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## Global Forum on Competition

### QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

#### Contribution from Bulgaria

-- Session III --

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## CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

### --Bulgaria--

#### 1. Countries that have been actively enforcing a competition law for a relatively short time

##### 1.1. *Organising your agency and preparing for work*

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

##### *1. Describe how you conducted this organisational phase. What went well, and what didn't?*

The changes in Bulgaria since the end of 1989 have had a major impact on national legislation. Bulgaria was both willing and obliged to transform to a market-based economy, thus it had to adopt a legislation ensuring that undertakings enjoy freedom and legal certainty while operating in an environment of effective competition with clear and fair rules. Moreover, the new legislation had to ensure that consumer interests were properly safeguarded.

On 2 May 1991 the Grand National Assembly adopted the first Law on Protection of Competition (LPC), which came into force on 21 May 1991. The LPC was aimed at promoting free entrepreneurship in the production, trade and services by introducing appropriate safeguards against abuse of monopoly position, unfair competition and other practices that threaten to distort competition in the national market. Furthermore, the LPC provided for the establishment of an independent specialised institution responsible for its implementation: the Commission on Protection of Competition (CPC). With a view to the specificity of competition law, the LPC stipulated that CPC members must be lawyers and economists with proven professional expertise in the relevant area.

In those early years, the notion of competition was just beginning to emerge as a value in the political and economic reality. For this reason, the newly established CPC encountered numerous challenges and obstacles in its effort to promote competition and enforce competition law. It was provided with office space and set about recruiting educated professional and administrative staff. At first the human capital was quite limited – only about 40 people were employed in the CPC, and they were not specially trained in competition law and policy. The resources available were also scarce and equipment was acquired gradually and in the course of the years.

The CPC adopted its Organisational Rules and established Directorates specialised in major economic sectors. Those Directorates were as follows: “Heavy Industry”, “Light Industry”, “Foreign Trade, Science, Education, Communications”, “Construction and Transport”, “International Cooperation”, “Normative Economic Impact”, “Information Systematisation and Processing”, “Administrative and Business Activities”.

##### 1.2. *Competition culture and competition advocacy*

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

*2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?*

In the first years since the establishment of the CPC the awareness of the general public, including the business community, lawyers, politicians and civil servants about competition law and the benefits of competition was strongly lacking in Bulgaria. Building such an awareness and promoting competition culture was quite challenging and difficult. However, the CPC received great support from USAID – this was the first international organisation which invested time and resources into the CPC. Thanks to USAID’s outreach activities and technical assistance, the CPC organised various public seminars and discussions to promote its work and policy. This was a virtually important determinant of the successful introduction of the competition regime. In the course of the years, the Commission was gradually able to get the public realise the benefits which can arise from competition and attract many followers to its cause.

### ***1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements***

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

*3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes and what factors can you identify that contributed to those successful outcomes?*

The first Bulgarian Law on Protection of Competition was adopted at a period when Bulgarian economy was undergoing transition from planned to market economy. It was a time when state monopolies were prevailing in all major economic sectors and free entrepreneurship and market initiative were substantially hindered. For this reason, the earliest version of the LPC did not contain any provisions specifically dealing with abuse of dominance or cartel agreements (cartels involve the active participation of several players and the presence of monopolies obviously excludes the existence of cartels). At that time, fighting the abusive practices of state monopolies was the biggest priority of the CPC. However, the changes in the Bulgarian economy – growing macroeconomic stability, trade liberalisation and privatisation of state owned enterprises, called for substantial review and amendment of the existing competition law. Another factor which necessitated changes in the law was the obligation for approximation of Bulgarian legislation with the *acquis* under the Europe Agreement between the European Communities and their Member States, on the one part, and the Republic of Bulgaria, of the other part. The objective was to ensure full coherence of Bulgarian legislation with the Community’s competition *acquis* and establish robust legal basis for efficient enforcement of competition rules, including Articles 81 and 82 of the Treaty establishing the European Community (the EC Treaty). This was thought necessary with view to Bulgaria’s future accession to the EU. Thus, in 1998 a new Law on Protection of Competition was adopted which specifically dealt with abuse of dominance and cartel cases. Chapter III of the newly adopted LPC dealt with agreements between undertakings, decisions of connected or joint undertakings, as well as concerted practices of two or more undertakings that have as their object or effect the prevention, restriction or distortion of competition on the relevant market, while Chapter IV prohibited actions of undertakings enjoying a monopolistic or dominant position that have as their object or effect prevention, restriction or distortion of competition. Only after the enactment of the new competition law was the CPC able to make its first steps in the fight against abuse of dominance issues and cartel agreements.

