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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN BULGARIA

-- 2009 --

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TABLE OF CONTENTS

Executive summary	3
1. Changes to competition laws and policies, proposed or adopted.....	3
1.1 Summary of new legal provisions of competition law and related legislation	3
1.2 Other relevant measures, including new guidelines.....	6
2. Enforcement of competition laws and policies	7
2.1 Action against anticompetitive practices, including agreements and abuses of dominant position	7
3. The role of the competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies	16
3.1 Competition advocacy	16
4. Resources of competition authorities	19
4.1 Resources overall.....	19

Executive summary

1. The year 2009 was of significant importance for enhancing the role of the Commission on Protection of Competition (the Commission, the CPC) with regard to the free and effective functioning of the markets. It was the first year of implementing the new Law on Protection of Competition (LPC) which ensured the full coherence of the national legislation with the latest achievements of the EU competition law.

2. In the beginning of the year the Commission adopted a number of legislative acts on the application of the LPC and thus managed not only to achieve a detailed approach to understanding the new law, but also to explain and introduce clear criteria with regard to the application of its provisions.

3. The fight against the most serious infringements of competition – the participation in cartels and the abuse of dominant position, continued to be one of the major priorities in the work of the CPC for 2009. Although as a result of the global economic crisis a decrease was observed in the number of mergers and acquisitions over the reporting period, the control on concentrations between undertakings comprised a significant part of the CPC enforcement record in 2009.

4. In a number of cases in 2009 the CPC exercised its powers for carrying out competition advocacy by suggesting amendments to draft acts or effective legislation to the purpose of preventing, and respectively eliminating, existing restrictions on competition. In the end of the last year the CPC elaborated and adopted *Guidelines for assessment of compliance of legislative and general administrative acts with competition rules*. The document, mainly based on OECD Competition Assessment Toolkit, is aimed at assisting state authorities, including state bodies and bodies of the local government, in the preparation of draft acts compliant with the principles of free market and effective competition.

5. An important part of the CPC activities in 2009 was related to ensuring fast and efficient proceedings with regard to public procurement review procedures pursuant to the Public Procurement Act (PPA) and pursuant to the Concessions Act (CA).

6. Public electronic register of CPC decisions was established in 2009. It provides easier access to information about CPC proceedings and decisions both for the economic operators and for the general public, and thus leading to increased effectiveness and transparency of Commission's work.

1. Changes to competition laws and policies, proposed or adopted

7. In the end of 2008 the Bulgarian Parliament adopted new Law on Protection of Competition thus ensuring full coherence of the national legislation with the European acquis. The law introduced some new and detailed procedures related to the different types of proceedings initiated by the Commission and strengthened its powers. It provided the legal basis for cooperation with the European Commission and the National Competition Authorities of the EU Member States as well as for the implementation of a deterrent sanctioning policy.

1.1 Summary of new legal provisions of competition law and related legislation

1.1.1 Parallel enforcement of national and EU competition rules

8. The new Law on Protection of Competition determines the position of the Commission on Protection of Competition as National Competition Authority, which is competent to apply the EU competition rules in parallel with the national competition legislation. The law sets specific rules for

cooperation with the European Commission and EU Member States competition authorities as envisaged in Council Regulation (EC) No 1/2003 and Council Regulation (EC) No 139/2004.

1.1.2 Block and individual exemptions regime

9. The new Law on Protection of Competition abolished the previously existing notification regime for granting block/individual exemption from the prohibition of certain agreements, decisions or concerted practices. The new exemption rules are in compliance with Council Regulation (EC) No 1/2003. The CPC may exempt from the prohibition certain agreements, decisions or concerted practices, established during an ongoing investigation, but the burden of proof that the exemption criteria in art. 17 LPC are met, is on the parties, referring to them.

1.1.3 De minimis thresholds

10. The LPC changed the market share thresholds for the agreements, decisions or concerted practices of minor importance (*de minimis*), to which the general prohibition does not apply. The market shares were increased to 10% of the relevant market, in case of competitors, and to 15% of each of the relevant markets, where the participants are not competitors, thus matching the EC levels¹.

1.1.4 Threshold for dominant position

11. The new law abolished the historical threshold of 35% for establishing a dominant position, which criterion existed since the introduction of competition rules in Bulgaria in 1991.

1.1.5 Interim measures and commitments

12. The possibility for the CPC to impose interim measures where there is a significant risk for competition was introduced with the new LPC. The law also provides for the possibility for the parties concerned to propose commitments during the course of CPC investigation. These commitments could be then accepted and approved by the Commission.

1.1.6 Mergers

13. The new LPC set higher notification threshold of 25 million BGN for the combined aggregate turnover of all undertakings participating in the concentration in the territory of the Republic of Bulgaria for the preceding fiscal year. In addition, a second cumulative criterion-local nexus criterion-has been added, requiring the turnover of each of at least two of the undertakings participating in the concentration or of the undertaking subject to the acquisition in the territory of the Republic of Bulgaria during the preceding financial year should exceed 3 million BG. This change aims to restrict the control exercised by the CPC only to those concentrations that might have significant impact on the national market.

14. In the proceedings to assess a concentration of undertakings the LPC envisages an opportunity for a “stop the clock” procedure within which the CPC shall pass a decision. This hypothesis arises if additional information for assessing the concentration by the Commission needs to be provided by the notifying undertakings.

15. The new LPC introduced significant changes to the process of carrying out an in-depth investigation of a concentration. In addition to extending the time limit for completing the investigation

¹ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*)

(within four months of the publication of the decision to launch an in-depth investigation in the electronic register), the CPC, in case of establishing competition problems in the relevant market, may issue a ruling whereby it shall approve its preliminary conclusions on the effect of the concentration on competition before it passes its final decision. In addition to imposing remedies necessary to maintain competition on its own initiative, the Commission may also approve remedies which have been proposed by the participants in the concentration.

