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SANCTIONS IN ANTITRUST CASES

Contribution by Bulgaria

-- Session IV --

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SANCTIONS IN ANTITRUST CASES

-- Bulgaria --

1. Introduction

1. The Commission for Protection of Competition (hereafter the CPC) is the independent administrative body empowered to conduct investigations and to impose sanctions on undertakings and individuals that have infringed the Bulgarian Law on Protection of Competition (hereinafter the LPC). The legal basis to impose fines on undertakings and/or associations of undertakings for engaging in anticompetitive behavior is provided for in Article 100 of the LPC. Article 102 of the LPC provides the legal basis for imposing pecuniary sanctions on individuals. The Commission is empowered to impose fines to cartel members since the adoption of the first Competition Act in 1991. The nature of the fines (pecuniary sanctions) imposed by the CPC is administrative. Thus, the CPC is empowered to impose sanctions against specific companies or associations, groups of companies (i.e. the company which actively participated in the infringement and its parent companies), specific individuals who participated in the infringement, and a combination of any of the above.

2. The calculation of the fine is based on *the Methodology for setting the amount of fines*. The present *Methodology* was adopted in 2009. *The Methodology* represents a two-step method of calculation, which includes the estimation of the basic amount of the sanction, which is consequently adjusted, if there are aggravating or mitigating circumstances. The Bulgarian Competition Act provides a legal maximum of the fine, which should not exceed 10% of the total turnover in the preceding financial year, based on the concept of legal maximum in the EU law

2. Determination of the basic amount of the fine

3. According to *the Methodology* the value of sales represents the net revenues, generated by the undertaking from selling the relevant products (the goods or services), to which the infringement directly or indirectly relates. The infringement may indirectly relate to a good or service in the case there may exist a horizontal price fixing agreement for purchasing of product, which serves as an input or a processed product necessary for the production of another product.

4. The basic amount of the fine is calculated by applying a standardized approach for similar infringements. The basic amount of the sanction is set as a percentage of the value of sales, depending on the gravity of the infringement, as follows:

- for minor infringement – up to 5% of the value of sales;
- for not very grave infringements – up to 8% of the value of sales;
- for grave infringements – up to 10% of the value of sales.

5. Cartel agreements are considered grave infringements and according to the *Methodology* the applicable percentage is from 8% to 10% of the value of sales.

6. The basic amount of the fine is multiplied by a duration factor. For infringements lasting less than one year – the duration factor is equal to 1 (one). For infringements lasting over one year – the duration factor is equal to the number of years of participation of the undertaking in the infringement, whereas periods of participation of less than six months are counted by as half a year, while periods longer than six months, but shorter than a year are counted as one full year.

3. Adjustment of the basic fine

7. In addition, the basic amount of the fine may be increased or reduced by 10% for each established aggravating or mitigating circumstance.

8. Aggravating circumstances include:

- repeated (same or similar) infringement, established by the CPC or other national competition authority of a member state of the EU or the European Commission;
- refusal to cooperate with or obstruction of the CPC in carrying out its investigation or resistance to the investigation;
- the undertaking has acted as an initiator, leader or instigator in performing the infringement or exercised coercion to persuade other undertakings to participate in the infringement;
- offer or give "indemnification" or "compensation" to other enterprises for their involvement in the infringement;
- affect the competition in related or neighboring markets;
- other, depending on the specific case.

9. Mitigating circumstances include:

- terminate the infringement as soon as the CPC intervenes. This circumstance would not apply in cartel cases;
- passive behavior of the undertaking or the association; perform a rather limited role in the infringement or adopt a “follow the leader” strategy;
- cooperate to the CPC outside the scope of the Leniency Program and its obligation to cooperate under the LPC;
- undertake due measures for reducing the unfavorable consequences of the infringement;
- other, depending on the specific case.

10. The fine for an undertaking or association of undertakings, having committed an infringement under Article 101 or 102 of the Treaty on the Functioning of the European Union, may be increased for deterrence by up to 25% of the basic amount.

11. If the amount of the fine exceeds the legal maximum, then the sanction shall be reduced to the amount of the legal maximum.

12. In case the infringer is an association of undertakings, the basic amount of the fine is determined by the turnover of the association as a legal entity, or in case the association does not generate turnover of its own, the Methodology provides that the basic amount of the fine should be set as follows:

- for minor infringement – the basic amount of the sanction is up to BGN 50 000 (Bulgarian leva);
- for not very grave infringements – the basic amount of the sanction is up to BGN 100 000;
- for grave infringements – the basic amount of the sanction is up to BGN 150 000.

13. Under the *Leniency program*, once the final amount of the fine has been determined, the undertakings that do not get full immunity may get a reduction of the fine by up to 50%. The first undertaking might get a reduction from 30-50%, the second – from 20-30% and the following undertakings from 10-20%.

14. In 2012, the CPC adopted Guidelines on Corporate Compliance Programs. However, in case of an infringement the fact that such a program has been adopted would not be considered aggravating nor mitigating circumstance. The reason for adopting such programs is to avoid the commitment of infringements and if that did not happen, it means that the program was not properly implemented.

15. *The Methodology for setting the amount of fines* does not take into consideration the “inability to pay” when determining the fine. Nevertheless, once the final decision for imposing a fine enters into force, the undertaking may request the Authority to defer the payment of the fine. It should be indicated that the fine becomes payable only after the final decision has entered into force. A court appeal launched against the decision suspends its entry into force. Under the judicial scrutiny, the court may reduce the amount of the fine. In most cases, the court concludes the percentage for gravity has not determined correctly and consequently reduces the amount of the fine.

4. Concluding remarks

16. The sanctions for antitrust infringements in Bulgaria are pecuniary and administrative in nature. There is neither criminal liability for the perpetrators of such infringements, nor a procedure for disqualification of individuals. The pecuniary nature of the sanctioning system may not be efficient in some instances and face some limitations. Therefore, the diversification of the sanctioning tools should be envisaged as a measure for effectively combating antitrust infringements. It is argued that among the reasons for lack of leniency applications could be the “*soft*” sanctioning policy, which makes the risk of facing a sanction more preferable over the opportunity to submit a leniency application.