The International Comparative Legal Guide to: Dominance 2009

A practical insight to cross-border dominance regulation

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1 Legislation

1.1 Please set out the basic elements of the offence(s) under your relevant laws?

The Bulgarian Protection of Competition Act (State Gazette, Issue 102 of 28.11.2008) sets out the principal elements of an offence constituting an abuse of monopolistic and dominant position. These include:

- a) conduct, which may be expressed in actions or omissions;
- b) of an undertaking enjoying dominant position or monopoly, or of two or more undertakings enjoying a collective dominant position; and
- c) that may prevent, restrict or distort competition and impair consumers' interests.

The list of possible forms of dominance abuse set out by the law is

- not exhaustive. It includes:
- 1. imposing directly or indirectly purchase or sale prices or other unfair trading conditions;
- 2. limiting production, trade and technical development to the prejudice of consumers;
- 3. applying to certain partners dissimilar conditions for equivalent transactions, thereby placing them at a competitive disadvantage;
- 4. making the conclusion of contracts subject to acceptance by the other party of supplementary obligations or to the conclusion of additional contracts which, by their nature or according to common commercial usage, have no connection with the object of the main contract or with its performance; and
- 5. unjustified refusal to supply goods or to provide services to actual or potential customers in order to impede their economic activity.

1.2 What is the underlying purpose of the competition legislation that applies to the conduct of dominant undertakings?

The competition legislation aims to ensure protection and conditions for promotion of competition and free economic initiative. For this purpose the Protection of Competition Act regulates protection against the abuse of monopolistic and dominant position on the market that may result in prevention, restriction or distortion of competition in the country and/or have an effect on trade between the Member States of the European Union.

Protection of consumer benefit is another objective of abuse of dominance regulations, which includes impairment of consumer interests as an obligatory element of a dominance offence.

1.3 Does the legislation also apply to public bodies?

The Protection of Competition Act applies to all undertakings active in the relevant market(s), being defined as any natural person, legal entity, or unincorporated entity which carries out economic activities, regardless of its legal and organisational form. Therefore whenever public bodies act as undertakings, their conduct can be subject to the general abuse of antitrust (including dominance) rules.

The Commission for the Protection of Competition (the Commission) has illustrated this in practice by imposing fines on a public health insurance scheme for abusive coercion aimed at resale margin maintenance in individual pharmacies (see Decision No. 64/2002, Decision No. 286/2005, Decision No. 71/2005, Decision No. 368/2008 of the Commission).

The Commission drew a distinction, however, by noting that the question of whether a public body will be viewed as being the subject of abuse of dominance rules will be answered having regard to whether the particular conduct represents the exercise of its official (administrative) functions, or it represents the conduct of an undertaking in the relevant market. Where the investigated conduct is only a form of exercise of the official administrative functions, which are discharged within the rules laid down by the relevant law, then such conduct could not be subject to assessment on the basis of abuse of dominance rules (see Decision 185/2009 of the Commission).

1.4 Does the legislation apply to: (i) unilateral conduct of a non-dominant firm whereby such a firm seeks to acquire a position of dominance; (ii) collectively dominant undertakings; and (iii) dominant buyers as well as suppliers?

Bulgarian competition law does not prohibit per se the unilateral conduct of a non-dominant firm seeking to acquire a position of dominance. However particular forms of such conduct, such as pricing below cost, may be prohibited as a form of unfair competition. In general any dominance abuse will be linked to the existence of dominance or a legal monopoly at the time the offence was committed.

The Protection of Competition Act specifically provides the possibility for an abuse to be committed by collectively dominant undertakings.

Abuse may be committed equally by dominant buyers as well as by suppliers.
1.5 Are there sector-specific regulations which apply to unilateral conduct and how do these relate to the general prohibition of abuse of dominance?

In line with the new European communications regulatory framework, the Commission has significant powers to enhance and protect competition, particularly in respect of operators enjoying significant market power. These include tools such as price regulation, approval of standard offers and terms, market analysis and finding of significant market power of operators etc. Both sets of regulatory rules - competition and communications rules - work in parallel.

