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DOES COMPETITION KILL OR CREATE JOBS?

Contribution from Bulgaria

-- Session I --

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Ms. Ania Thiemann, Global Relations Manager, OECD Competition Division
Tel: +33 1 45 24 98 87, Email: ania.thiemann@oecd.org

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DOES COMPETITION KILL OR CREATE JOBS – LINKS AND DRIVERS BETWEEN COMPETITION AND EMPLOYMENT

-- Bulgaria--

1. Competition policy encourages efficiency, creates a wider choice for consumers and helps to reduce prices and improve quality. In a competitive environment, firms must constantly strive to lower their production costs in order to charge competitive prices. They must also constantly improve their goods and services so that their quality corresponds to consumer demands. Competitive pressure is one of the forces driving companies to be efficient and to pass on to consumers the benefit of these efficiencies. Although competition is beneficial for society, the law distinguishes between fair and unfair methods of competition. This legislative policy recognizes that some methods of competition are socially undesirable.

2. On 9 July 2015, the Bulgarian National Assembly amended the Law on Protection of Competition (LPC) by introducing a new Chapter VIIa, titled *Abuse of superior bargaining position*. The new Article 37a of the LPC prohibits any act or omission by an undertaking with stronger bargaining position during negotiations, which is contrary to good faith business practice and harms or may harm the interests of the weaker negotiating party and consumers. The second sentence of Article 37a clarifies that unfair trading practices are all acts or omissions that have no objectively justifiable economic ground such as unjustified refusal to deliver or purchase goods or services, imposition of unjustifiably burdensome or discriminatory terms or unjustified termination of commercial agreements.

3. The concept of *superior bargaining position* is new for the Bulgarian legal system. Paragraph 2 of Article 37a provides that the existence of *superior bargaining position* shall be assessed by reference to the structure of the relevant market and the specific legal relationship between the undertakings concerned, taking into account the level of economic dependency between them, the nature of their activity and its difference in scale, the availability of alternative commercial partner, including the existence of alternative sources of supply, distribution channels and/or clients.

4. For any violation of the prohibition laid down in Art. 37a, paragraph 1 the Commission for Protection of Competition shall impose a pecuniary sanction up to 10% of the annual turnover of the product(s) concerned for the preceding financial year but not less than 10 000 BGN (approx. 5000 EUR) . If no record of the turnover exists, the Commission shall impose a sanction in the range from 10 000 to 50 000 BGN.

5. The concept of *abuse of superior bargaining position* was introduced in the LPC with the purpose of addressing deficiencies resulting from asymmetries in bilateral business-to-business negotiations. Although the new legislative provisions encompass any business agreements, the initial intent of the Bulgarian lawmakers was to tackle economic asymmetries in the retail supply market.

6. In recent years, structural changes occurred in the supply chain of food and other products in Bulgaria, the result of which is the development of the “modern trade” model with an increased entering of new retail chains. The trend on the market points towards steady growth of the market share of retail supply chains and the reduction of the total amount of the retailers in the long term. This evolution leads to the emergence of complex contractual relationships between various types of suppliers and increasingly large retailers. On the one side, suppliers counting on a global well-known brand and sufficient consumer loyalty are likely to hold stronger bargaining power than their distributors, whose revenues depend on their ability to display these products (so-called “must have” products). On the other side, small producers willing to market their products (in particular perishable goods) might end up having weaker bargaining power with regard to large retailers. The result is that contracts between these undertakings might be imbalanced to the detriment of the weaker party. The party with a superior bargaining power will seek to impose unfavourable price and contract terms to its counter-party in order to maximize its profit. The existing antitrust rules cannot fully tackle those practices, as the abuse of dominant position requires that one of the parties involved in the commercial relationship holds a dominant position in the relevant product and geographic market.

7. The newly introduced rules are devised to deal with imbalances in business-to-business trade practices regardless of the level of the supply chain and the industry in which they occur. Full equality between parties is almost impossible to achieve in reality. For example, retail chains offer wide variety of goods at affordable prices, which is beneficial for consumers. They can use their superior bargaining power to lower the suppliers’ prices and subsequently to pass on to consumers the benefits of this gain. However, there might be situations in which the party with superior bargaining power uses trading practices that are unjustifiably harmful for the weaker party and the final consumer.

8. The abuse of superior bargaining power may force the weaker party to accept disadvantages that it would not have accepted if the competition process worked properly. The party on which unjustifiably burdensome contract terms are imposed is in a disadvantageous position to compete with its competitors. This may result in having negative effects on the overall competition environment. Placed in a disadvantageous position, the weaker party is constrained to reduce its profits to a level, which will deprive it from investment opportunities. The ability of a company to expand and innovate relates to its capacity to create and maintain jobs. Fair trade is a key driver for growth and job creation. Providing legal protection to the weaker party in case of abuse of a superior bargaining power ensures a level playing field for companies to compete, which is vital to generating growth and unleashing companies’ potential to create jobs.