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COMPETITION COMMITTEE**

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**Working Party No. 3 on Co-operation and Enforcement**

**PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT  
PROCEEDINGS**

**-- Bulgaria --**

**15 June 2010**

*The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.*

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## **1. Improvement of the decision-making process**

1. The CPC has recently created a special unit with the purpose of providing ad hoc independent legal consultancy to case-handling teams. The unit is composed of the commission's lawyers responsible to defend the CPC's decisions before the Supreme Administrative Court at appeals as well as by the legal experts working within the Competition Policy unit. The unit is not involved in every single case in parallel with the main case-handling teams but is rather being consulted at the initiative of the latter or at the request of the commissioner reporting the case to the panel of commissioners. The unit may be consulted at every stage of the proceedings – during the investigation phase (for example, the assessment of collected evidences), to the formulation of a Statement of Objections, to the stage of drafting the final decision. Moreover, the unit is mandatorily consulted at three occasions: prior to a decision on whether or not to initiate ex officio proceedings, when assessing the effect on trade between Member States in antitrust cases and when applying the mechanism of referral of merger cases having a Community dimension to/from the European Commission). Finally, the unit may be required to prepare a legal analysis on a specific topic for the purposes of consolidating and improving the commission's practice.

2. The consultation may be given in a formal way (in a report or an analysis discussing specific questions raised by the case-handling team) or through non-formal discussions and correspondence. When done formally, the unit's opinions are added to the case file as internal commission documents. This way they are necessarily being taken into consideration by the panel of commissioners when deciding on the cases. At no time, however, are the unit's formal consultations binding for the case-handling teams or for the panel of commissioners. It is necessary to further mention that, being given the status of internal documents, the formal consultations of the unit are not accessible to the parties to the proceedings (art. 55, Para 1 of the Law on the Protection of Competition (LPC)).

3. The unit may, furthermore, assist the commissioners at hearings, especially where it has already been involved in the case. The unit's role at these occasions is to provide clarifications on legal questions as, for example, the rights of defense, assessment of evidences, qualification of a given behavior as constituting an infringement etc.

4. In sum, the creation of the above described unit mainly aims at ensuring that case-handling teams, although having in their midst legal experts as per the internal rules of the CPC, have the opportunity to raise questions of law and procedure whenever an independent opinion would be of significant help to finding the most adequate approach to the issue at hand. The initiative is, furthermore, expected to bring a better quality of the decision making process as a whole. The earlier involvement of the CPC's defense lawyers in such cases will help, in this respect, identify potential flaws before the decision has been issued. This is likely to improve the chances of issuing decisions that stand during appeals.

5. The tasks of the above described unit have been laid down in the Internal Rules for Administering Documents.

6. Based on a similar understanding, the CPC has also created a special task team, composed of expert-economists, whose task is to provide independent assistance and advice to the case-handling teams where such is needed. Its creation, however, is too recent to allow us to assess its effectiveness.

7. Outside independent experts are also used to help decision making process when the CPC needs special expertise in order to clarify any aspects related to the proceedings. These experts are appointed upon request of the parties or on the authority's own initiative, by a ruling of the decision-making body. In the ruling the CPC indicates the expert, the task of the expertise and the deadline for submission of expert's report. According to the newly adopted LPC the expert appointed must be totally independent and

therefore, cannot be a person interested directly or indirectly in the outcome of the proceedings. The expert submits his report to the CPC which can approve it with a ruling. Where the report is contested by the parties to the proceedings, the CPC may assign the assessment of the same task to one or more other experts. Ultimately, when taking the final decision on the case the CPC is not bound by the expert's report but is empowered to consider it together with the other evidential materials collected during the proceedings.

## 2. Confidentiality

8. The parties to proceedings before the CPC have the right to access all documents included in the case file except for those containing production, trade or other secret, as well as internal documents of the Commission, including correspondence with the European Commission and other national competition authorities. Such documents, namely production and trade secret as well as professional secret, are defined in the LPC as representing confidential information. Here below are the exact definitions of the LPC for such documents:

*“Production or trade secret shall mean facts, information, decisions and data related to the economic activities, the preservation of confidentiality of which is in the interest of the rightful holders thereof, and for which the latter have undertaken appropriate measures.”*

*“Professional secret shall mean:*

*a) any information, which the Commission creates or acquires for the purposes of the investigations under this Law or in relation thereto, and the disclosure of which may jeopardize the business interest or the reputation of the parties or that of a third party; the professional secret shall not be official secret within the meaning of the Protection of Classified Information Act;*