2. Dominance

2.1 How is dominance, or your equivalent concept, defined under national law?

The Protection of Competition Act defines a monopolistic position as a position of an undertaking which by law has the exclusive right to carry out a certain type of economic activity. A monopolistic position may be granted only by law in the cases provided for in the Constitution of Bulgaria. Any other kind of granting of monopolistic position apart from this case is null and void.

Dominance is the position of an undertaking which, in view of its market share, financial resources, possibilities for market access, level of technology and economic relations with other undertakings, may hinder competition on the relevant market. It is independent of its competitors, suppliers or customers.

2.2 How is dominance established / proven and what type of evidence is used?

In its Methodology on Investigation and Definition of the Market Position of Undertakings in the Relevant Market (the Methodology), the Commission states that:

"The Commission assumes that maintenance of a market share higher than 70% over a sufficiently long period of time is sufficient proof that there is a dominant position. Where the market share ranges between 20 and 70% of the relevant market, an undertaking is likely to have a dominant position. An additional investigation is conducted in order to prove by means of analysing also the ratio between the market shares of the leading undertaking and those of its competitors, potential competition due to surplus production capacity, sustainability of the market share of the undertaking having a dominant position in the longer term, dynamism in the market share over a certain period of time, and existing barriers to entry.

Data about the structure and the resources of the undertaking which is being analysed do not provide per se sufficient proof to assume that it has a dominant position. Therefore, further analysis is made to establish whether the undertaking has:

- technological advantage over its competitors;
- commercial advantages, such as a better-known trade mark and a very well organised distribution network;
- large production capacity and greater investment capabilities compared to its competitors;
- advantages related to access to inputs;
- financial resources; and
- opportunities to spread risk over other production activities."

2.3 How is the relevant market established to assess market power?

The Protection of Competition Act defines the relevant market as a cross-section of product market and a geographic market:

A product market is defined to include all goods or services which could be accepted by consumers as interchangeable in respect of their characteristics, intended use and price.

The geographic market includes a specific territory on which the corresponding interchangeable goods or services are offered and on which the conditions of competition are the same, while differing from those in neighbouring areas.

In its Methodology, the Commission notes that from an economic point of view, for the definition of the relevant market, the most immediate and effective disciplining force on the behaviour of the suppliers of a certain product is the demand substitutability. Assessment of demand substitutability entails a determination of the range of products which are viewed as substitutes by the consumer. To this end, an assessment is made of the likelihood of the consumer to resort his demand to another product in response to a hypothetical small but constant increase of the prices of products under consideration. Supply-side substitution, notes the Commission, can also be taken into consideration, provided it has the same implication as substitution in demand, if the suppliers are in a position to start in the short-term and without substantial additional costs the production of the product under consideration in response to the small and permanent increase of its price.

2.4 Is a safe harbour provided for low market shares and/or is there a presumption of dominance for high market shares? If so, what are the relevant market share thresholds?

As noted in question 2.2 above, a market share exceeding 70%, maintained over a sufficiently long period, can be regarded alone as a sufficient proof of the existence of dominance in the relevant market. It seems from the Commission's methodology that doubts of [single] dominance are unlikely to exist where the share of the undertaking in the relevant market is below 20%. Within the 20% to 70% range dominance may be present, and needs to be assessed based on a variety of factors, listed in question 2.2 above.

2.5 How is dominance assessed in relation to after-markets?

The Commission has not had yet the opportunity to discuss dominance in after-markets. Having regard to the general position of the Commission, that in the absence of local guidance, the guidance of the European Commission should be used, it may be safe to assume that the same principles will be followed, as those accepted by the European Commission.

3 Abuse

3.1 How is abuse defined? Is there a general standard? Is there a closed list of abuses?

The conduct of undertakings enjoying a monopoly or dominant position, as well as the conduct of two or more undertakings enjoying a collective dominant position that may prevent, restrict or distort competition and impair consumers' interests, is prohibited. Such conduct may include (but is not limited to):

1. "imposing directly or indirectly purchase or sale prices or other unfair trading conditions;"
3.2 What connection must be demonstrated between dominance and the abuse?