16. In the proceedings for establishing infringements with regard to concentrations between undertakings, the CPC may submit its Statement of objections for an alleged infringement of the Law to the defendants, and shall specify a deadline within which the complainant and the defendant shall have the right to submit their written objections on the submitted Statement of objections. The law also envisages an opportunity for the parties and the constituted interested third parties to be heard at an open sitting of the Commission.

1.1.7 Inspections

17. The CPC competence to conduct on-site inspections to collect evidence was further enhanced with the provisions of the new law. The LPC includes all types of evidence (paper, electronic, digital, etc.) that could be seized during the inspection. The process of obtaining court authorization for the inspections was streamlined with the new provisions, by virtue of which these authorizations are issued by only one court-Sofia Administrative Court. The law requires the court to pronounce on the day of the submission of the CPC request. The court authorization could be appealed to the Supreme Administrative Court, but the appeal however does not suspend the execution of the inspection.

1.1.8 Leniency

18. The new LPC contains special provisions for applying leniency policy. These rules are further detailed in the CPC Leniency Programme and the Rules on its application (see p. 24).

1.1.9 Statement of Objections and Access to file

19. The submission of a Statement of Objections (SO) for alleged antitrust infringement(s) to the defendant(s) is a new legal instrument introduced for the first time into the Bulgarian legislation with the entering into force of the new LPC. The SO shall contain the established facts and circumstances as well as an overview of the economic and legal grounds of the committed infringement. The SO provides a mechanism which can to a greater extent guarantee the right of defence of the parties and which provides an opportunity for finding a more effective solution to the competition problems in the relevant markets. Once the Statement of Objections have been submitted, the parties in the proceeding can present their points of view and objections, as well as additional evidence to be taken into consideration by the Commission in adopting its final decision. The undertakings concerned may also propose commitments in order to remedy the competition concerns of the CPC.

20. The new LPC contains detailed rules on access to file. These rules are compliant with EU rules and they further ensure the right of defence of the alleged infringers of competition law.

1.1.10 Sanctions and fines

21. The new law established more deterrent sanctioning policy for the undertakings/associations of undertakings with the changes in the method for calculating and setting the pecuniary sanctions and with widening the types of infringements that are sanctioned. Instead of setting the amount of the sanctions in absolute values, as it was before, the new LPC provides for that the pecuniary sanctions for violations of the substantial provisions of the law and for failure to comply with CPC decisions and rulings are

calculated as a percentage of the aggregate turnover for the preceding financial year of the undertaking(s) or association(s) of undertakings concerned and can reach up to 10%. Furthermore, sanctions, amounting to 1% of the aggregate turnover for the preceding financial year are imposed for refusal or failure to provide assistance to the Commission, for breaking or destroying seals during an inspection, for delayed submission or inaccurate or false information submitted to the CPC, as well as for not submitting information for the implementation of remedy or commitment decisions. Periodic sanctions for the undertakings/associations of undertakings are also envisaged, as well as increased fines for natural persons who have assisted in the commitment of infringements of the LPC provisions.

22. Detailed rules for the method of setting the sanctions and fines under the LPC were adopted by the Commission (see p. 24).

1.1.11 Private damages

23. The LPC explicitly provides for the right of all natural or legal persons, who have suffered damages as a result of infringement of the competition rules, to claim private damages in civil lawsuit on the basis of the CPC decisions, which have entered into force.

1.2 Other relevant measures, including new guidelines

24. Pursuant to the provision of the Law on Protection of Competition, the Commission is assigned the obligation to adopt the acts for its application. By April 2009 the following documents were prepared and adopted:

- CPC's Internal Rules of Organisation;
- Rules on agreements of minor importance to competition (de minimis) for the application of the provision of Article 16 (2) and (3);
- Internal Rules on classifying the identity of persons who have given statements or provided information for infringements of the Law on Protection of Competition;
- Instruction on the procedure to organize and conduct the joint actions with the National Police Service in carrying out inspections;
- Rules on the access, use and storage of documents constituting production, trade or other secret, protected by law;
- Model form for application for initiation of proceedings to establish infringements and model forms for concentration notification;
- Methodology for setting fines under the LPC;
- Programme on immunity from fines or reduction of fines in case of participation of an undertaking in a secret cartel (Leniency programme) as well as Rules on its application;
- Templates for application and notification for initiation of proceedings and the instructions for their completion;
- Methodology on investigation and definition of the market position of undertakings in the relevant market.

25. With the adoption of the above mentioned acts full coherence has been achieved of the national legislation in the field of competition with the procedures and rules followed in the other EU Member States and the best international practices in this field. The adoption of the secondary acts on the application of the LPC has ensured transparency, legal certainty and predictability of the work of the Commission and has set additional guarantees for protecting the rights and interests of parties concerned.

2. Enforcement of competition laws and policies²

2.1 Action against anticompetitive practices, including agreements and abuses of dominant position

2.1.1 Prohibited agreements, decisions and concerted practices

26. The provision of Article 15 (1) of the LPC contains a general prohibition of all types of agreements between undertakings, decisions by associations of undertakings, as well as concerted practices of two or more undertakings having as their object or effect the prevention, restriction or distortion of competition on the relevant market.

27. In 2009 the CPC initiated 7 proceedings for anticompetitive agreements - 1 investigation for infringements of Article 9 of the LPC (repealed) and 6 – for infringements of Article 15 of the LPC. 2 of these proceedings were initiated on written applications by the persons, whose interests were affected or threatened by an infringement of the LPC, and 5 of them were initiated on the Commission's own initiative (*ex officio*).

28. In 2 of the proceedings for establishing infringements of Article 15 of the LPC, the Commission extended its investigation to Article 81 of the EC Treaty (new Article 101 of TFEU by virtue of Article 3 (1) of Council Regulation (EC) No. 1/2003³.

29. In 2009 the CPC adopted 8 decisions on the application of Article 9 of the LPC (repealed) and respectively Article 15 of the LPC and Article 81 of the EC Treaty (new Article 101 of TFEU). By 6 of its decisions the Commission established that no infringement had been committed of Article 9 of the LPC (repealed), respectively Article 15 of the LPC. By 2 decisions the Commission established infringements under Chapter Three of the LPC (repealed).