*4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?*

Although the first Law on Protection of Competition adopted in 1991 contained provisions on prohibited agreements, they only concerned the attainment of a monopoly position as a consequence to such agreements.

Even after the adoption of the new Law on Protection of Competition in 1998, the anti-cartel program was ineffective and the CPC encountered difficulties when dealing with prohibited agreements. The main challenges the CPC faced in anti-trust enforcement comprised gathering of evidence during the investigation; insufficient awareness of the economic players of the competition legislation dealing with prohibited agreements; a practically inactive leniency program due to the low sanctions which did not have a prohibitive effect on the violators. Moreover, the CPC did not have the power to conduct dawn raids in order to search for and seize information relevant to the disclosure of cartels. The 2003 amendments in the law vested the Commission with the power to carry out dawn raids and gradually it was able to achieve some progress in its fight against cartels.

Only recently have the investigations of cartel activities resulted in imposing pecuniary sanctions permissible by the law. However, even those may not have the anticipated deterrent effect since the fines are but an insignificant share of the violators' turnover. For this reason, some further changes in the legislature were needed in order to run a harsher anti-cartel policy. The new Law on Protection of Competition which was promulgated in the State Gazette on 28 November 2008 and entered into force on 2 December 2008 envisages the sanctions to amount to up to 10% of the companies' turnover for the preceding year. This would ensure a stronger incentive for the violators to comply with the law in order to avoid possible sanctions.

#### **1.4. Mergers**

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

*5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?*

Bulgarian economy is relatively small and especially in the first years of transition its markets were highly concentrated and monopolistic. It is obvious that mergers can lead to further concentration, because they usually reduce the number of market players, and mostly increase the market shares of merging entities. For this reason, the authors of the 1991 Law on Protection of Competition thought it necessary to include provisions on merger control with the aim to protect consumers from the negative consequences of mergers and to prevent the abuse of market power. It is important to note, however, that those provisions dealt only with the attainment of market power and their enforcement in practice was quite ineffective.

*6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem?*

It would not be just to say that merger control was more resource-consuming, simply because in the first years since the establishment of the CPC it was ineffective. In the transition period there were but a few private owned enterprises and merger notifications were the exception rather than the norm.

*7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?*

The greatest challenge for the Commission was to promote competition culture and build an awareness of the importance and value of competition law. It took some time and effort to teach the economic operators to notify the CPC of planned concentrations. Gradually, the merger control programme was becoming more and more efficient, but the greatest progress was achieved after the 2003 amendments in the law.

### **1.5. Judicial appeals**

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

*8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?*

The CPC decision can be appealed before two instances of the Supreme Administrative Court – before panels of three and of five judges of the College. Although in some cases the Supreme Administrative Court has overruled CPC decision, most of the Commission's rulings have been upheld by the Court, timely and efficiently.

*9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.*

In the first years of competition enforcement, the judges of the Supreme Administrative Court had little or no knowledge of Competition Law. For this reason, the CPC organised and held numerous seminars and workshops to inform judges and keep them up to date with the Commission's activities and policy. The CPC regularly publishes and distributes to various target groups translated decisions of the European Court of Justice which has proved to have an enormous influence on promoting competition law among the judges.

### **1.6. Resources**

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

*10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?*

Upon its establishment, CPC had scarce resources, both financial and human, for the difficult task that lay ahead – the protection of competition and the interest of the economic operators in all sector of the Bulgarian economy. However, thanks to its firm competition policy and the promotion of competition culture, the CPC was able to convince the political elite and the society at large of the importance of its task and in the subsequent years its budget grew to an adequate amount.

### **1.8. Independence**

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

*11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?*

Ever since its establishment, the CPC has been an independent and specialised state body funded through the state budget. The Commission has always enjoyed political independence to effectively apply competition law and policy.

### **1.9. Conclusion**

*12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.*

## **2. Countries that have been actively enforcing a competition law for a longer period**

*1. For each of the topics A-G in part I above, on the basis of your experience in enforcing your competition law and your interaction with countries beginning to enforce a law, give your views on best practices by a new competition agency.*

For a new competition agency, it is very important to allocate resources for the education of its personnel. In order to run a clear competition policy, its staff must be well-trained and knowledgeable. Donor programs and outreach activities of major international organisations are a valuable tool in this respect. Also, the competition agency should impose heavy sanctions on the violators, making it clear that anticompetitive behaviour will not be tolerated in any form. It should also strive in any way possible to promote competition culture and build awareness in the society of the importance of its work.

*2. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.*

The competition agency should not distract itself with minor and insignificant cases. Rather, it should have the courage to dive into difficult issues, investigate and reach conclusions on cartels and complex cases such as joint dominance.