While the Protection of Competition Act's anti-trust rules prohibit abusive unilateral conduct only of dominant undertakings or an undertaking enjoying a monopoly position, it does not provide for an exclusive causation link between the position of dominance and the abuse.

The effects of the abuse may occur in the market in which the undertaking is dominant, or in other markets, where the abusive conduct has its effect on competition.

The Supreme Administrative Court, however, has held (see Decision 1402/2007) that a dominant position is an element of a causation complex, and conduct would be considered a form of abuse only where it or its effect was made possible because of the market power enjoyed by the dominant undertaking. Conduct of a dominant undertaking which would be possible or whose effect would have occurred even if the undertaking was not dominant, would not be viewed as an abuse of dominance.

3.3 Does certain conduct benefit from a safe harbour?

Neither the Protection of Competition Act, nor the Commission's case law and guidance provide for a safe harbour in respect of the conduct of a dominant undertaking. Exclusions from the application of the dominance rules to unilateral conduct are present where either the undertaking is not dominant or in a position of monopoly, or where the relevant entity is not an undertaking (e.g. in the case of a public entity discharging its administrative functions).

A hypothetical exclusion may also exist based on the Commission's territorial jurisdiction, in respect of unilateral conduct which has no effect in the territory of Bulgaria. It has to be noted, though, that the Commission has accepted a broad standard of whether conduct will be considered to have effect in Bulgaria.

3.4 Are certain types of conduct considered per se illegal, without a need to demonstrate actual negative effects on competition?

No conduct is declared by the Protection of Competition Act as illegal per se. In each case actual or potential harm to competition and to consumers' interests needs to be proven. In fact in some of its decisions (see Decision 1023/2007 of the Commission) the Commission has taken an effects based view, and declared that bundling conduct by a dominant undertaking was not abusive, since it had been demonstrated that such conduct had not appreciable effect on competition in the relevant markets.

3.5 Can the unilateral conduct of a non-dominant firm be abusive, e.g. does your national law provide for special obligations where a particular customer is in a relationship of dependency?

Unilateral conduct by a non-dominant firm would not be considered abusive, unless it represents a form of unfair competition (e.g. pricing below cost, which is defined as a separate unfair competition offence). The Commission, however, will sometimes take a very narrow view of the relevant market, which may lead to the finding of dominance of an undertaking that would not otherwise be considered dominant. Thus, for example, the Commission has found that the service of termination of traffic in each telecommunications operator's network should be regarded a separate relevant market, and therefore each such operator would be considered dominant in respect of such market.

4 Types of Abuse

4.1 Does the definition of abuse include both exclusionary and exploitative conduct?

The definition of abuse under Protection of Competition Act covers both exclusionary and exploitative conduct.

4.2 To what extent is excessive pricing considered to be abusive?

There is no legal test justifying the finding of abusive excessive pricing. In its case law (see Decision 628/2005 of the Commission) the Commission has used a price/cost assessment in the context of a successive price increase to argue the existence of excessive pricing. Thus, it has found that a successive annual increase of 88% and 162%, not justified by an associated comparable increase of costs, is excessive if implemented by an undertaking in a position of dominance. In addition, the Commission used a comparative argument, that the price charged by the dominant company to a preferred supplier was significantly lower than the price offered to the third parties.

Predatory Pricing

4.3 Is there a price/cost test for evaluating predatory pricing? If so, what is the relevant measure of cost?

The Commission has rarely gone into sophisticated analysis of the various cost measures to be used in the assessment of predatory pricing. Overall, while its criteria on cost assessment are not definitively clear, it can be assumed that there is general preference in respect of the various measures of average incremental costs.

4.4 To what extent is recoupment relevant to the evaluation of predatory pricing?

While it has cited recoupment as a logical step in the sequence of exclusionary and exploitative conduct, the Commission has never considered recoupment as a necessary element of a predatory pricing offence.

