aggrieved parties prefer to file complaints for alleged violations of the various PCA rules before the CPC for administrative review. The principal reason for this preference is the evidentiary burden. Under standard rules of civil litigation the plaintiff must prove all elements of their case (tortious conduct, damage and causal link) bearing unilaterally the evidentiary burden. Since in most cases the defendant is in possession of all evidence with respect to the infringing behaviour it is difficult for the plaintiff to build a successful case. In administrative proceedings, however, a CPC case team conducts an independent investigation of the facts and collects independently the necessary evidence not only from the principal parties (petitioner and respondent), but also from any third party that may be in possession of relevant information. This represents a significant relief for the petitioner as they can simply file a complaint and after that adopt a passive position relying on the efforts (and compelling power) of the competition authority.

[68] CPC decision no. 28/2000, *Gypsum*.

Besides the CPC, several other public authorities in Bulgaria have sector specific competence to launch ex officio investigations to pursue abusive practices. For example, the Commission on Regulation of Communication exercises control over telecom operators and enforces the rules designed to prevent abuses by undertakings with significant market power[69], while the State Commission on Energy and Waters monitors the behaviour of utility companies.

Private enforcement in Bulgaria did not progress beyond embryonic stage and was completely stalled by a recent ruling of the Supreme Court of Cassation (SCC), which in practice prevents all stand-alone litigation of claims for damages for antitrust violations.[70] The SCC simply stated that the civil courts should deny hearing a case for antitrust damages unless it was already examined by the CPC and the competition authority has issued a decision confirming that a violation of competition law was committed. *The effect of this ruling is to bestow upon the CPC complete exclusivity in enforcing the rules of competition law in Bulgaria*.

The Bulgarian judicial system does not follow the doctrine of stare decisis and in general the decisions of the SCC are not immediately binding on all courts. However, in practice they have such strong persuasive authority that lower courts rarely take their chances to support a contradicting position. This is even less probable in this case, since in all decisions encountered so far civil judges shy away from competition law matters. Thus in the presence of this specific SCC ruling it is highly unlikely that a breakthrough would be possible.

7.3. Public Enforcement

The common framework for antitrust investigations - covering both alleged prohibited agreements and abuse of dominant position - is set forth in PCA Chapter IX, while proceedings for review of complaints alleging unfair competition violations are governed by Chapter XII. The most important difference is that in antitrust investigations the CPC acts both as a public prosecutor and as a deciding authority and has complete control over the case – it cannot be terminated by the private parties even where the original petitioner and respondent - alleged perpetrator reach a settlement with respect to all disputed issues. Proceedings under an unfair competition complaint, on the other hand, have adversarial character and follow closely standard civil action procedure. Two distinct sides are formed: (i) petitioner - the aggrieved party, and (ii) respondent - the alleged perpetrator, while the CPC's function is limited to independent verification of the factual allegations of the disputing parties (i.e. it acts as a quasi-judiciary tribunal). The petitioner may withdraw the complaint at any time without stating any grounds, causing automatic termination of the proceedings.[71]

All CPC investigations – under both antitrust and unfair competition law - are initiated: (i) upon the complaint of a private party with legitimate interest (supplier, client or competitor), (ii) upon the request of a public prosecutor, (iii) on the basis of a leniency application, or (iv) on self-approach by the authority (sua sponte).

The complaint should be in writing and must clearly identify the petitioner, respondent, essential facts of the case and the requested remedy. The complaint may be supplemented by relevant written evidence, but there are no actual restrictions to provide documents and information at a later stage of the proceedings. Furthermore, a state fee of BGN 500 (approx. EUR 256) is due. Anonymous complaints are not possible but they can be treated as "signals" which may trigger preliminary review by the authority and serve as a ground for self-approach in antitrust cases, or even for some forms of

[69] In line with Art. 16 (4) Framework Directive, the Bulgarian Electronic Communications Act defines "significant market power" as a position equivalent to dominance, i.e., a position of economic strength vesting in a single undertaking (or a group of undertakings) the power to behave to an appreciable extent independently of competitors, users and end users.

[70] Ruling no. 520/2014 on case 4004/2013, SCC 2nd Commercial Chamber.

[71] Art. 98 (1), para 4 PCA.

unfair competition (e.g. misleading advertising, prohibited promotional activities, etc.).

Standing before the CPC is restricted to business entities (without limitation on the legal form - commercial companies, sole traders, individual professionals, etc.) that can prove that their legitimate interests are infringed or endangered by behaviour in violation of the substantive provision of the PCA. Consumers may not be party to CPC proceedings, but a complaint from a consumer may serve as sufficient ground for, or trigger preliminary investigation that would ultimately result in, self-approach.

