

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

STANDARD SETTING

-- Bulgaria --

14 June 2010

The attached document is submitted to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 June 2010.

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1. Bulgarian standard-setting body

1. The Bulgarian Institute for Standardization (BIS) is the only and unique national standard-setting body. It has been instituted by a special law that provides for its structure and organization of activities. The law also lays down the basic principles for the adoption of standards.

2. The organization of BIS is based on a large public membership. Members may become:

- associations of employers, branch chambers, producers and traders;
- governmental bodies;
- scientific organizations, institutes and higher schools;
- persons for assessment of the compliance, bodies for control and/or certification, laboratories for testing and/or calibration;
- associations of insurers, associations of consumers, professional organizations and unions.

3. BIS is further structured into different bodies - the general meeting of members, the managing board, the control board, the executive director as well as the technical boards and committees.

4. The managing board of BIS is currently composed of 15 members that are representatives of various backgrounds. The president of the board is also member of the Union of Quality Experts in Bulgaria. The government is represented by 3 members coming respectively from the ministry of economy, the defense ministry and the ministry of regional development and public works. The other members are representatives of different universities, scientific or standardization unions, certification, inspection and control firms, as well as representatives of private corporations.

5. The control board, which has essentially financial and budget controlling powers, is, on the other hand, composed of 3 members that are currently representatives of respectively of the association “Consumer”, the ministry of finance and the higher school of civil engineering.

6. The actual decision taking regarding standardization activities is entrusted to three technical boards active in three specific areas. Their members are appointed by the managing board from among recognized experts in the area of standardization on the proposal of sector councils (sub-divisions of the technical boards), technical committees (responsible for drafting the standards) and BIS members.

7. Standardization process in Bulgaria is nowadays harmonized at a large extent with this of the European Union. On the one hand, BIS applies the same rules for standard setting as EU standard setting bodies thus ensuring a harmonized approach not only in the process of adoption of standards but as it regards their methodology and content as well. Thus, from a structural point of view, BIS is organized in way that can reasonably be expected to ensure proper balance of the interests of all economic layers which are affected by standardization – from industries to government and consumers.

2. The standard-setting process

8. Any person, being it natural or corporate, could make a motivated proposal before BIS for adopting a standard. The proposal is then presented to the respective technical board for assessment. The technical board needs to establish, inter alia, whether there is a necessity for such a standard to be adopted

or the extent to which the standard, if adopted, can be continually improved. Once the decision to adopt the proposed standard has been taken, the technical committee starts drafting the documentation.

9. A crucial stage of the standard-setting process is the achievement of a consensus over a draft standard. Indeed, according to the principle for transparency in the elaboration of standards, a public consultation is held on the draft. For that purpose, drafts are published on the web site of BIS. The consultation lasts eight weeks. In case significant objections are formulated or important corrections to the draft are made during the public consultation, the draft is amended and republished for consultation. Where, as a result of the consultation, it becomes clear that there would be no consensus on the draft, the technical committee reconsiders the usefulness and scope of the draft – in the latter case, it may abandon the standard and opt for technical specifications or technical report instead. It is the technical committee's responsibility to settle the dispute over the draft. Its decision is final.

10. After having been adopted standards are periodically reviewed and, where necessary, revised in order to ensure that they reflect the achieved up-to-date level of science and technologies.

11. As part of the obligations to Directive 98/34 and 98/48 BIS is obliged to notify all European standardization organizations upon initiating the elaboration or the review of a standard at a national level. Furthermore, according to the procedure Vilamoura in the electro technical field, BIS can adopt standards at a national level only where less than four technical committees of other member states showed an interest in the standard in question. According to the same principle, BIS applies the "standstill" procedure in case standard setting is made at a European level. In the latter case, BIS cannot elaborate Bulgarian standards or modify existing standards that fall within the scope of work at the European level.

2.1 Principles and requirements which standards need to satisfy

12. According to the Law on national standardization standards may be adopted only where a consensus among all interested parties, based on the consolidated results of science, technologies and experience, has been achieved.