30. By the decisions of the Commission establishing prohibited agreements, decisions or concerted practices of undertakings, pecuniary sanctions were imposed on the infringers to the total amount of 360 000 BGN.

31. In 2009 the CPC adopted 2 decisions by which it fined with a total of 64 038 BGN defendants in proceedings for failure to provide complete and accurate information requested by the CPC in the course of the proceeding as well as for failure to perform their obligation for rendering assistance to the Commission in exercising its powers under the LPC.

² All cases, initiated under the repealed Law on Protection of Competition, were concluded under its provisions, as set down in the § 6 (1) of the Transitory and Supplementary Provisions of the new LPC. Therefore, the data on CPC enforcement record in 2009 includes the cases, initiated and finished under the repealed Law on Protection of Competition, and the cases, initiated under the new law.

³ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules laid down in Article 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p.1.

32. In 2009 the CPC carried out 2 inspections as a first step in the procedure under two of the recently initiated proceedings. The inspections were carried out in accordance with the procedural rules and in exercising the powers vested in the CPC by the new LPC. In carrying out the inspections the CPC seized paper and forensic evidence which was further analyzed at the Commission's Forensic IT Laboratory.

2.1.2 Case summaries

- The CPC established the presence of a prohibited agreement in the market of construction and maintenance of water recreation facilities

33. The proceeding before the CPC was instituted on request of "Spa Design", Bourgas, performing activities on the design, equipment and tiling of SPA centres. The defendant parties in the proceeding were three legal persons – competitors of the complainant in the market of construction and maintenance of water recreation facilities, as well as the National Association of Spa and Wellness Centres.

34. The CPC investigation established that the undertakings had a series of meetings in the form of sessions of the Managing Board of the Association they were members of. In the period February 2002 – June 2008 the companies infringed the rules of competition by concerting their market conduct under various forms. The defendant undertakings designed and applied a mechanism for anticompetitive cooperation by means of a system of ethical rules; they took decisions on concerted fixing of prices and trading conditions; they created conditions for allocation of markets by means of boycotting competitors and manipulating tenders. In addition, the participants in the cartel provided the Association with the opportunity to exercise control on the implementation of those anticompetitive decisions and stipulations, including through collecting and exchanging "sensitive information" with regard to undertakings – debtors and irregular payers.

35. The CPC with its Decision No. 167/2009 imposed pecuniary sanctions to the total amount of 345 000 BGN on three legal persons participating in the agreement and 5 000 BGN on the National Association of Spa and Wellness centres and ruled on termination of the infringements. The CPC decision was appealed before the Supreme Administrative Court.

- The CPC established the existence of prohibited vertical agreements in the market of establishing cable networks for the provision of Internet in the territory of Studentski Grad (Students' Town) Neighbourhood in Sofia

36. The proceedings before the CPC for establishing alleged prohibited agreements among eight universities and two connected undertakings, providing Internet access. The prohibited agreements were claimed to prevent and restrict the competition in the market of Internet provision in Studentski Grad Neighbourhood by limiting the access to student dormitories of other Internet providers, willing to establish cable networks for Internet provision and use them to provide the service "access to Internet" to end-clients, namely the students.

37. On the basis of its investigation, the CPC established that since 2005 the two defendant Internet providers had concluded a total of seven contracts with the defendant universities responsible for running the student dormitories in Studentski Grad Neighbourhood. The concluded contracts were for establishing cable networks for the provision of Internet in the student dormitories and included clauses that provided the legal person exclusive rights for establishing, administering and using the network, as well as exclusive rights for provision of Internet.

38. One of the defendant Internet providers concluded similar contracts with all other universities (except one), running student dormitories in the territory in question. By signing all those parallel agreements which are similar with regard to their subject matter, the undertaking covered almost all student dormitories in “Studentski” region and managed to establish dominant position on this geographic market.

39. The CPC accepted the argument that the establishment of the infrastructure for access to Internet was of benefit both for the consumers and for the quality of the provided service thereby outweighing the anticompetitive effects as well as the argument that an opportunity existed for the networks to be rented by competitors of the legal person. Due to those reasons the Commission exempted from the prohibition laid down in Article 9 of the LPC (repealed) the clauses that granted one of the Internet providers exclusive rights for establishing, administrating and using the established networks for a 4-year period as of the conclusion of the contracts.

40. With regard to the exclusive rights for provision of Internet included in the clauses of some of the contracts, the CPC was of the opinion that they restrict competition between providers and that there were no positive effects of their action that outweigh the negative effects. In the absence of exclusive rights, each of the competitive Internet providers would have had free access to the end-client and would have function in the environment of free competition on the basis of price and the quality of the provided services. Based on this, the CPC considered that the clause in question could not be exempted from the prohibition of Article 9 of the LPC (repealed), as well as that the relevant universities and the Internet provider committed an infringement of the law in terms of entering into prohibited vertical agreements and prohibited exclusivity clauses. The Commission imposed pecuniary sanctions of 5000 BGN each to two universities and one of the Internet providers for infringing Article 9 (1) (3) of the LPC (repealed). The CPC decision was appealed before the Supreme Administrative Court.

- The CPC established anti-competitive effects in the market of the service „share allocation of heat”, resulting from the legislation in force

41. The proceedings before the CPC for establishing an alleged infringement of Article 9 (1) of the LPC (repealed) and Article 81 of the EC Treaty by Toplofikatsia – Sofia AD, the Association of the heat share allocation companies”, 11 legal persons providing the service “share allocation of heat” and 10 suppliers of heat allocation devices, were initiated on the Commission’s own initiative in 2008.

42. The relevant market includes the provision of the service “share allocation of heat” among consumers in condominium buildings in the territory of Sofia. The provision of this service is related to the use of special metering devices which render an account of the consumed quantities of energy for heating and hot water.

