EUROPEAN COMPETITION DAY - CHANGE AND CHALLENGES

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Following Bulgaria’s accession to the EU, a new Law on Protection of Competition was adopted in 2008. The new law is in line with the provisions of the European competition legislation. In accordance with Art. 35 of Regulation 1/2003, the law designated the CPC as the national competition authority, responsible for the implementation of the competition rules, laid down in Art. 101 and 102 of the Treaty on the Functioning of the European Union. The law empowered the Bulgarian authority to cooperate with the European Commission and other EU national competition authorities; to impose interim measures; to approve commitments by undertakings, etc. The new sanctioning policy ensured the effective enforcement of competition rule by imposing adequate and proportionate sanctions to infringers.

However, a challenge for us was to combine the enforcement of the European competition rules with public procurement and unfair competition provisions, which formed the bulk of our enforcement practice prior to Bulgaria’s accession to the EU. At the same time, one of our major priorities was raising public awareness of our new competences to apply Art. 101 and Art. 102 of the Treaty in parallel with the national competition legislation.

Since Bulgaria’s accession to the EU in 2007 to mid-2014, the CPC has notified 19 cases in the ECN. 8 of the cases concerned infringements under Art. 101 of the Treaty, 8 cases were under Art. 102 of the Treaty and 3 cases dealt with both Art. 101 and Art. 102. In 4 of the cases the CPC issued infringement decisions; in 4 cases no effect on trade was established; and in 10 cases no infringements were found.

These statistics show that the Bulgarian competition authority has a modest enforcing practice of Art. 101 and Art. 102 of the Treaty. We have been trying to figure out why we have so few cases with EU dimension. It might be because Bulgaria joined the EU not so long ago. Another possible reason could be the application of effect on trade test and the consultation mechanism provided by Regulation 1/2003. We should also keep in mind that Bulgaria’s economy is still below the average level of development of the EU economies.

As regards our priorities, unlike the European Commission and some other members of the ECN, the Bulgarian authority cannot refuse to investigate a case on the grounds of priority setting. The CPC is legally bound to investigate and issue a decision on each case that has been submitted by an applicant. Nevertheless, the CPC found an alternative way to set its own priorities in competition law enforcement. The Bulgarian competition law enables the CPC to initiate proceedings *ex officio* on its own

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1 Chairman of the Bulgarian Commission on Protection of Competition. Speech held at the European Competition Day, Rome, 10 October 2014.
initiative. Every year the CPC adopts an Action Plan for the following year where it sets its own priorities. This allows us to better plan and manage the allocation of resources. In this way the CPC can devote its enforcement capacity and powers to investigate cases in key sectors of the economy suffering from market distortions. Recently, for example, special focus has been put on the energy sector.

When talking about Article 101 it is worth mentioning that the Communication from the European Commission shows that the Commission focuses on cartels while the national competition authorities deal more with non-secret agreements.

I don’t think that this is a matter of priorities. Most of the Commission’s cases under Article 101 are initiated on the basis of leniency. Unfortunately, the same does not apply for the Bulgarian competition authority and the other agencies from the South-Eastern Europe. Even though our leniency programme is fully in line with the ECN Model Leniency Programme, it is not working properly. The turnover-based sanctions introduced with the new competition law at the end of 2008 were supposed to trigger our leniency programme. In order to encourage applicants, we revised the program in 2011. We introduced some additional incentives, such as leniency plus, and enhanced the transparency and legal certainty of potential applicants. We also made a lot of efforts to make it popular through public events, video presentation, cartoon brochures, our website. But it is still not working, which for us means that the ECN Model Leniency Programme is not universally applicable. There are also other factors. For example, in Bulgaria competition culture is not very high and this probably applies for other EU member states too. Some undertakings are not aware of the competition rules, national and European, and sometimes they don’t even realize that their conduct is anticompetitive.

For example, in 2008 the CPC sanctioned 14 insurance companies and their association for infringement of Article 101 of the Treaty (then Article 81 of the EC Treaty) and the relevant national provision. The companies had concluded an agreement in the form of Memorandum, fixing a common minimum risk premium for the motor vehicle civil liability insurance and a maximum amount of the commission fee for insurance brokers. This was an obvious cartel but the agreement was not even kept secret. We received information about it through the media and none of the ‘classical’ tools for cartel detection and investigation, such as leniency and dawn raid were applied. Moreover that the case had an effect on trade between EU member states. So you see that the focus of the enforcement practice does not depend only on priorities. Effective leniency policy and anticartel enforcement practice are common goals within the ECN, but the local specificities of the different countries must be taken into account.

In addition, sometimes there are challenges with regard to the uniform application of EU competition rules. I will give you an example from our enforcement practice.

We had a case in which the Chamber of Engineers in the Investment Design adopted Guidelines for setting the remuneration fee for engineering services in urban planning and investment projects. The Guidelines explained how to estimate the minimum costs for these
services and fixed hourly rates depending on the qualification and liability of the engineers. They also regulated the conditions for the negotiation of engineering services to be provided in another country. The Chamber adopted these Guidelines because it was obliged to do so under the Bulgarian Law on the Chambers of Architects and Engineers in the Investment Design. This is how the national sector-specific law had in fact facilitated the infringement of EU competition rules. In accordance with the European court of Justice (ECJ) CIF judgement, the CPC based its decision on the principle of precedence of the EU law and argued that the text of this sector-specific law was incompatible with Articles 3 and 10 of the EC Treaty, as well as Article 101 of the Treaty. In addition, the CPC imposed a sanction on the Chamber for infringement of Article 101 of the Treaty, because it exceeded the requirements of the law and set a minimum price for the provision of engineering services. The CPC decision was, of course, appealed before the review court. Unfortunately, the court repealed our decision saying that the CPC is not competent to decide on the non-applicability of a national law based on the principle of precedence. Moreover, the court ruled that Articles 3 and 10 of the EC Treaty, in relation with Article 101, could not serve as a legal basis for the CPC decision and that the CPC has exceeded its competences under the competition law. The court concluded that the CPC decision was null and void in this part. As to the sanction, the court concluded that since the infringement is not committed by the Chamber, the CPC could not sanction it.

So, in practice, we were not able to apply the EU competition law in accordance with the principles of the CIF judgement. That is why we turned to the European Commission and asked for an amicus curie intervention before the cassation judicial instance. Unfortunately, the desired intervention came too late after the hearings in the court had already finished.

Nevertheless, the CPC highly values the new forms of cooperation between the national competition authorities and the European Commission, as well as among the competition agencies, introduced by Regulation 1/2003. The meetings of the Director Generals, the ECN Plenary and the ECN working groups and subgroups allow us to learn about the experience of the other authorities, and to take part in the process of setting the ECN joint work programme. These meetings were very useful for improving our enforcement practice especially in the first years after accession to the EU. A valuable tool for cooperation is the possibility under Regulation 1/2003 for exchange of information in individual cases. The right to ask another authority to conduct an inspection on its territory is also very useful.

In conclusion, I would like to say that the achievements over the past 10 years show that the ECN is a successful mechanism for cooperation, but still there is room for improvement. For example, the convergence of fining policies could be considered. In addition, the cooperation within the ECN can be extended with regard to mergers. There are more ways to guarantee to a greater extent the uniform application of the EU competition law and it is up to all of us to achieve it.