*b) the information, exchanged between the Commission and the national competition authorities of the member-states of the European Union and the European Commission in relation to the exercise of their powers and the co-operation between them;*

*The information subject to public announcement pursuant to this or any other act shall not be professional secret.”*

9. It is for the parties involved to claim the confidentiality of such documents. The party alleging the confidentiality of a particular document needs to motivate its claim as well as to provide a non-confidential version of the document in question. However, the CPC may, via a formal ruling subject to appeal before the Supreme Administrative Court within seven days of the notification thereof, decide that a given information, contrary to the allegations of the party, does not constitute confidential information within the meaning of the LPC.

10. In the event where the CPC acknowledges the confidential character of a document, no access is given thereto to the other parties to the proceedings. However, the LPC provides for an exception in this case. Indeed, access to such a document may be granted where the CPC considers it as constituting evidence of significant value to the alleged infringement or as being of importance to the proper guarantee of the other party/ies' rights of defence. Whenever the CPC considers that certain confidential information has to be disclosed on the above-mentioned grounds, it shall issue a ruling in this regard and inform the affected person of it. The act of granting access in this case is also subject to judicial review.

11. Whenever the CPC investigates an alleged violation under Art. 101 or Art. 102 TFEU (ex Art. 81 EC and Art.82 EC), it applies independently or in parallel with the relevant national prohibitions the

provisions on cooperation under Council Regulation (EC) No 1/2003. By virtue of Art. 12 of the Regulation, the CPC can exchange with the European Commission and with the other national competition authorities all kind of information, incl. confidential information. The documents and the correspondence with the European Commission and the other national competition authorities become part of the CPC case file, but the parties to the proceeding or other parties are not given access to these documents (Art. 55, para 1). The protection regime of these documents is similar to the one, regulating the access to the Commission's internal documents.

12. Moreover, the CPC is currently working on substantiating its rules concerning an alleged by the parties under investigation Legal Professional Privilege (LPP), with special emphasis given to the practical issue of how the CPC agents deal with LPP allegations during on-site inspections. Although seizure of privileged attorney-client information is generally prohibited under the Bulgarian legislation, the CPC needs to elaborate a more detailed view on how to handle such information in practice. In this regard, the CPC is following closely the development of the case *Akzo Nobel Chemicals and Akros Chemicals v. Commission* which is ongoing before the CJEU<sup>1</sup>.

13. Handling of confidential information on behalf of the CPC is subject to the judicial control of the Supreme Administrative Court over the commission's decisions and rulings as part of the process of appeal. On the other hand, any disclosure of confidential information by agents of the CPC, being it intentional or negligent, is subject to disciplinary sanctions.

### **3. Requests for information to targets of investigations**

14. All parties to the proceedings are informed immediately after their initiation on the theory of case. At the same occasion, the case team, besides inviting the parties to present their statements on the case, usually requests information or evidence to be provided. The parties are given the contacts of the case team's experts, to whom the parties can turn during the investigation. It is usual practice, and most of the time objectively necessary, for the parties to the proceedings to meet the case team and/or to have telephone conversations or e-mail communication with the case handlers. Meetings are organized on *ad hoc* basis and are only intended to ensure the process of gathering evidence on the specific case. In this respect, it is not unusual for the parties to ask for a reconsideration of the deadlines for response to the requests for information.

15. The requests for information are considered the most common procedural instrument for evidence gathering in competition cases and there is no difference as to the procedural rules applicable to parties to the proceedings and other persons or entities in this respect. In accordance with the LPC all natural persons and legal entities, including undertakings, associations of undertakings, state authorities and local government bodies, non-governmental organizations are obliged to render their assistance to the CPC, including by responding to its requests for information. All the persons requested are obliged to provide complete, accurate, true and not misleading information within a time limit determined by the CPC. In case of failure to comply with this obligation the authority is empowered to impose pecuniary sanction in the amount of 1% of the total turnover in the preceding financial year on the respective legal entities and/or administrative fine of BGN 500 to BGN 25,000 – on the natural persons. The decision, by which the pecuniary sanction is imposed, shall specify the period within which the relevant entity shall fulfil its assistance obligation or furnish complete, accurate, true and not misleading information. In case of failure to furnish complete, accurate, true and not misleading information after the expiry of the specified period, the CPC is empowered to impose periodic pecuniary sanctions on an undertaking or association of undertakings to the amount of up to 1% of the average daily turnover for the preceding financial year for

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<sup>1</sup> Case No C 550/07.

each day of failure until the unlawful action or omission is terminated and the requested information is provided, respectively.