43. Further to a detailed economic and legal analysis of the sector legislation, the vertical relations between the legal persons providing the service “share allocation of heat” and the undertaking producing and distributing heat, the vertical relations between the legal persons providing the service “share allocation of heat” and the suppliers of metering devices, and the horizontal relations between the legal persons providing the service “share allocation of heat”, the Commission established the existence of several problems in the market of the service “share allocation of heat” from the point of view of the competition law:

44. The CPC considered that the anti-competitive effects in question result from the national sector legislation in force – the Energy Act and the Ordinance on Heating Supply. Therefore by its Decision No. 1368/2009 the Commission adopted that no infringement was committed under Article 9 of the LPC

(repealed) and Article 81 of the EC Treaty (new Article 101 of the TFEU) on the part of the defendant undertakings and association of undertakings. The CPC decision came into force.

- The CPC conducted a survey on anticompetitive conduct of undertakings in the fuels sectors

45. The survey was conducted under a proceeding initiated in 2008 on the Commission's own initiative. The proceeding was initiated on the occasion of a number of comments in the press and in other mass media as well as on the basis of signals and requests on the part of various economic, political and other subjects concerning the increase in the prices of fuels which could be observed in the country in the first half of 2008. The signals contained claims that the prices of fuels in Bulgaria were higher than those in the EU Member States and that the retail prices of the gas stations were identical, which was a result of cartel agreements in the fuels market. The defendant parties under the proceeding were the Bulgarian Petrol and Gas Association and its members – 17 petrol and gas companies.

46. The CPC conducted a survey of the commercial practices of the participants in the market with regard to the prices, the marketing and the contracts of the defendant parties under the proceeding. In its analysis the CPC also used the data of the Petrol Bulletin of DG Energy of the EC for the weekly prices, VAT and excise duties of diesel oil and petrol in the EU Member States as well as the EC analysis "Facing the challenge of higher oil prices" according to which the increase in the prices of fuels came as a result of the complex impact of the supply and demand factors.

47. On the basis of the collected information, the extended technical and economic expertise and the economic and legal analysis for the period 2005 – June 2008 the CPC established that:

- The average sale prices of automobile fuels in Bulgaria are lower compared to the prices of the same fuels in the EU Member States. The comparison of the wholesale prices of fuels in Bulgaria with the average prices in the EU 15 and the EU 27 confirmed the conclusion that for the examined period the prices in Bulgaria were the lowest as compared with the average prices in Europe.
- The amount of prices is seriously influenced by the values of excise duty and VAT (40 – 50 %) which for Bulgaria are higher compared to their respective values in a number of other countries such as Cyprus, Greece, Spain, Lithuania, Latvia, etc.
- The retail market has a clearly outlined oligopolistic structure as the first four undertakings – Lukoil Bulgaria, Petrol, OMV and Shell own a market share of more than 80% on the basis of both revenues from sales and number of gas stations.
- The market is characterised by price transparency, standardised retail prices and similar dynamics of the prices for the period under examination.
- The abrupt increase of the prices of diesel oil and petrol in the surveyed period is in parallel with the increase in the prices of crude oil.

48. The analysis of the retail prices of the main chains of gas stations showed similarity in the prices and an identical trend of price change for the period. On the basis of the practice of the EC and the Court of Justice of the European Communities, the CPC accepted that the presence of price parallelism in the clearly oligopolistic retail market of fuels should not be considered sufficient evidence for establishing a cartel agreement in the relevant market, provided that there were no written or indirect evidence for meetings, contracts or agreements for maintaining equal prices. Therefore by Decision No. 746/2009 the

CPC adopted that no infringement was committed under Article 9 (1) of the LPC (repealed) by the Bulgarian Petrol and Gas Association and its members.

- Application of the Council Regulation (EC) No. 1/2003

49. In implementing its obligation under Article 3 (1) of Council Regulation (EC) Regulation No. 1/2003 when the CPC applies the provision of Article 15 of the LPC it should also apply Article 81 of the EC Treaty (new Article 101 of the TFEU) should the respective agreements, decisions or concerted practices affect trade between EU Member States.

50. For the reporting period the CPC investigated the potential effect on the trade between EU Member States in each of the instituted proceedings. The analyses was carried out in accordance with the criteria laid down in the Commission Notice on Guidance on the effect on trade⁴, according to which such effect is in place always when it is possible to foresee with a sufficient degree of probability on the basis of a set of legal fact or objective circumstances that the investigated agreement or practice may have an influence, direct or indirect, actual or potential, on the model of trade between Member States.

51. In the course of the investigation in relation to the provision of the service “share allocation of heat” the Commission established that one of the main problems for achieving effective competition in the relevant market is the lack of substitutability between the heat allocation devices. In performing their activities the share allocation companies use metering devices on the basis of contracts for licensing, maintenance, supply, servicing and distribution that they conclude with either foreign or Bulgarian producers. Most of the producers and providers of share allocation devices are foreign companies established, registered and performing their activities in other EU Member States. In addition to that, some of the share allocation companies operating in the relevant market belong to economic groups that perform economic activities on the territory of other Member States. That’s the reason why the Commission held the opinion that the relationships of the sale of share allocation devices as well as the transfer of know-how and sites of industrial property were of trans-border nature and might affect trade between Member States.

52. The Commission accepted that this specific case was related to conduct on the part of the defendant parties which might affect the pattern of trade between EU Member States and in accordance with Article 3 (1) of the Council Regulation (EC) No. 1/2003 extended the proceeding under Article 81 of the EC Treaty (new Article 101 of the TFEU).

2.1.3 Abuse of monopoly or dominant position

53. The provision of Article 21 of the LPC prohibits the conduct of undertakings enjoying 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.

54. In 2009 the CPC initiated a total of 41 proceedings on potential infringements under Chapter Four “Abuse of Monopoly or Dominant Position” of the LPC. 34 of these proceedings were initiated following written applications by persons, whose interests were affected or threatened by an infringement of the LPC, 4 of them were initiated on the Commission’s own initiative and 3 were reverted by the Supreme Administrative Court to the CPC for a new decision.