13. Furthermore, standards need to obey certain standardization principles that are enumerated below.

- Standards must be impartial, that is standards should not favor particular commercial, industry, those of suppliers or economic groups' interests;
- Standards should aim at describing essential characteristics of products/processes and services rather than prescribing particular forms or materials used; application of this principle is likely to encourage innovation and ensure the free movement of goods;
- Double standardization must be avoided. This principle requires that where European and international standards exist BIS should stimulate the use of these standards rather than adopt their own; international and European standards are adopted by BIS as Bulgarian standards;
- Certification is not a compulsory requirement of the standard. This means that the application of the standard is voluntary.

3. Reference to standards in the legislation

14. Standards of BIS are commonly referred to in the national legislation. This is generally done for the purposes of avoiding the reproduction of detailed technical prescriptions and specifications.

15. Commonly, a distinction between two types of reference to standards is made:

- Unconditional reference – renders compliance compulsory;
- Non-binding reference – standard is referred to as means to achieve compliance, i.e. one of the possible and, in the same time easiest way to achieve compliance with the legislation concerned – that is, anyone that does not make use of the specified standard must prove compliance with the legislation in the different way – application of the standard in this case equals to a presumption for compliance.

16. The Bulgarian legislation does not use unconditional references to standards but rather use application of standards as a presumption for compliance with certain statutory requirements.

17. Particularly important in this respect are the so called EU harmonized standards. Harmonized standards are European standards (EN), produced under mandate from the European Commission (EC) or from the European Free Trade Association (EFTA) for supporting the essential requirements of “New Approach” Directives. Compliance with Harmonized standards is voluntary. Nevertheless it remains the most efficient way to demonstrate compliance of products with the corresponding essential requirements of the EC directives. Annex Z of each standard, developed under mandate provides information for which essential requirements of directives shall be applied the respective harmonized standard.

18. In order to become harmonized standards the EU Member States have the task to translate the titles of standards into their national language and send them via CEN/CENELEC to the EC and EFTA Secretariat for publication of the reference in the Official Journal of EU. Thus the European standards, developed by CEN or CENELEC, following a mandate issued by the EC become harmonized standards and, as of the date of their publication, they can be applied for providing presumption of conformity of products to the corresponding EC directives.

19. The aforementioned directives of New Approach have a special place in the Bulgarian standard setting process. Their transposition in the Bulgarian legislation was made through, inter alia, the adoption of the Law on the technical requirements, complemented with series of Ordinances in all respective areas covered by the Directives.

20. As a general principle laid down in said Ordinances, products that are manufactured according to Bulgarian standards that introduce harmonized European standards are deemed to be conforming to the essential requirements laid down by the Ordinances.

21. Conversely, for products that are not manufactured according to above said standards, the manufacturer needs to obtain a certificate for compliance which is physically apposed on the product (certification mark).

22. Although based on a voluntary compliance, this approach gives a special emphasis on compliance with standards. Indeed, as a prerequisite for starting the provision of a given product or service, an undertaking must identify and ensure that all statutory product/service minimum requirements are met in its production line or service provisioning. Depending on the product or service, this is not always an easy task to perform as some products for example are subject to tough and complex quality/safety regulation and control. This is likely to stimulate undertakings to apply standards to which statutory requirements make reference. Generally speaking, the more complex the essential requirement, the more likely is for an undertaking to apply related standard in order to prove compliance.

4. Intellectual property aspects

23. BIS is the unique holder of all copy rights to standards that have been elaborated by its technical committees. In that sense, any publication or reproduction of a Bulgarian standard is subject to BIS's prior written consent. The acquisition of standards documentation is subject to payment of royalties to BIS. As a national member in international standardization organizations, BIS is also authorized to sell international standards documentation – the royalties collected in this case are set by the respective international standardization organizations.

24. As far as third parties copy rights are concerned, Bulgarian standards may include documents of such third parties only with their prior consent. In case a standard needs to include a drawing which is subject to the copy rights of a third party, such a drawing is included in the standard only for purposes of illustration and cannot be made part of standard's requirements.