Once a decision to open a case has been adopted (whether in response to a valid complaint or ex officio), a case supervisor (rapporteur) and a case team are designated to conduct the investigation. The case rapporteur is a CPC commissioner, who is primarily responsible for the respective case. In practice the investigation is moved forward by a case team from the CPC administration, which in exceptional circumstances may be assisted by external experts and specialists. By authorisation from the case rapporteur or head of respective unit the investigators may collect (i) written or oral testimonies from petitioner, respondent, third interested parties, and any other market players, as well as from officials in any government or local authority; (ii) copies of private and official documents; and (iii) opinions from public authorities and private experts.[72] As a guarantee for that broad competence, the law entitled the CPC to impose penalties on individuals who obstruct the investigation by either not cooperating with the authority or by providing false information.

The PCA prescribes that investigations on unfair competition cases should be completed within 2 (two) months.[73] By decision of the CPC, in cases of factual and legal complexity, the time limit may be extended by additional 30 (thirty) days. However, no timeframe is prescribed for antitrust investigations, which in the practice so far span from several months to a couple of years. Upon completion of the investigation, the case team prepares a report, which is submitted to the rapporteur for review. If the rapporteur approves the report, she is obliged to inform the CPC Chairman.

In unfair competition cases the CPC Chairman schedules a public hearing within two weeks as of completion of the investigation, for which respondent, petitioner, and any other interested parties are dully summoned in accordance with standard rules of administrative procedure. The parties are provided with an opportunity to get acquainted with the materials collected on the case, in order to prepare for their final pleadings.

The final stages of antitrust proceedings differ significantly from unfair competition review. First, within two weeks as of completion of the investigation the CPC Chairman schedules a closed internal session, on which following deliberation upon the case report, the CPC can either: (i) resolve that no violation was committed, or (ii) bring formal charges against the respective undertakings, by adopting a “statement of objections” in the form of a ruling.

Where a statement of objections is issued, the undertakings concerned (now defendants) and the complainant (if any) would be given not less than 30 (thirty) days to review all collected evidence and submit statement of defence and/or objections in writing. The undertakings concerned may also offer

[72] The PCA further empowers the CPC in antitrust investigations only (i.e. not for the purposes of unfair competition review) to conduct site inspections (dawn raids) on the basis of a court warrant. The warrant is issued by a judge from the Administrative Court-Sofia, upon the request of the CPC Chairperson. During site inspections CPC officials are entitled to search premises, means of transport and other locations used by the undertakings, which are listed or otherwise identified in the warrant. The law does not explicitly empower the CPC to conduct inspections in private premises or to search individual persons. Within the scope of the inspection, CPC officials may examine all documents and records, related to the activity of the undertakings concerned, irrespective of the medium on which they are stored, and may seize or obtain electronic, digital and forensic evidence, as well as traffic data, from all types of computer data media, computer systems and other information media as well as seize the devices for transmission of information.

[73] Art. 96 PCA.

specific commitments - e.g. to adopt a behaviour that would be in compliance with the law. If the commitments are approved and accepted, the CPC would close the investigation without imposing penalties or sanctions.[74] Upon acceptance, the commitments become binding contractual obligations, compliance with which is controlled by the authority. If the undertakings concerned fail to perform as promised, or if the CPC discovers that the commitments were accepted on the basis of incomplete or misleading information, it can reopen the original investigation. Where no commitments are offered or accepted, the procedure usually (upon request of at least one of the defendants) continues with a public hearing, for which the defendants as well as all other parties in the proceedings (e.g. complainants) are duly summoned.

The public hearing (for both unfair competition and antitrust cases) is modelled according to the rules of procedure applied by the courts for judicial review of administrative decisions: each of the parties summoned may present and request the admission of additional evidence[75], and is entitled to plead orally or present additional arguments in writing. The case team can also attend and theoretically they may also ask or respond to questions (however in reality they almost never intervene, or even appear at the hearing for that matter). After the hearing the CPC adopts a decision in a closed session.

The decision would be valid if at least 4 (out of 7) of the members of CPC were present, but in all cases a majority is formed by at least 4 members voting in favour. If the CPC confirms that a violation of the law has been committed, it can: (i) impose fines in a lump sum and/or as periodic payments and (ii) order the undertakings concerned to bring to an end the illicit behaviour, and where necessary (iii) impose any behavioural or structural remedies, which are proportionate to the infringement committed and are necessary to restore competition on the relevant market;[76] or (iv) withdraw the benefit of a block exemption (where the case concerns a collusive practice).

All CPC decisions can be challenged before the Supreme Administrative Court (SAC) by any of the parties involved in the administrative proceedings, as well as by a third party that may show loss of present or foreseeable benefits as a result of that decision. The appeal should be lodged within 14 days as of service of notification that the decision and the reasoning thereto have been issued (for the parties to the proceedings) or the date of publication of the decision on the CPC website (for third parties).

