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## Global Forum on Competition

### COMPETITION ISSUES IN TELEVISION AND BROADCASTING

#### Contribution from Bulgaria

-- Session II --

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## COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- Bulgaria --

### 1. Sector Regulation

1. Two main legal acts regulate the TV and Broadcasting industry in Bulgaria – the Law on Radio and Television and the Law on Electronic Communications. The Law on Radio and Television regulates the provision of audio-visual media services (TV and Radio). It provides for the licensing and registration procedures for the performance of media services. The Law for the Radio and Television is implemented by the Council for Electronic Media. The Law on Electronic Communications regulates the provision of electronic communication services. The act provides for the licensing and registration procedures for the operation of electronic communication services. The Law on Electronic Communications is implemented by The Communication Regulation Commission.

### 2. CPC enforcement practice

2. Taking into consideration the abovementioned legal framework, the Bulgarian Commission on Protection of Competition (CPC) has investigated in particular cases the distribution chain of TV content focusing on two market levels, namely those of the TV Channel broadcasters (the wholesale market) and the TV Channel platform distributors (the retail market). The cases of the CPC encompass all the prohibited decisions and concerted practices (art. 15, Law on Protection of Competition - LPC), abuse of dominance (art. 21, LPC) and merger control (art. 22, LPC).

3. The cases in the broadcasting industry that the CPC investigated so far would suggest that there is considerable concentration at the level of the TV Channel broadcasters. On the other hand the market of TV Channel distribution seems to be very competitive and diverse in terms of the variety of the bundled services offered and increased convergence between telecommunications, broadcasting and IT services. There are developed cable networks and satellite platforms and also new terrestrial multiplexes in progress. It is also envisaged that the planned digitalization of the terrestrial transmission<sup>1</sup> will increase even more the competition on the market. CPC observes that some of the TV Channel distributors have started to manage their own content databases (movies, sports, etc.) and develop pay-per-view platforms on the internet or TV.

4. The recent merger cases notified to the CPC are indicative of the continuous structural horizontal consolidation on the market. They confirm as well that at present it could not be considered that there is significant vertical integration. Furthermore the CPC observes that there are new entrants on the markets – telecommunication undertakings entering the market which leads to increased content and bundle competition as well as technological innovations.

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<sup>1</sup> Until 1<sup>st</sup> September 2013 all free-to-air broadcasters are obliged to transfer their broadcast technology from analogue to digital multiplexes.

5. The CPC has not conducted sector inquiries relevant to the television and broadcasting sector. However the above mentioned sector regulators publish periodical studies, including annual reports, containing pertinent data on the markets. As CPC customarily takes into consideration such analysis when investigating particular cases it would be appropriate to proceed with an overview of the main cases investigated by CPC and then draw some conclusions as per the given points for considerations.

## **2.1 Prohibited agreements and abuse of dominant position cases**

### *2.1.1 Decision № 362/2007 (Diema Vision-abuse of dominant position)*

6. The procedure before the CPC was initiated following a complaint by two regional TV platform distributors against a TV program producer regarding two of its programs. The complaints claimed that the TV producer abused its dominant position by suspending the existing contracts or by refusing to enter into new ones, the alleged infringement in the form of objectively unjustified refusal to deal.

7. In its decision the CPC defined two vertically related markets: creation of TV programs and distribution of TV programs. The CPC determined that the two programs produced by Diema Vision have broad program content including news, entertainment programs, TV series, movies and live sport events. The most important asset of these two TV channels were however the exclusive sport broadcasting rights. It was estimated that there is a consumer group with specific and permanent interest in those live sport events and therefore the viewers' demand in general is not very elastic. Those characteristics of the two TV channels in question gave a specific image, uniqueness and distinction that renders the TV channel producer the freedom to have an independent commercial policy concerning its competitors – the producers of TV programs, the TV programs distributors and the consumers. On these grounds CPC defined a dominant position for the producer.

8. For the assessment of the alleged abusive behaviour CPC used the criteria contained in Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743 ('*Magill*'), namely (1) are the contracts an absolute precondition for entering the market; (2) does the behaviour impede the appearance of a new product on the market; (3) is the refusal objectively justified; (4) the likelihood of competition on the market of TV channels distribution being excluded. The Commission determined that the particular contracts were not an absolute precondition for entering the market as the complaining distributors continue to provide service. The alleged abusive behaviour did not impede the appearance of a new product on the market because there were distributors, other than the claimants, which provided that service (distribution of TV channels by cable). The CPC found also that as regards one of the plaintiffs the refusal to deal was objectively justified.

9. On the above grounds CPC concluded that there was no abusive behaviour in this case.

### *2.1.2 Decision № 472/2012 (TV+ case - prohibited decisions and concerted practices under art. 15, CPA and abuse of dominance under art. 21, CPA)*

10. The procedure before the Commission on Protection of Competition was initiated following a complaint by the traditional (incumbent) telecom operator against a TV channel producer regarding its TV program named TV +. The complaints claimed that the TV producer abused its dominant position by refusing to deal with the operator (acting as a platform distributor) for the supply of its channel. TV + channel was accessible only within the network of one platform operator who is competitor of the complainant on the distribution market.

11. CPC analysed the markets in the light of the abovementioned decision. The challenge before the authority was the verification of a dominant position for a TV Channel broadcaster based on the possession of some exclusive sport broadcasting rights. Furthermore CPC effectuated analysis of a possible vertical

agreement between the broadcaster and the exclusive distributor of the channel. The analysis was based on indirect evidence (market behaviour).