25. Third parties' patents may represent a particular difficulty in the standard setting process. It is responsibility of BIS to ensure that all claims related to third parties' patent rights are effectively dealt with. According to the Rules of BIS, materials that are subject to patent rights of third parties may be included in a standard only in case they satisfy the following cumulative criteria: the material is absolutely necessary to the standard in question; the material does not impose any requirements to comply with; the patent' holder agrees to provide the material at acceptable, affordable and non-discriminatory conditions.

5. Case law of Bulgarian Commission on Protection of Competition related to standard setting

26. Bulgarian Commission on Protection of Competition has adopted a number of decisions with facts relating to observance of certain standards. These decisions however are usually not for infringement of antitrust provisions of Bulgarian Law on Protection of Competition, but for infringement of unfair competition rules, which form a separate chapter of the law. This paper will therefore not give details on these cases.

27. As regards the application of antitrust rules to standards and standard setting, there are fewer decisions.

28. In 2009 the CPC was asked to adopt an opinion on the compliance with the competition rules of a draft Ordinance setting the requirements for performing road construction and reconstruction works and the way these works are made visible to the drivers. The Draft Ordinance previewed the introduction of modern materials and products for signaling repair and reconstruction works on roads - fluorescent paint and folio, fluorescent glass pearls, self adhesive bands, etc. The aim was to have road signs, which are well visible both during the day and the night, during snowfall and with fog. The Draft Ordinance indicated specific standard for the fluorescent materials to be used for some of the road signs. The purpose of the draft act was to ensure higher safety on roads.

29. The road signs are procured and paid either by central administration authorities or by the local authorities under public procurement procedures and contracts. The Public Procurement Act sets in its Art.2 that the public procurement procedures should observe the principles of free and fair competition and of equal treatment and non-discrimination.

30. In its analysis the CPC considered that potential competition problems could arise if the legal act puts unreasonably high criteria for the quality of the materials and products, as this would limit the number of the companies, which are capable of satisfying such high requirements. Such regulation could serve as a barrier for entry for new participants on the market or it could force some of the undertakings out of the market. The introduction of high quality requirements might limit the freedom of the producers and suppliers to offer products with different quality, satisfying different types of demand. Due to these

considerations, the requirements for the materials to be used for road signs should not be set above the necessary level of quality, which will guarantee the safety on roads.

31. The CPC found, that the Draft Ordinance introduces modern materials and products without requiring the highest possible standards as regards the quality of the materials. In fact, the requirements for fluorescence of the paint for horizontal signaling and of the folio for the vertical signaling are minimal and therefore the producers of road signs will be capable of satisfying these requirements. In addition, the CPC considered that these requirements could serve as an incentive for the companies to modernize their production, thus making them more competitive on the single European market. Bearing in mind the purpose of the Draft Ordinance and on the basis of the analysis made, the CPC ruled that the higher standards for the quality of the materials used for road signs will not impede competition and it is justified from the point of view of the public interest.

32. In another case in 2005, two elevator producing companies filed a complaint before the CPC, claiming that a compliance certification company had been abusing its dominant position through the imposition of unreasonably high prices for the certification.

33. The CPC established that all new elevators should pass two-stage compliance certification process in order to receive permission for entering into exploitation. These two stages included testing and assessment. The process of compliance certification was performed by companies, which were licensed by and registered in the State Agency for Standardization and Technical Control, ancestor of today's Bulgarian Institute for Standardization. This legal requirement for the compliance certification to be done by licensed companies was introduced into Bulgarian legislation following its harmonization with EU Directive 95/16/EC¹ on the lift safety. The first license for compliance certification company in Bulgaria was issued in September 2004 to the defending undertaking. The defending company then sent offers with prices for its certification services to many lift producing and lift maintenance companies in Bulgaria.

34. The complainants stated that the compliance certification company had a monopoly position and had abused this position through high prices.

35. The CPC defined the relevant market as the service market for applying procedures for compliance assessment of lifts on the territory of Bulgaria. In its analysis the Commission established that the defending company had enjoyed dominant position of 100% for a short period of 3-4 months before other companies had also been licensed to perform compliance certification. When analyzing the prices asked by the defendant, the CPC concluded that the company had not infringed the Law on Protection of Competition.

¹ OJ L 213 of 7 September 1995.