4.5 Is there a specific abuse of margin squeezing?

On several occasions the Commission has based its decisions on the
basis of the concept price or margin squeeze (see Decision 210/2006, Decision 135/2006, Decision 187/2005 of the Commission). In its decisions it has set out the main elements which it would consider relevant to a finding of a margin squeeze or tying offence, as follows:

- the dominant undertaking should be vertically integrated, offering services or products in both the upstream and the downstream market;
- the undertaking should be dominant in the upstream market so that competitors are dependent on it for the provision of input for the competing products in the downstream market;
- the price or margin squeeze would be present whenever the differential between the price the dominant company charges customers on the downstream market and the wholesale price of the relevant input it charges to its competitors is insignificant and is unable to cover the costs of the provision of the services by the competitors in the downstream market; and
- the vertically integrated undertaking’s presence in the downstream market is appreciable.

Rebates

4.6 Does the law distinguish between different categories of rebates? Are there certain legal presumptions that apply to particular types of rebates?

The local case law on abusive rebates is scant. In its Decision 1201/2008 the Commission has recognised that a bundled rebate offered by a dominant undertaking to customers, in respect of a bundle of the dominant product or service and a non-dominant product may be abusive. However it has refused to sanction the conduct to the extent that both products were also offered separately, there was no actual evidence of appreciable anti-competitive impact of the rebate scheme over the period the rebate was applied (no appreciable shift in customers) and that the bundled non-dominant product was in fact a product in a market where other market players had dominance.

4.7 Does the law recognise a “meeting competition” defence?

So far the Commission has not had the opportunity to rule on the “meeting competition” defence of a dominant company. In this respect, it may be expected, however, that the Commission will follow the case law and guidance of the European Commission and the Court of Justice in respect of this type of objection by dominant undertakings.

Refusal to Deal

4.8 In what circumstances is a refusal to deal considered abusive and is there a concept of an “essential facility” under your national law?

Unjustified refusal to supply goods or to provide services to actual or potential customers in order to impede their economic activity is one of the exemplary types of abuse provided for by the Protection of Competition Act. The definition, therefore, may include both termination of existing long term relationships as well as de novo refusals to supply. The definition does not mention refusals to purchase, however given that the list of typical abusive conduct is not exhaustive it cannot be excluded that an unjustified refusal to purchase will be viewed as offensive.

The Commission has heartily accepted and used the concept of ‘essential facility’ in its decisions. It has defined the term as a facility owned by a dominant undertaking, without which undertakings cannot offer goods or services to their clients (see Decision No. 26/2002 of the Commission). As a result it has accepted that a railway line, a bus station, an incineration facility, telecommunications infrastructure of the incumbent operator, and even a trademark (Decision No. 52/2001, Decision No. 26/2002, Decision No. 79/2002, Decision No. 16/2006, Decision No. 64/2008, Decision No. 212/2009) can be ‘essential facilities’.

4.9 Is a distinction drawn between termination of supply and de novo refusal of supply?

Please see the previous question.

4.10 Is a distinction drawn between a refusal to supply involving intellectual property rights and other refusal to deal cases?

In its Decision No. 16/2006 the Commission held that the refusal to license a well known trademark by a recycling scheme to competing recycling schemes, coupled with aggressive enforcement of the trademark, did represent an abuse of dominance by the trademark licensee, since the Commission held that the trademark represented an essential facility, which due to its popularity was needed by competitors to effectively compete in the market of the provision of recycling services. On appeal, however, the court quashed the decision of the Commission (see Decision 1402/2007 of the Supreme Administrative Court) stating that a refusal to deal may be sanctioned only in respect of a product or service in the market in which the undertaking is dominant, and to the extent that there was no finding of dominance in the market of licensing of such intellectual property by the sanctioned undertaking, there could be no abusive refusal to deal by the refusal to license the trademark.

Tying and Bundling

4.11 Does the law distinguish between different forms of tying and bundling?

The Protection of Competition Act declares that making the conclusion of contracts subject to acceptance by the other party of supplementary obligations or to the conclusion of additional contracts which, by their nature or according to common commercial usage, have no connection with the object of the main contract or with its performance is abusive.

While the Commission recognises the potential abusive nature of tying and bundling by a dominant undertaking, it has had very few cases related to a tying or bundling offence and has not drawn specific distinctions between the various forms of these offences.