55. The Commission adopted a total of 37 decisions in relation to the application of Article 18 of the LPC (repealed), respectively Article 21 of the new LPC and/ or Article 82 of the EC Treaty (Article 102 of

4 Commission Notice on Guidance on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)

the TFEU). By 7 of the decisions the CPC established that an infringement was committed and determined the type and amount of the sanction in accordance with the provisions of the LPC. By 3 of its decisions the CPC imposed pecuniary sanctions for failure of the defendants to provide complete and accurate information requested by the CPC in the course of the proceeding as well as for failure to perform their obligation for rendering assistance to the Commission in exercising its powers under the LPC.

56. In 10 of the initiated proceedings the Commission exercised its powers under Article 74 (1) (3) of the LPC by submitting Statement of objections for an alleged infringement of the Law to the defendant under Article 21 of the LPC.

57. In relation to the application of the prohibition for abuse of monopoly or dominant position in 2009 the Commission imposed pecuniary sanctions to the total amount of 442 297 GN.

58. The attention of the CPC in its proceedings for alleged abuses was focused mainly on the markets with a single provider of a certain service who possessed essential facility and whose actions to a great extent affected the interests of the consumers of this service. Such markets are the markets of electricity and heat-power supply, as well as the market of sewerage and water supply, which are characterized by a lack of alternative supply and which attracted great public interest.

- Natural gas supply

59. In 2009 the CPC imposed a sanction on Toplofikatsia – Bourgas EAD for abuse of dominant position pursuant to Article 18 (1) and (2) of the LPC (repealed). The Commission accepted that the heat transmission company limited the access of the complainant Burgasgas AD to the market of public provision of natural gas. This access was performed through a connection gas pipeline, a property of Toplofikatsia – Bourgas EAD. The CPC has established that after the supplies of natural gas to the jointly used pipeline of the defendant were suspended due to unpaid debts to the public provider Bulgargas EAD, Toplofikatsia – Bourgas EAD, making use of its rights on the facilities and in order to prevent the discontinuance of its own economic activity on production of heat and electricity and heat supply, utilised the natural gas quantities intended for Burgasgas AD. Thus the undertaking restricted the supplies of natural gas to the gas distribution company, and respectively to its customers, including through full suspension of supply to the connected industrial customers.

60. In addition to that, a sanction was imposed to the undertaking for imposing unfair trading conditions in the contract it concluded with Burgasgas AD for access to the connection gas pipeline for 2009.

61. The decision was upheld by the Three-Member Chamber of the SAC.

2.1.4 Mergers and acquisitions

62. In 2008 the Commission initiated 54 proceedings of which 40 following a written request to issue an authorisation for concentration and 14 following a Commission's decision. For the same period the Commission adopted a total of 58 decisions. 2 of those decisions were for launching an in-depth investigation on the basis of doubts that the implementation of the respective concentrations might result in strengthening of a dominant position and the effective competition on the relevant market might be significantly distorted. After an analysis of the additional information and evidence collected in the course of the investigations, one of the proceedings was closed by a decision of the Commission for authorising the notified concentration, and the other proceeding was suspended due to a withdrawal of the request for authorisation. Throughout the year the Commission adopted 12 decisions by which it established

infringements of the obligation for prior notification of the concentration in accordance with article 24 (1) of the LPC (repealed) and imposed sanctions to the total amount of 1 833 710 BGN.

63. In 2009 there was a decrease in the number of initiated proceedings and adopted decisions in the field of concentration compared to the period 2004 – 2008. This trend came as a result of the change in the threshold level for mandatory prior notification of concentrations introduced with the new LPC, as well as of the introduction of the second cumulative criterion. The global economic crisis also contributed to the decrease in the number of mergers and acquisitions.

64. The main economic sectors that saw concentrations of undertakings in 2009 were: the financial sector (a total of 9 concentrations); the media sector (a total of 5 concentrations); road construction (a total of 4 concentrations); production and trade with transportation vehicles (a total of 4 concentrations); food industry (a total of 3 concentrations); trade with petrochemical products (a total of 2 concentrations); production and trade with tobacco products (a total of 2 concentrations); air transport (a total of 2 concentrations); one concentration in the following sectors – telecommunications and electronic messages, production and trade with consumer electronics, trade with fast moving consumer goods, production and trade of paper and cardboard, trade with pharmaceuticals and chemical products, production of mineral water and non-alcoholic drinks, production of inert materials, as well as 8 concentrations in other sectors.

65. In the beginning of 2009 the CPC adopted a standard concentration notification form and detailed instructions for its completion. In this relation the Commission carried out a number of preliminary consultations on the request of participants in future concentrations in the national market in order to ensure that standard concentration notification forms are completed in compliance with the new LPC.

- The CPC imposed a sanction for infringement of the obligation for prior notification of a concentration between undertakings

66. By Decision No. 923/2009 the CPC imposed a pecuniary sanction on Baranko EOOD, Sofia for failure to perform its obligation for prior notification in acquiring 49% of the capital of Plovdiv-Yurii Gagarin BT AD, Plovdiv, in October 2006.

67. In the proceeding instituted on the Commission's own initiative, the CPC adopted that all elements of the legal provisions were in place for the transaction to be considered a concentration of economic activity. The CPC investigated the extent to which the acquisition of part of the share capital of Plovdiv-Yurii Gagarin BT AD, Plovdiv provided Baranko EOOD with the opportunity to exert control on the joint-stock company. In this relation, the CPC analysed the way in which the remaining part of the share capital of the acquired undertaking was allocated as well as the influence of the other shareholders on taking the strategic decisions of the company.

68. The CPC held the opinion that in this particular case the acquisition of part of the capital of a given undertaking analysed in the light of competition law gave the owner the factual opportunity to exercise control, i.e. decisive influence with regard to that undertaking. In such cases what should be proved is not whether the decisive influence has been implemented or would be implemented, but the existence of an opportunity for such an influence to be present.

