

NEW BULGARIAN PROTECTION OF COMPETITION ACT (EFFECTIVE AS OF 2 DECEMBER 2008)

The new Bulgarian Protection of Competition Act (PCA) was promulgated in the Bulgarian State Gazette No 102/28.11.2008.

A summary of the key provisions is set out below:

I. GENERAL STANDINGS

Subject

The new PCA explicitly provides for regulation on matters in relation to the application of Articles 81 and 82 of the Treaty on the Establishment of the European Community (the Treaty), including the matter in relation to the application of Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down Articles 81 and 82 of the Treaty (the Modernization Regulation) and Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the Merger Regulation).

Scope of application

The new PCA provides for that it shall not be applicable with regard to actions which consequences restrain or may restrain and distort competition in another state save in cases where it has been provided for by virtue of an international treaty whereto Bulgaria is a party.

II. PROHIBITED AGREEMENTS, DECISIONS, CONCERTED PRACTICES

General prohibition

The new PCA contains the same general prohibition on agreements, decisions and concerted practice as the repealed PCA¹, in particular these are the restrictions which:

1. directly or indirectly fix purchase or selling prices or any other trading conditions;
2. share markets or sources of supply;
3. limit or control production, markets, technical development or investment;
4. apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at competitive disadvantage; and
5. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to customary

¹ The legal text of the this general prohibition is identical to the text of article 81 of the Treaty.

commercial practice, have no connection with the subject of the main contract or its execution.

Agreements having minor effect (*de minimis doctrine*)²

The new PCA provides for new market thresholds below which agreements, decisions and concerted practices shall be considered to have a minor effect and therefore the general prohibition shall not be applicable in such cases.

Market thresholds for agreements between competitors

The aggregate market share held by the parties to the agreement should not exceed 10 % on any of the relevant markets affected by the agreement.

Market thresholds for agreements between non-competitors

The market share held by each of the parties to the agreement should not exceed 15 % on any of the relevant markets affected by the agreement.

Non-application of the *de minimis doctrine*

The *de minimis doctrine*, however, shall not apply where the agreements, decisions or concerted practices have as their object and effect:

1. the direct or indirect fixing of prices;
2. the allocation of markets or customers; or
3. the limitation of output and sales.

Block exemptions

The Bulgarian Commission for Protection of Competition (CPC) may introduce through a decision block exemption criteria for certain categories of vertical agreements³.

No preliminary notification

The new PCA left behind the requirement for preliminary notification of agreements in order for CPC to assess whether or not such agreements comply with the competition rules in general, and whether or not such agreement could benefit from the respective block exemption. In particular. Rather, this matter is now left to the discretion of the parties to such an agreement.

III. ABUSE OF MONOPOLY AND DOMINANT POSITION

Dominant position

The repealed PCA used to contain a presumption that an undertaking holding more than 35% market share on the respective relevant market on which it was positioned would be considered as dominant.

The new PCA does not contain such a presumption any longer. Rather an undertaking is considered to be dominant when in view of its market share, financial resources, means of

² CPC has adopted Guidelines on the application of the *de minimis doctrine* through Decision 125/12.02.2009.

³ At present there are four such decisions which had been adopted under the regime of the repealed PCA. Two of them concern vertical agreements and two horizontal agreements. CPC has neither adopted new decisions nor has it restated the present ones. It may be the case that CPC would tacitly restate in its practice the existing four decisions.

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access to the market, technological level of development and economic relations with other undertakings may prevent the competition on the respective relevant market as such an undertaking may afford to act independently from its competitors, suppliers and buyers.

Abuse of dominant position

The new PCA contains the same general prohibition with regard to the behaviour of the dominant undertaking, as the repealed PCA⁴ namely:

1. directly or indirectly fix purchase or selling prices or any other trading conditions;
2. limit or control production, markets, technical development, or investment to the prejudice of consumers;
3. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
4. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts⁵.
5. ungrounded refusal to supply goods or render services to a real or potential client in order to prevent its economic activity.

However, under the new PCA it is required that the abuse of dominance affects in a negative way consumer interests.

IV. CONTROL ON THE CONCENTRATIONS BETWEEN UNDERTAKINGS

Definition

The new PCA contains the same definition of concentration between undertakings as the repealed PCA with the linguistic difference that under the repealed PCA this institute was named 'concentration of economic activity' while under the new PCA it is named 'concentration between undertakings'.

New turnover thresholds for notification⁵

Under the repealed PCA the concentration was subject to notification before CPC in cases where the joint turnover of all undertakings participating in the concentration generated from the territory of the Republic of Bulgaria for the preceding financial year was over BGN 15 000 000.

Under the new PCA the concentration will be subject to notification in case the joint turnover is over BGN 25 000 000 and: (i) the turnover of at least two undertakings – participants in the concentration generated from the territory of the Republic of Bulgaria for the preceding financial year is over BGN 3 000 000; or (ii) the threshold of the undertaking – subject to acquisition generated from the territory of the Republic of Bulgaria for the preceding financial year is over BGN 3 000 000.

Calculation of the turnover

The new PCA contains provisions which describe the way the turnover of an undertaking is to be calculated⁶.

⁴ The legal text in this general prohibition is identical to the text of article 82 of the Treaty.

⁵ CPC has introduced new Guidelines for the preparation of a notification in cases of concentration.

⁶ Under the regime of the repealed PCA such a description was not provided in the PCA itself, rather it used to be introduced by CPC in separate guidelines.

V. UNFAIR COMPETITION

The new PCA has preserved in an identical way the formulations of the repealed PCA in the field of unfair competition and has introduced few new changes with regard to advertising and imitation.