4.12 Does the law adopt a form or effects-based approach? Are there any tests which are used to determine legality?

In at least one of its few decisions linked to tying and bundling (Decision No. 1201/2008) the Commission has held that even though the offering of a bundled rebate may in principle be abusive where it includes a service in respect of which the offering undertaking is in a position of dominance, the lack of evidence that the offer had any appreciable effect in terms of shifting of consumers during the period of the bundled rebate, showed that the bundling had not prevented, restricted or distorted competition. This holding opens to dominant companies a line of defence based...
on proving or disproving any abnormal shift in customer movements during the period bundling was applied.

4.13 In what circumstances would bundling and tying be objectively justified?

Neither the law, nor the practice of the Commission, shows specific rules which can be applied to justify bundling or tying by a dominant undertaking. Given the effects based approach mentioned above, the primary focus should be on whether the bundling or tying are likely to prevent, restrict or distort competition.

Discrimination

4.14 Does the mere fact that parties are being treated differently render such conduct abusive or otherwise unlawful in Bulgaria or does the law require demonstration of actual or likely anti-competitive effects?

The Protection of Competition Act requires the finding of actual or potential harm to the competitive position of the counterparty to argue the existence of a discrimination type offence. The Commission's practice, however, does not show significant focus on proving the actual competitive impact of discriminatory conduct, and seems to accept as a foregone conclusion that discriminatory conduct, except where objectively justified, would almost always be seen as abusive.

Other Abuses

4.15 Are there examples where systemic abuses of administrative or regulatory processes and/or aggressive litigation strategies have been characterised as abusive?

In its Decision No. 16/2006, the Commission attempted to argue the existence of abuse, where by aggressively threatening to enforce intellectual property rights, a dominant undertaking has achieved the termination of existing relationships of clients with competitors. The courts, however, quashed this approach (see Decision No. 142/2007 of the Supreme Administrative Court), holding that to find dominance the Commission must prove that the conduct in question or its effect occurred as a result of a causation complex, of which dominance itself is an important element, such that if the conduct or its effect were possible without the existence of dominance, then it could not be considered abusive. In this particular case even if the undertaking had not been dominant, it would still have been able to enforce its intellectual property rights and achieve termination of the infringing conduct, and therefore its steps in this respect could not be considered to represent a form of abuse of dominance.

4.16 Are there any examples where a misuse of the standard setting process has been characterised as abusive?

The Bulgarian Commission and the courts have had no notable practice identifying the misuse of standard setting process as an abuse of dominance.

5 Public Enforcement

5.1 Which authorities enforce the legislation against abuse of dominance? What is the role of sector-specific regulators?

The Commission on Protection of Competition (the Commission) is the national authority of the Republic of Bulgaria responsible for the enforcement of Bulgarian national and Community competition law. The Commission is the only authority responsible for enforcing competition laws across all sectors. At the same time certain sectoral regulators have powers which allow them to intervene actively to preserve and enhance competition in their sector. Most notable among these is the Commission on Regulation of Communications, which has powers which are even wider ranging than the Commission, and include price regulation, approval of general terms and conditions as well as conducting sector analyses in the communications sector, and identifying communications operators enjoying significant market power. This does not exclude the communications sector from the scope of the Commission's competences, and it has been very active in intervening particularly on dominance issues.

5.2 What investigatory powers do the enforcement authorities have?

The general investigative powers of the Commission include:

- to request information and corporeal, written and electronic evidence, irrespective of the carrier on which they are preserved;
- to take written and oral statements;
- to assign the preparation of expert reports to outside experts; and
- to request cooperation and information form the national competition authorities of other Member States of the European Union, as well as from the European Commission.

All natural persons and legal entities, including undertakings, associations of undertakings, state and local authorities, non-governmental organisations are obliged to cooperate with the Commission when it exercises its powers under the Protection of Competition Act. Persons from whom cooperation is requested (including the presentation of statements and other evidence) cannot refer to manufacturing, commercial or other protected secrets to object to the presentation of the requested information.

The Commission has the power to visit the sites of the companies or associations under investigation for a suspected dominance infringement without a prior notice. An inspection requires, however, an authorisation by a judge from the Sofia Administrative Court.