69. With a view to the above, the CPC established that the deal should be considered a concentration within the meaning of the LPC (repealed). In the evaluation of the concentration the Commission considered that the transaction had not led to any horizontal or vertical effects in the relevant market. Therefore, the CPC accepted that the implemented acquisition of control led neither to a change in the position of the acquired undertaking, nor to a change in the structure of the market. The Commission imposed a pecuniary sanction on Baranko EOOD only for infringing the obligation for prior notification of

the concentration and did not impose behavioural and/ or structural remedies on the participants in the concentration. The CPC decision was appealed before the SAC.

- The CPC applied the cumulative local nexus criterion with regard to the turnover of the acquired undertaking

70. By Decision No. 808/2009 the CPC ruled that no obligation for prior notification of the CPC had arisen for Dunarit AD, Rousse in the acquisition of control over Terem – Tsar Samuil EOOD, Kostenets, due to the lack of the cumulative criteria for turnover laid down in Article 24 (1) of the LPC. In this specific case the concentration was manifested in the intention of Dunarit AD to acquire 74% of the capital of Terem – Tsar Samuil EOOD – a company 100% of whose shares were owned by Terem EAD.

71. In the course of the investigation the CPC evaluated the type of control that would be acquired (sole or joint), as it analysed a draft contract which regulated in detail the relations between the seller and the buyer in their capacity as partners in the acquired undertaking. The Commission reached the conclusion that as a result of the transaction Dunarit AD would acquire the opportunity to solely determine the trade policy of Terem – Tsar Samuil EOOD without the presence of another partner and without having to consider its potentially different interests in taking strategic decisions, i.e. it would gain sole control over a previously independent undertaking,. Therefore, the transaction could be defined as a concentration between undertakings.

72. Undertakings are obliged to notify the CPC of their intention to implement a concentration where the aggregate combined turnover of all undertakings participating in the concentration in the territory of the Republic of Bulgaria in the preceding financial year exceeds the threshold BGN 25 million. At the same time, the turnover of each of at least two of the undertakings participating in the concentration or the turnover of the undertaking – subject to acquisition in the Bulgarian territory during the preceding financial year should exceed BGN 3 million.

73. In the course of the investigation the CPC established that the first criterion had been met but that the second cumulative requirement with regard to the turnover of the acquired undertaking was not in place. The CPC ruled that for Dunarit AD in its capacity as acquiring undertaking no obligation for prior notification had arisen. The CPC decision came into force.

2.1.5 Judicial review of CPC decisions

74. All CPC decisions adopted under the LPC are subject to judicial review by the Supreme Administrative Court (SAC). SAC reviews on decisions under the LPC are carried out at two instances: a Three-Member Chamber and a Five-Member Chamber.

75. 84 of all 196 decisions⁵ adopted by the CPC in 2009 were contested before the SAC which in the same year issues 108 court decisions on appeals against CPC decisions. As a result of the 52 final decisions adopted by a Five-Member Chamber of the SAC 38 decisions of the Commission were upheld, 3 decisions of the Commission were repealed and referred back to the CPC for re-examination, 8 decisions of the Commission were repealed and 3 decisions were partially repealed by the SAC.

⁵ This is the total number of CPC decisions, adopted in 2009, including decisions under the Law on Protection of Competition, the Public Procurement Act and Concessions Act.

- The SAC upheld the sanction to the amount of 2,47 million BGN for cartel in the market of Civil Liability Insurance

76. By Decision No. 9407/13.07.2009 the SAC upheld the CPC decision for imposing pecuniary sanctions amounting to 2,47 million BGN on 14 Bulgarian insurance companies and on the Association of Bulgarian Insurance Companies (ABIC) for infringing Article 9 (1) (1) of the LPC (repealed) and Article 81 (1) (1) of the EC Treaty by participating in the preparation and signing within ABIC of a Memorandum on the mandatory Civil Liability Insurance policies for automobile drivers.

77. The Memorandum in question had as its anticompetitive object the fixing of uniform minimum premium for the Civil Liability Insurance as well as a maximum level of the commissions paid to insurance brokers as a means to fixing a uniform minimum price for the mandatory insurance. The CPC proclaimed in its decision that this document represented prohibited agreement between undertakings and a prohibited decision by association of undertakings. The Court confirmed in its final decision that the participation of the Bulgarian insurance companies and of the Association in the above-mentioned Memorandum infringed the national competition law.

78. The SAC also upheld the CPC conclusions that the restrictions of competition arising from the Memorandum were not justified either by the provisions of the Insurance Code, or by the guidelines provided by the sector regulator – the Financial Supervision Commission. Besides, these restrictions could not be exempted from the general prohibition due to the fact that neither the conditions for exemption from the prohibition pursuant to Article 13 of the LPC (repealed) and Article 81 (3) of the EC Treaty, nor the requirements pursuant to Council Regulation (EC) No. 358/2003 of 27 February 2003 on applying Article 81 (3) of the EC Treaty to some categories of agreements, decisions or concerted practices in the insurance sector have been met.

- The SAC upheld a sanction of 500 000 BGN for abuse of dominant position of “Coca Cola Hellenic Bottling Company Bulgaria” AD (CCHBCB)

79. By Decision No. 15928/12.22.2009 of a Five-Member Chamber of the SAC confirmed Decision No. 985/11.11.2008 of the CPC to impose pecuniary sanctions to the amount of 500 000 BGN on “Coca Cola Hellenic Bottling Company Bulgaria” AD for abuse of dominant position within the meaning of Article 18 of the LPC (repealed).

80. The SAC shared the view of the CPC that CCHBCB is an undertaking enjoying a dominant position on the markets of immediate and delayed consumption of sparkling non-alcoholic drinks and iced tea, as well as on the market of immediate consumption of fruit juices and nectars in the country. In addition the Court confirmed that in the period 2005-2007 CCHBCB abused its dominant position by imposing unfair trading conditions in the investigated commission merchant contracts. This was done through transferring the property on the products delivered by CCHBCB to the commission merchants and through transferring the responsibility in case of consumers’ failure to pay to the same merchants, provided that no opportunities for competition with the other commission merchants exist (an infringement under Article 18 (1) of the LPC (repealed)), as well as by imposing a restraint on the distributors to supply Coca cola products only to commercial outlets servicing end-consumers (an infringement under Article 18 (2) of the LPC (repealed)).