With regard to unfair attraction of clients CPC has also adopted new maximum limitations on the value of additions⁷ accompanying the goods/services and the value of gifts/awards given the receipt of which is conditional on the play of a game, collection of points, etc.

Prohibition on misleading and unauthorized comparative advertising⁸

One of the new changes concerns the prohibition of misleading and unauthorized comparative advertising in the context of unfair competition relations between competitors⁹.

Misleading advertising

According to the definition given in the new PCA, 'misleading advertising' means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.

Comparative advertising

According to the definition given in the PCA, 'comparative advertising' means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.

The comparative advertising shall be permitted only when the following conditions are cumulatively met:

- it is not misleading within the meaning of the new PCA and it does not constitute unfair business-to-consumer commercial practices within the meaning of the Bulgarian Consumer Protection Act;
- it compares goods or services meeting the same needs or intended for the same purpose;
- it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
- it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor.
- it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor;
- for products with designation of origin, it relates in each case to products with the same designation;

⁷ The new maximum limitations have been adopted through CPC Decision 55/29.01.2009 published on the Internet site of CPC.

⁸ The definitions and formulations in this respect used to be provided under the Bulgarian Consumers Protection Act.

⁹ In this way the new PCA introduces the rules contained in Directive 2006/114/EC of the European Parliament and the Council of 12 December 2006 concerning misleading and comparative advertising.

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- it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
- it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;

Responsibility

The responsibility for infringement of competition rules concerning misleading and comparative advertising shall be vested with the advertiser and the advertising agency.

Imitation of a domain or an Internet page

In the field of imitation the new PCA contains explicit provisions with regard to the imitation of a domain and the appearance of an Internet page¹⁰.

Unfair attraction of clients – new maximum limitations

Offering additions to the goods/services

1. Prohibition on offering of additions to goods/services free of charge or against a seeming price of other goods/service

PCA prohibits the offering of additions to goods/services free of charge or against a seeming price of other goods/service save for: advertising materials of inconsiderable value which clearly indicate the advertising party; things or services, which according to commercial practice may be considered as accessories to the main goods/services; goods/services as a discount in cases of sales in large quantities.

2. Inconsiderable value of advertising materials

CPC has adopted the view that advertising materials clearly indicating the advertising party have inconsiderable value if their value is less than 10 (ten) times the value of the goods/services in addition to which such advertising materials are offered.

Making gifts/awards upon sale

1. Limitation on the value of the gifts/awards

PCA prohibits sales where together with such sales gifts/awards are offered/promised and in the receipt of such gifts/awards is conditional upon: solving tasks, rebuses, questions, puzzles; collection of a series of coupons and suchlike; playing games with monetary or material gifts/awards; which value is considerable as opposed to the value of the goods/services sold.

2. Inconsiderable value of gifts/awards

CPC has adopted the view that in order for a gift/award to have inconsiderable value as opposed to the value of the goods/services sold the value of the gift/award should not be more than 100 times the value of the good/service sold, however not more than 15 minimal labour remunerations for the respective year¹¹.

VI. PROCEEDINGS BEFORE CPC

¹⁰ This change has been introduced based on the practice of CPC.

¹¹ This double standard has been adopted in view of expensive and less expensive goods/services. Practically where the product has a considerably low value the first limitation would usually apply, and where the product is considerably expensive, the second limitation shall apply.

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The new PCA provides for a more detailed regulation with regard to the different proceedings that could be held before CPC.

In summary the new PCA provides for rules regarding the following proceedings:

- General rules for all types of proceedings;
- Proceedings on ascertainment of infringements and imposing of sanctions with regard to Chapter III¹² and Chapter IV¹³ of PCA and art. 81 and art. 82 of the Treaty for establishing the European Community;
- Proceedings on granting permission for concentration between undertakings;
- Other proceedings:
 - Vindication of competition¹⁴;
 - Proceedings for conduct of sector analyses.
- Proceedings on ascertainment of infringements and imposing of sanctions with regard to Chapter VII¹⁵.

VII. SANCTIONS

Percentage of the turnover

In contrast to the repealed PCA¹⁶ the new PCA provides for the amount of sanctions as a percentage of the turnover for the preceding financial year of the undertakings having committed the infringement.

Legal maximum at the rate of 10%

The legal maximum of a sanction that could be imposed is up to 10%¹⁷ of the infringing undertaking's turnover for the preceding financial year.

Periodical sanctions

The new PCA also provides for the possibility that periodical sanctions up to the amount of 5% of the average daily aggregate turnover for the proceeding financial year.

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¹² Prohibited agreements, decisions and concerted practices.

¹³ Abuse of dominant position.

¹⁴ The vindication of competition would encompass all cases in which a private party would seek CPC's assessment with regard to projects of normative, normative-administrative and general administrative acts; effective normative, normative-administrative and general administrative acts; projects of acts of associations which are intended to regulate the activity of the members of such associations. In this type of proceedings CPC has the powers to make an assessment of such acts with the provisions of the new PCA and to propose to the respective competent authorities to amend or repeal such acts. However, with the new PCA CPC has been deprived of its authority under the repealed PCA to appeal such acts before the respective competent authorities.

¹⁵ Unfair competition.

¹⁶ The repealed PCA used to provide for sanctions with fixed amounts.

¹⁷ CPC has introduced its Methodology for determination of sanctions for infringement of PCA. The Methodology contains some detailed analyses on how sanctions should be determined in respect to the different types of competition infringements. From a practical point of view the most serious infringement are considered to be the cartels, while the least dangerous are considered to be infringements of unfair competition rules.

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