The Commission may:

1. enter any premises, means of transport and other locations used by the undertakings and associations of undertakings;
2. examine all books and records, related to the business of the undertakings or associations of undertakings, irrespective of the medium on which they are stored;
3. seize or obtain information in hard, digital or electronic copy, copies of, or extracts from such books and records, irrespective of the medium on which they are stored or, where this is impossible, seize the originals; as well as any other material evidence;
4. seize or obtain electronic, digital and forensic evidence, including traffic data, from all types of computer data carriers, computer systems and other information carriers as well as seize the devices for transmission of information;
5. receive access to all types of information carriers, including information stored on servers, accessible by computer systems or other means located in the inspected premises;
6. seal for a certain period of time any premises, means of transport and other sites, used by the inspected undertakings or associations of undertakings, as well as commercial or accounting books or other information carriers; and
5. What are the basic procedural steps between the opening of an investigation and the imposition of sanctions? What are the timelines?

The investigation of the Commission may be initiated at its own motion, or by a complaint of an interested party, affected by the claimed violation. The investigation may also be initiated by a request by the public prosecutor. The Commission will initiate proceedings also in case it is requested to do so under Article 20 or Article 22 of Regulation 1/2003.

Where the proceedings are initiated upon a complaint of an interested party, affected by the violation, the statement of complaint will go through a phase of preliminary control within 7-10 days after it is filed. It is not unusual that during this phase the Commission will require additional information or documents to consider the complaint admissible. Once the additional information and documents are presented, or the complaint is otherwise considered complete, the Chairman of the Commission will initiate the proceedings, and appoint a reporting member as well as a working group of case handlers.

Where the proceedings are initiated at the Commission's own motion, they are usually preceded by preliminary internal research, assigned by the Chairman to officers of the respective internal division of the Commission. The Commission's interest may be triggered by written or verbal information received from an injured party, which does not constitute a formal complaint, by information published in the media or data obtained from other sources. There is no timeline for such research. The preliminary research will end with an internal report, addressed to the Commission, recommending opening or not opening proceedings in the case. The proceedings are opened with a decision of the full panel of the Commission.

There is no deadline for the completion of the investigation on the case.

Once the case handlers consider that they have collected sufficient evidence and information, they prepare a report of their findings to the reporting member of the Commission. The reporting member informs the Chairman who should schedule a closed session of the Commission within 14 days. At the closed session the Commission may dismiss the case, return the case to the case handlers with instructions on the collection of additional information and evidence, or approve a statement of objections, based on the findings contained in the report.

The statement of objections is notified to the parties to the proceedings, including the defendant(s) and any interested parties, such as the complainant. The statement should give to them a period not shorter than 30 days in which to present their own objections to the statement, as well notify them that within this period they are allowed to have access to the file.

Upon submitting their response to the statement of objections the parties are obliged to present all evidence in their possession in support of their position. The defendant reply, within the period allowed to respond to the statement of objections, also offer to undertake commitments. Should such commitments be approved with a decision of the Commission, it will terminate the infringement proceedings without finding a violation.

In all other cases the Chairman will schedule a hearing with the participation of the parties, not earlier than 14 days following the expiration of the deadline for submission of responses to the statement of objections.

Following the hearing, the Commission, following discussion in a closed session, will pass a definitive decision which either ends the administrative proceedings before the Commission, or, by a ruling, broadens the scope of the proceedings in respect of new claimed violations or returns the file to the case handlers for additional investigation.

5.4 What are the sanctions and remedies that may be imposed in an abuse of dominance case? Do these include structural remedies?

The Commission can impose a monetary sanction to a dominant undertaking for abuse of a dominant position, whose amount can reach 10% of that undertaking's turnover. In determining the amount of the pecuniary sanction the gravity and duration of the infringement will be taken into account as well as the circumstances mitigating or aggravating the liability. The exact amount of the sanction is determined in compliance with a methodology adopted by the Commission.

Individuals who have assisted in the commitment of infringements of the provisions of the Protection of Competition Act, will be liable to a fine of BGN 500 to BGN 50,000.

Whenever the Commission orders the termination of an infringement, it may impose appropriate behavioural or structural measures to restore competition in the affected relevant markets.