81. The Court ruled that the undertaking enjoying a dominant position had imposed unfair trade conditions on the commission merchants by restricting their market freedom and by unilaterally imposing on them contractual conditions making them take risks by transferring to them the property of the products and the responsibility in case of consumers’ failure to pay. The conduct of “Coca Cola Hellenic Bottling Company Bulgaria” AD contravenes the general obligation for good faith commercial practice as it creates

an actual opportunity for impairing the interest of commission merchants. The SAC ruled that this conduct should be considered imposition of unfair trading conditions within the meaning of Article 18 of the LPC (repealed) and that it runs counter to the market conditions of supply and demand. In addition to that, the Court confirmed the findings of the CPC that a restriction was imposed on the distributors of “Coca Cola Hellenic Bottling Company Bulgaria” AD to sell the products of the company solely to commercial outlets selling to end-consumers. According to the Court, the above mentioned actions of the defendant undertaking were aimed at restraining the circle of consumers of the distributors thus limiting the trade. The decision of the SAC is final and is not subject to appeal.

3. The role of the competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

3.1 Competition advocacy

3.1.1 Guidelines for assessment of compliance of legislative and general administrative acts with competition rules

82. In 2009, in its efforts to assist state authorities, including state bodies and bodies of the local government, in the preparation of draft acts, the CPC elaborated and adopted Guidelines for assessment of compliance of legislative and general administrative acts with competition rules. The document has been published on the website of the Commission. The Guidelines are based on the approach taken in this field by the European Commission, the OECD, as well as by other competition authorities in the EU Member States.

83. The CPC Guidelines provide criteria by which, without having extensive knowledge of competition, one can easily determine whether the proposed draft act contains provisions that could harm competition. The document gives guidelines as to how the set objectives of the respective policy could be achieved in compliance with the principles of free competition.

84. In 2009 a total of 23 proceedings were initiated under which the CPC exercised its powers under Article 28 of the LPC (competition advocacy). 11 of these proceedings were initiated on requests submitted by state bodies for discussing draft legislation, decisions, etc. with respect to their conformity with the LPC; 4 of the proceedings were acted upon written applications of persons for CPC opinion statements with regard to the conformity of the general terms they offer to customers with the LPC; 2 proceedings were initiated on the Commission’s own initiative; 3 proceedings were initiated on requests by state bodies for discussing the conformity of effective legislative acts with the LPC; 3 proceedings were initiated following requests of legal persons alleging that a regulatory instrument contravened to the competition rules.

85. In 4 of the cases the Commission made recommendations for amendments to the draft legislative or administrative acts and in 2 of the cases it proposed amendments to effective legislative acts.

3.1.2 Public bus transportation

86. By Decision No. 1392/17.12.2009 the CPC expressed its opinion on the compliance of a consolidated version of the Draft on Amending and Supplementing Ordinance No. 2 of 15 March 2002 on the conditions and order for approving transportation schemes and carrying out public transportation of passengers by busses and cars with the provisions of the LPC. The Draft aimed at amending the existing national legislation in line with Regulation (EC) No. 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road which came into force in 3 December, 2009.

87. According to the CPC the proposed amendments and supplements to Ordinance No. 2 would have a positive effect on competition, improving the transparency of the procedure on awarding transportation services on the basis of approved transportation schemes and would better appreciate the interests of SMEs. The introduction of a maximum period of 10 years of the contract for assigning passenger transport services on bus lines gives the market the possibility not to be closed for too long which gives opportunity for the competitive pressure on the part of the potential competition to continue performing its disciplinary role, creating incentives for services of higher quality at lower price.

88. Nonetheless, on the basis of its enforcement record, related to this sector, the CPC proposed amendments to the Draft. More specifically, the Commission considered that the act should contain clear and non-discriminatory criteria for limiting the number of the transportation providers in case the bus station in a given area runs out of capacity. The CPC accepted the opinion that an explicit provision had to be included in the Ordinance restricting the right of municipal councils to include in the decision or in the public procurement documentation conditions or requirements which might lead to prevention, restriction or distortion of competition. The Ordinance in force gave the municipal councils the competence to include criteria on the basis of their own judgement in such cases. The CPC adopted several decisions declaring some selection criteria to be restricting competition, giving preference for certain undertakings. Examples of such criteria included: preference for the initiator for opening a line and for the historical operator; eligibility criteria – the candidates to be performing or to have performed services on public transport of passengers in areas with population of above 500 thousand people; criterion for “experience in a certain town/city”; criterion “court and tax registration of the provider of transportation services in the municipality in which the competition is organised”; criterion for the participants in the competition to be Bulgarian natural or legal persons registered under the Commercial Law; introduction of minimum and/ or maximum prices for the transportation service offered by the providers; requirement for turnover; requirements for income of the provider of public transport services for the last financial year as the points given for this criterion vary in accordance with the size of the income; criterion for a paid tax in income in the last three years; assessment criterion – paid taxes and insurances for the last year; criterion for the legal persons to be VAT registered; a requirement for the number of staff and the number of busses; criterion “ownership of the busses”.

3.1.3 Disbursement of expensive medicines paid by the state

89. By Decision No. 811/28.07.2009 the CPC proposed to the Ministry of Health (MH) to amend and supplement Ordinance No. 34 of 25 November, 2005 on the order of disbursing from the state budget the treatment of Bulgarian citizens for illnesses that do not fall within the scope of mandatory health insurance, by explicitly identifying the criteria and regulating the procedure for determining the end receivers of medicinal products. The proceedings were initiated on the occasion of a decision of the Commission for Protection against Discrimination in relation to a complaint for discrimination of patients with malignant diseases and direct discrimination on the part of the MH against a private medical institution compared to state and municipal medical institutions with regard to the allocation of budget funds for expensive treatments. Pursuant to Ordinance No. 34 of 2005 the medications for treatment of cancer, for post transplantation support, for infectious diseases, rare diseases, patients with kidney insufficiency on dialysis, psychic and behavioural disorders, etc. are paid by the state budget and are distributed to the patients by medical institutions that have the opportunity to ensure quality treatment and had been authorized by the MH. These institutions are listed in an appendix 1 to the Ordinance.