12. Eventually CPC ruled that there are no infringements because the TV broadcaster does not enjoy dominant position on the market. Furthermore it was found that the prohibited agreement between the broadcaster and the platform operator fell under the block exemption rules as neither of the parties has a market share above 30 % on the relevant market. The decision is currently under appeal.

## **2.2 Merger cases**

13. It is worth analysing in greater detail two main merger cases focused primarily on the definition of the upstream level of the market.

### *2.2.1 Decision № 769/2009 (MTG Broadcasting acquisition of Diema Vision)*

14. The CPC analysed the market of TV content which is divided in two submarkets: the submarket of acquisition and licensing of TV rights for production of TV programs and the submarket of exploitation of rights of television programs. The TV operators create programmes for in-house or captive use, which they broadcast or use the programme of other operators or others independent national or international broadcasters. The submarket of acquisition and licensing of TV rights for production of TV programs covers the rights to television programme to broadcast films, events or other programs. The CPC outlined that “premium” content (films and sport events) could be analysed as separate licensing submarket, which is different from the licensing of non-premium TV programmes.

### *2.2.2 Decision No 385/08.04.2010 (CME acquisition of Balkan News Corporation and TV Europe)*

15. As part of the investigation the CPC defined the following product\_markets: TV distribution market and audio-visual content market.

16. The European Commission case law<sup>2</sup> separates the TV content market into: 1) production of content for captive use and content for non-captive use and 2) distribution (licensing) of rights or acquisition of distribution rights (audio-visual content)<sup>3</sup>. This distinction is mainly based on the existence of two independent markets for free-to-air and pay-TV as part of the TV broadcasting market. The particular characteristics of Bulgarian TV industry however led CPC to consider that such an approach was not entirely applicable to Bulgarian market as most of the TV channels distributed by the Bulgarian cable and satellite operators do not fulfil the definition of the term pay-TV in the light of the European Commission case law. The market definitions of the European Commission and of Bulgarian CPC do not however contradict each other, but rather express the main mechanisms for ensuring TV program content. As regards the production of content for captive and non-captive use, or the submarket of production and exploitation of TV program rights, the product portfolio could be examined broadly-from the point of view of the TV production as a whole, or, in a narrow sense, the non-captive content could be separated. In the broad sense the term "production of TV content" should include the whole content, created by the TV operators – the captive use content created for being broadcasted by the TV and the non-captive content - sold on a market where the TV operators compete directly with the independent producers as external content creators. At the same time the analysis of the competition in the TV content market requires that the corresponding productions are object of market supply. In this respect the EU case law<sup>4</sup> is in the sense

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<sup>2</sup> Case COMP/M.4353 – *Permira / All3Media Group*

<sup>3</sup> Case COMP/M.5121 – *NewsCorp / Premiere*

<sup>4</sup> Case COMP/M.4353 – *Permira / All3Media Group*

that as far as the captive use content is not for sale, the market should include only the non-captive use content, which is produced to be offered for broadcasting for payment.

17. CPC noted that in Bulgaria the platform for broadcasting the TV signal as such does not provide for the distinction between free-to-air and pay-TV as manifested by the EU case law. This conclusion was supported by the thesis that the distinctions drawn between the free-to-air TV and pay-TV in the case of other European media markets were not applicable to the situation in Bulgarian media market at that moment, both as regards the specific content (program profile) and the model of financing (including integration), which in the final analysis did not allow to treat these markets as separate ones. Therefore, in Bulgaria the free-to-air TV channels and the TV channels, broadcast by satellite or by cable, could not be separated into different and independent product markets for the purposes of the merger analysis. Thus, the free-to-air TV operators were considered by the CPC to be direct competitors to the TV operators distributing their program by cable, satellite, etc., with the two groups of media belonging to the same relevant market of TV distribution. Based on the above, the CPC defined the relevant product market as the market of audio-visual content, comprising all productions (incl. films, sports, news, etc.), which could be broadcasted by the TV operators both as content creators and as licensed rights holders.

18. Based on the characteristics of TV industry and on the opinions of the other TV operators and of the independent producers, CPC concluded that the merger might have the following aspects: participation of the new media group as content producer (content for captive use); possibilities for the new group to exercise "buyer power" in acquiring licensing rights; danger of excessive growth, having in mind the financial ability of the new group to acquire "premium" content, thus attracting more viewers.

### **3. Challenges for competition policy in TV and broadcasting sector**

19. The experience of the CPC so far suggests that the TV and Broadcasting sector and the relevant markets as analysed in the abovementioned cases are diversified. However, there are a number of challenges in defining markets in highly differentiated sectors such as the TV market. The boundaries between different markets are not very clear, and products/bundles (TV, telephony, internet) apparently outside a particular market can exert a constraint on it.

20. We would expect that undertakings which are traditional participant on different markets such as the provision of mobile telephony services, on the one hand, and platforms operators, on the other hand, will try to use their market positions to attract consumers on the less developed hand of their business i.e. a telecoms operator will attract clients of the platform operator by providing TV content. On the other hand, one of the major platform operators in Bulgaria has been granted license for the provision of telecommunication services. This process may lead to the implementation of practices which are not in compliance with the applicable competition rules. For the CPC the prime objective is to keep the attractiveness of the markets and their potential to allure new entrants and investments and to introduce innovations.