5.5 Can abusive conduct amount to a criminal offence?

There are no criminal provisions in respect of dominance abuse in Bulgaria.

5.6 How often is the legislation enforced in practice?

According to the Commission's Annual Report in 2008 the Commission initiated a total of thirty-two proceedings on potential infringements under Chapter Four "Abuse of Monopoly or Dominant Position" of the Protection of Competition Act. Nineteen of these proceedings were initiated following written applications by the persons, whose interests have been affected or threatened by an infringement of the Protection of Competition Act, twelve of them were initiated on the Commission's own initiative and one was reverted by the Supreme Administrative Court to the Commission for a new decision.
6 Private Enforcement

6.1 Can the legislation be enforced in private actions before your national courts?

Private claims to enforce competition law in the Bulgarian civil courts can be brought either as individual actions or as class actions. The decision of the Commission that has not been appealed or has been upheld by the courts on appeal is binding on the civil courts when resolving a civil action brought before them.

6.2 To what extent is interim relief available?

If, during an investigation of infringements of Article 81 and Article 82 of the EC Treaty there is sufficient evidence of an infringement, in urgent cases where there is a risk of serious and irreparable damage to competition, the Commission may (at its own initiative or on request of the persons whose interests are affected or threatened by the infringement) order the immediate termination of the practice by the undertaking, or impose other necessary measures, taking into account the objectives of Protection of Competition Act. The interim measures may be ordered at any time during the course of the proceedings.

6.3 To what extent are private damages available and can punitive damages be awarded?

Individual actions for damages as a result of competition violations, would regard these violations as torts, and absent any special provision would be subject to the general regime of torts. In contrast to other kinds of torts, where only direct and immediate damages of an infringement are to be compensated, the Protection of Competition Act provides that all legal and natural persons, to whom damages have been caused, are entitled to compensation even where the infringement has not been aimed directly against them. This special rule allows the compensation of damages suffered by persons or entities (e.g. final customers and consumers) which have not been a direct counterparty of the infringer/s but the results of the infringement were passed on to them by the intermediate commercial operators. Bulgarian law does not provide for the imposition of punitive damages.

6.4 How frequent are private enforcement actions before your national courts?

So far private enforcement actions based on dominance abuses have been very rare. The new facilitated regime of class actions is expected to change that in the near future.

7 Defences

7.1 What defences are available to a firm accused of abusing its dominant position and to what extent are efficiencies taken into account?

Objective justification of the investigated conduct would be the primary point of defence of a dominant undertaking. Another line of defence would normally be the proof or disproving the existence or likelihood of competitive harm. Finally, by virtue of the recently amended definition of abuse of dominance, an offence would necessarily require actual or potential harm to consumers’ interest, and therefore conduct which is hypothetically harmful to competitors but cannot actually or potentially harm consumers, or is beneficial to them, should not be sanctioned.

8 Recent Developments

8.1 Please provide brief details of significant recent or imminent developments not covered by the above in relation to Bulgaria.

The change of the definition of dominance abuse in the Protection of Competition Act is yet to be interpreted by the Commission and the Courts. The cumulative requirement for proof of actual or potential harm to consumers’ interests in a dominance offence is likely to shift enforcement priorities more towards the final effect of a conduct on the ultimate beneficiaries of competition policy, rather than on protecting competitors and other market players from the conduct of a dominant undertaking. Whether the Commission and the courts will take a narrow or a broad view on what level of proof of such harm will be required, may fundamentally shift priorities when proving what conduct of a dominant undertaking can be considered an offence of competition rules.
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Established in 1990, Borislav Boyanov & Co. is one of the leading firms on the Bulgarian legal market. The firm’s competition practice dates from the first Competition Act adopted in Bulgaria following the transition to market economy and has been involved in many of the landmark cases related to dominance, prohibited agreements, merger control, state aid, and unfair competition before the Bulgarian competition authority and the courts. Consistently ranked top tier in competition/antitrust, the practice was recently commended as “undoubtedly the foremost practice around,” and the only firm ranked Band 1 in Bulgaria by Chambers Europe 2009 in this field. For more detailed information please visit www.boyanov.com.