The SAC reviews the appeal in a panel of three judges (a "Chamber") and can: (i) affirm the CPC decision, (ii) affirm and revise in part the CPC decision (e.g. revise the amount of the sanctions imposed), or (iii) quash the CPC decision and remand the case to the CPC for de novo proceedings with instructions for further review. The court rarely embarks on re-evaluation of the economic analysis part of the administrative decision, although on some rare occasions the judges did amend the original market definition. Case practice shows that the court would prefer to rule on legal issues, such as whether the test for establishing an infringement has been correctly applied and whether the evidence collected is relevant and sufficient.

The decision of the Chamber is subject to further appeal on points of law before a SAC panel of five judges (a "Grand Chamber"). The Grand Chamber has the same powers as in a first instance review, ut it cannot collect new evidence and re-examine the facts of the case. If it quashes the judgment of the Chamber, it must decide the case on the merits, unless a manifest breach of the rules of procedure has been committed or additional facts need to be established, for which written evidence is not sufficient. The decision of the Grand Chamber is final and is not subject to further appeal.

[74] Art. 75 (2) PCA.

[75] In practice however, the CPC would reject the admission of additional evidence at that stage, unless it clearly refutes the conclusions made during the investigation.

[76] The CPC may impose structural remedies only where there are no equivalent behavioural remedies, or where such behavioural remedy would be more burdensome to the respective undertaking.

7.3 Approach Followed by Competent Courts and Authorities

Neither the CPC nor the SAC have ever stated preference for a uniform approach or standard of harm towards analysis of abuse of dominance cases. Nevertheless, it was noted that a presence of intention to act in violation of existing obligations is not an element of the statutory hypothesis, thus no evidence of subjective set-up is required to establish that a dominant undertaking has abused its market power.[77] Liability under Art. 21 PCA seems to be strict – it will arise irrespective of whether the dominant undertaking has aimed at a specific anticompetitive result or even anticipated that such a result could arise as a side effect. The only requirement is that there is a causal relationship between the conduct of a dominant undertaking and effective or imminent adverse effect on competition and consumers.

In this respect it should be noted that the stated objective of the PCA (as per its Art. 1) is to ensure protection and conditions for promotion of competition and free economic initiative. However, the task of the CPC is not simply to guard and promote competition as an abstract concept, but to ensure that market players can operate within an environment which allows them to innovate and operate efficiently, based on the assumption that the ultimate beneficiary of normal competitive processes are consumers. Following this approach the PCA (similarly to TFEU) contains a number of exemptions for conduct, which though prima facie anticompetitive, would result in positive consumer welfare effects that could outweigh any negative impact on market structure and relations.[78]

Similar to other legislative instruments, there are several categories of objectives pursued by the PCA. As its name suggests, protection of the legitimate interests of competitors is one of the main goals of the legislation, but due attention is also paid to other market players (operating on neighbouring markets – i.e. suppliers or customers).[79] Nevertheless, consumers are considered the principal beneficiaries of loyal competition and their interests should be examined with due consideration in all cases. Specifically with respect to unilateral abusive conduct, the rule of Art. 21 PCA clearly states that a violation of the law would exist where the suspect conduct may not only prevent, restrict or distort competition, but also harm the interests of consumers. Therefore, efficiency defences will be accepted to the extent there is evidence of pass-on of welfare benefits to end-users.

There is no clear evidence that the CPC follows the guidance of the European Commission on enforcement priorities. Indeed, on many occasions investigations in Bulgaria were opened as a follow-up on EC cases that were broadly publicised.[80] Nevertheless, the enforcement priorities of the CPC exhibit much stronger affiliation to topics of enhanced local sensitivity. As with all Bulgarian public institutions, the CPC is not immune to political influences, and in the turbulent political environment of Bulgaria enforcement priorities are changed so often that it is very difficult to establish permanent enforcement focus or objectives that are followed consistently. This, as can be expected, diminishes the preventive effect of public enforcement, since despite the severity of the fines imposed in individual cases, in the absence of consistency market players do not feel actual threat from prosecution and may often dare to cross the rules.

[77] Nikolov at al., p. 208.

[78] See e.g. Art. 17 PCA specifying the conditions for exemption from the general prohibition, similar to Art. 101 (3) TFEU.

[79] The interests of suppliers are not differentiated as a separate object of protection and they would come in the focus of CPC enforcement only as part of the general obligation of the authority to protect the competitive relations along the supply chain from deformations that in the long term may affect end-users.

[80] The most recent example seems to be the investigation of Bulgargaz following the SoO of the European Commission against BEH (the Bulgarian Energy Holding).