90. The CPC hold the opinion that the rules of competition are applicable to the system of health care. The provision of medical services as an activity is not simply aimed at protecting public health, but it is also an economic activity. The competition in the system of healthcare, however, is different from the competition in the other sectors of the economy. The quality of the offered service, not the price, is the main competitive factor on the market of providing medical services. Important conditions for maintaining

a high level of the quality of the offered treatment is the opportunity for competition between the providers of medical services as well as the opportunity for patients to choose among a number of options. At the same time, the lack of specialised knowledge and sufficient information for accessible alternatives for treatment puts the patient, as a user of the service, in an unfavourable position. Thus the Commission is of the opinion that state regulation is justified.

91. The CPC hold the opinion that the funding and the allocation of medications is a matter of state policy and accepted the existence of a list of medical institutions so that the limited funding for medications can be utilized in the best possible way. In this case, however, the CPC established that the Ordinance does not contain eligibility criteria for medical institutions to be included in the list of authorized medical facilities. This creates legal uncertainty for the economic entities and preconditions for restricting effective competition, discouraging the economic operators to enter the market and reducing the incentives for innovations. Therefore, with a view to achieving objectivity and legal certainty, the CPC proposed to the MH to include in the Ordinance clear and transparent criteria for the choice of medical institutions. It should be envisaged that the medical institutions are chosen by a special committee consisting of representatives of the MH as well as of the medical institutions from the state and the private sector.

3.1.4 Allocation of food vouchers

92. By Decision No. 1393/17.12.2009 the CPC proposed the initiation of amendments to Ordinance no. 7 of July 9, 2003 on the conditions and procedure for issuing and withdrawing authorisations for carrying out activities as an operator of food vouchers by prohibiting the acquisition of more than one quota by connected undertakings. The proceedings were initiated on request by the ministry of Finance (MF). The CPC adopted an opinion on the existence of a competition problem in the issuing of authorisation for performing activity as an operator of food vouchers to connected undertakings.

93. The activity on the issuing and use of food vouchers, as well as their tax treatment, is regulated by Ordinance No. 7/2003 and Article 209 of the Law on Corporate Income Tax (LCIT). Only persons who have been granted authorisation by the MF on the basis of a competition to carry out activities as an operator have the right to print food vouchers. The act of issuing authorization is not a matter of discretion by the Ministry, but is adopted in the exercise of its circumscribed powers. Therefore, MF cannot refuse to grant a licence as long as the documents required by the law are in place. The Ordinance introduces the so called “quota” which is the annual nominal value of the printed vouchers for a calendar year. The quota is fixed by the MF and is proportionally allocated among the operators, as there are no requirements or criteria on the basis of which a different quota may be determined for one of the persons.

94. In reviewing the documents in the course of the competition in 2009 the committee established that some persons applying for authorisation and performing activities as operators were connected undertakings. There is no explicit prohibition in the legislation to receive an authorisation for carrying out activity as an operator by connected undertakings within the meaning of § 1 (3) of the Additional Provisions of the Tax Insurance Procedure Code.

95. In its opinion, the CPC pointed out that in competition law the judgement with regard to the independence of undertakings is related not to an analysis of their legal and organisational form or their legal capacity by operation of law, but to the freedom they have to determine independently their market behaviour. In the lack of actual autonomy to determine its market behaviour, the controlled undertaking, along with the mother company and the other controlled undertakings in the group, forms one economic entity, within the frames of which no competition exists. In the specific case the some applicants and the persons already functioning as operators were registered as separate legal persons, but they had one and the same natural persons in their management bodies or were subsidiary companies. Therefore the legal persons could not be considered independent undertakings within the meaning of competition law and there was no competition between them.

96. The provision of a double quota of vouchers to one and the same person would contravene the principle of equality between operators laid down in Ordinance No. 7/2003, according to which the issued vouchers were allocated proportionally among operators. The registering of several legal persons that belong to one economic group with a view to receive a larger quantity of vouchers by the eligible legal person led to the strengthening of their market power and was a precondition for establishing dominant position on the market. According to the Commission the allocation of more than one quota by means of a newly established undertaking might distort competition. That's the reason why in carrying out competitions for selecting operators of food vouchers, the selection committee should treat the legal persons related by means of single management and control as legal persons belonging to one economic group with a single policy.

4. Resources of competition authorities

4.1 Resources overall

4.1.1 CPC budget

97. The Commission on Protection of Competition is an independent institution funded entirely by the state budget. The budget income is formed on the basis of a budget subsidy and own incomes by virtue of the provisions of the Law on Protection of Competition, the Public Procurement Law and the Concessions Act.

98. The CPC budget subsidy for the year 2009 was 5 294 811 BGN (2 708 343 Euro). The approved CPC budget income for 2009 was 7 000 000 BGN (3 580 562 Euro), the actual budget income of the CPC as of 31 December 2009 amounted to 8 567 610 BGN (4 382 409 Euro).

4.1.2 CPC staff

99. The administrative staff of the Commission numbers 130 full time employees, most of whom hold a university degree in law or economics. 64% of the CPC experts are lawyers, 21% of has degree in economics, 5% are engineers and 6% has degree in humanities.

4.1.3 Human resources

100. In 2009 in the specialized administration of the Commission on Protection of Competition, divided into six directorates, worked 95 experts. All employees of the specialized administration are civil servants.

101. The distribution of the experts in the CPC specialized directorates in 2009 was the following:

- Prohibited agreements, decisions and concerted practices-14 employees;
- Abuse of monopolistic or dominant position-14 employees;
- Concentrations and sector inquiries-18;
- Competition policy-9
- Unfair competition-10
- Legal service-4

102. 26 experts worked for "Public procurement and concessions" directorate, which deals with appeals of public procurement procedures under the Public Procurement Act and Concessions Act.