#### **4. Agreed resolutions of enforcement proceedings**

16. The newly amended LPC has introduced the possibility for undertakings against which the CPC adopted a Statement of Objections (SO) to propose to the commission to undertake commitments in view of terminating the alleged in the SO conduct. In case the CPC approves the proposed commitments, the proceedings are terminated with a no-infringement decision.

17. This instrument presents a dual utility. From a defense strategy perspective, on the one hand, the possibility to undertake commitments constitutes for the undertaking an alternative way to exercise its rights of defense once the CPC formulated the SO against it. Indeed, faced with the SO, the undertaking may either decide to continue defending itself or acknowledge the allegations of the CPC by proposing, on its own accord, corrective actions. The law actually does not prevent the undertaking from doing both simultaneously, that is, to propose to undertake commitments and, in the same time, build its defense in a response to the SO in case the commission does not approve the proposed commitments. The undertaking may also decide on withdrawing the commitments it has proposed any time until the CPC has made its decision on the commitments. In the latter case, the proceedings continue their normal course. If the SO has been formulated against more than one undertaking, it is possible for those undertakings or part of them to propose to jointly undertake commitments. In any event, the undertaking needs to decide upon its course of action within the deadline for responding to the SO.

18. From a competition policy perspective, on the other hand, the instrument of undertaking commitments may represent, in some cases, a more adequate remedy to the distortion of the competition caused by the conduct of the undertaking/s. An undertaking that is able to propose and further undertake concrete, adequate and most likely difficult for it commitments would certainly be aware of the harm it has caused to the competition and, what is more, to the legal offence such harm could lead to. Such a state of awareness on behalf of the undertaking is likely to have a much stronger deterrent effect for it in the future than it would have had if the undertaking were simply fined for its conduct. This latter effect is even strengthened given that the CPC may reopen the proceedings at any time if the undertaking lacks to abide to the commitments it has taken.

19. Undertaking commitments is not, however, made possible for all types of infringements. The law forbids the CPC to approve commitments where the alleged in the SO infringement has been qualified as serious. The adopted by the CPC earlier in April 2010 Rules on Commitments further substantiate the cases where the commission cannot approve the proposed commitments. Those cases include cartel allegations, abuses of dominance with price and/or market territory fixing, structural abuses and exploitative abuses where a large number of consumers have been affected.

20. In the specific cases that follow the CPC can even refuse to review a proposal for undertaking commitments: where the undertaking did not comply with a previous decision of the CPC that has entered into force, where there is a precedent to the alleged infringement either sanctioned in a previous decision or put into evidence by a past behavior, where the alleged infringement is continuing or where the infringement has caused significant damages to a large number of persons whom would have legal interest to claim indemnity before the Civil Courts. In this respect, when commitments have been proposed by an undertaking, the CPC is due first to assess their admissibility in an in-camera sitting. If the commission decides that the proposal is admissible for further review, it issues a ruling in that sense; in the opposite case, the commission simply resumes the proceedings, adds the proposal to the case file and informs the party thereof.

21. The LPC leaves the appraisal of the proposed commitments against the circumstances of the case at the full discretion of the CPC. The Rules on Commitments provide further guidelines to the commission on the principles against which the commitments need to be assessed. Those principles require, inter alia, that the commitments, in order to be approved by the commission, be proportionate to the harm done, lead to the immediate recovery of the competition and not only to the termination of the unlawful conduct, be relevant to the essence of the infringement, be unconditional, adequate and sufficient in order to guarantee the effective resolution of the competitive problems as well as to allow the CPC to control their fulfillment. Thus, the CPC may only partially approve the proposed commitments if it considers that some aspects are not satisfying the above criteria.

22. As part of the procedure, the CPC, once it has ruled further review of the commitments, informs all the parties to the proceedings inviting them to present their comments and/or objections within a deadline of seven days. At the discretion of the commission, the undertaking that has proposed the commitments may be allowed to respond to any objections made by the other parties or modify its proposal as a result of such objections. The deadline for reaction in this case is set to not less than seven days. In case that the initial proposal has been indeed modified, the CPC may, again on its own discretion, invite the other parties to comment on the new proposal. It is necessary to be outlined, however, that the commission is not bound by any of the formulated objections and may approve the commitments even where all parties have objected to the proposal. The only exception in the latter case is when the fulfillment of the commitments is conditional to the acceptance or the cooperation of a party that objected to the proposal.

23. The procedure ends with either an in-camera decision of the CPC that approves the commitments or the resumption of the proceedings in case the CPC has not approved the proposed commitments.

24. In the event the CPC decides on approving the undertaking of commitments, it outlines in its decision the facts of the case as well the infringement, the proposal and the objections formulated by other parties and its own analysis for compliance of the proposed commitments. The decision sets also the deadline for the fulfillment of each commitment and last, but not least, it states that there are no further grounds for the continuation of the initiated proceedings. At the Commission's discretion, the decision may also set the duration of the commitments and/or oblige the undertaking/s to periodically inform and present evidence on the fulfillment of the commitments.

25. Should there be more than one undertaking subject to an SO and some of the offending undertakings did not present or withdrew a proposal for undertaking commitments, the CPC continues the normal course of the proceedings against those undertakings, while dismissing the case regarding the undertaking or undertakings whose commitments have been approved.

## **5. Judicial review and interim relief**

### **5.1 *Judicial review***

26. The CPC decisions being administrative acts may be entirely or partially contested before the Supreme Administrative Court regarding their lawfulness. Grounds for contestation are: lack of competence; lack of conformity with the prescribed form; essential breach of the administrative and procedural rules; contradiction to the substantive legal provisions; non-compliance with the purpose of the law. The court does not limit itself only with the consideration of the grounds, pointed out by the appellant, but is obliged to check the lawfulness of the contested administrative act on all grounds provided for in the Administrative Procedural Code.

27. As a general principle laid down in the LPC, all decisions of the CPC, unless otherwise provided in the law, are subject to appeal before the Supreme Administrative Court within fourteen days upon their notification to the parties to the proceedings or upon their publication in the electronic registry of the commission for third parties. Appellants may be either the parties to the proceedings or any third party that proves legal interest of overturning the decision. Decisions that cannot be appealed are, inter alia, the decisions for terminating proceedings that have been initiated ex officio by the commission, the decisions adopting a sector inquiry, the decisions adopting statements as part of the proceedings for competition advocacy and other purely administrative decisions (as, for instance, a decision for provision of assistance to agents of the European Commission carrying out inspections on the territory of Bulgaria).

28. Conversely, the rulings of the CPC are subject to appeal before the Supreme Administrative Court only where expressly so provided by the LPC. The deadline for appeal is set to seven days upon the ruling notification to the parties concerned. Appellants in this case may only be the parties to the proceedings. Examples of rulings that are subject to appeal is when the CPC rejects an allegation stating that a given document represents confidential information or the ruling ordering interim measures.

29. According to the procedural rules laid down in the Administrative Procedural Code, the decisions and rulings of the commission are subject to a two-instance judicial control of the Supreme Administrative Court. At the first instance, the decision or ruling is reviewed on substance by a panel composed of three judges, while at cassation the decision may be reviewed only on points of law by a panel of five judges. The court may declare the invalidity of the contested administrative act, to cancel it entirely or partially, to amend it or to reject the contestation. After declaring the invalidity or cancelling the CPC decisions, the court refers the case back to the competition authority with obligatory instructions for the interpretation and the application of the law.

30. As a general rule, the appeal suspends the enforcement of the decision/ruling except for the cases where the CPC prohibits a concentration among undertakings or orders the termination of an infringement, including by imposing behavioural and/or structural measures to restore competition or other cases that are expressly provided for in the LPC (as, for instance, the ruling ordering interim measures).

31. The CPC decisions and rulings enter into force whenq according to the LPC, they are not subject to appeal or they have not been appealed by the interested parties or the appeal has been withdrawn by them, or the appeal has been dismissed by the court. If a sanction has been imposed by the CPC, it is not executable until the decisions has entered into force.

## **5.2 *Interim relief***

32. According to the procedural rules in force, the Supreme Administrative Court may, as an interim relief, order the suspension of the enforcement of the CPC's decision or ruling in exceptional circumstances.

## **5.3 *Timing of the review of the judicial body***

33. The timeframes of the judicial proceedings that are laid down in the Administrative Procedure Code are purely instructive and are, therefore, not binding upon the court. However, in practice, most of the cases are finalized (first and cassation instances altogether) within one calendar year. There is no expedited review of the cases envisaged by the Code.