

## **COMPETITION LAW ENFORCEMENT IN THE EURASIAN COUNTRIES: CHALLENGES AND OPPORTUNITIES**

Dear ladies and gentlemen,

First and foremost I would like to thank the Turkish Competition Authority for the invitation to participate on this Competition Summit and to thank for the opportunity to address this round table. Also, I would like in the name of the Macedonian Commission for Protection of Competition to congratulate Turkish Competition Authority for the 20 years of existence and successful implementation of competition law. Moreover, I would like to greet the idea for the exchange of experiences in the enforcement as well as the challenges facing the competition authorities in the Eurasian countries.

### **Institutional setup**

The beginnings of the protection of competition in the Republic of Macedonia were since 1999 when the Law Against Limiting Competition was enacted and Monopoly Authority was formed as a body within the Ministry of Economy. This Law in its implementation was very inefficient and the authority was not independent and autonomous. Taking into account the relevance of the specific matter of work and the decision that were enacted, it was very important this body to be independent and collective. That's why in 2005 the Monopoly Authority was transformed into the Commission for Protection of Competition (hereinafter CPC) and the new Law on Protection of Competition was enacted. This Law was amended in 2006 and 2007. The main changes in 2006 were that the CPC becomes responsible for the control of state aid. According to the changes in 2007, the CPC can initiate misdemeanor procedure and can impose fines. Also, a separate Commission for Misdemeanor Matters (CMM) which decides in the misdemeanor procedure and enacts misdemeanor decisions was formed within the CPC. The CPC was able to initiate administrative procedure and enact administrative decision. After that CPC could initiate misdemeanor procedure and enact misdemeanor decision. This solution was not very effective and that's why in 2010 the new Law on Protection of Competition was enacted which is fully harmonized with the EU legislation, because the leniency program was introduced and the misdemeanor procedure was simplified (in one decision CMM can determine that there was misdemeanor and also can determine the fine). This Law was amended in 2014 and 2016.

The purpose of the new Law on Protection of Competition is to ensure free competition on the domestic market in order to stimulate economic efficiency and consumers' welfare. The main pillars of the Law are prohibited agreements, abuse of dominant position and control of concentrations (mergers).

But, the existence of legal framework for protection of competition accomplished with the EU legislation, on its merits, is not enough for effective protection of competition on the market. It can be effective only if it is properly enforced. The enforcement record is among the most important indicators of an effective competition regime and all economies have to improve it.

The CPC is an independent state authority with a status of a legal person, responsible for its work to the Assembly of the Republic of Macedonia. The budget necessary for the operation of the CPC is provided from the Budget of the Republic of Macedonia. The CPC is accountable for its work to the Assembly of the Republic of Macedonia and submits an annual report for its activities no later than by March 31st. The CPC is a collective body consisted of a president, four members and a team of supporting staff. There are five departments within the CPC which are managed by general secretary.

The CPC plays central role in providing free competition on the market in the Republic of Macedonia. It controls the application of the provisions of the Law on Protection of Competition, the Law on State Aid Control and the by-laws based on these Laws, it monitors and analyzes the conditions on the market to the extent necessary for the development of free and efficient competition on the market.

### **Enforcement record of the CPC**

Decisions enacted by the CPC in the last 5 years

|                  | <b>Mergers</b> | <b>Prohibited agreements</b> | <b>Abuse of dominant position</b> | <b>Other infringements</b> | <b>Total fine imposed</b> |
|------------------|----------------|------------------------------|-----------------------------------|----------------------------|---------------------------|
| 2012             | 22             | 3                            | 1                                 | /                          | 780.000 EUR               |
| 2013             | 18             | 2                            | 3                                 | /                          | 17.500 EUR                |
| 2014             | 30             | 4                            | 4                                 | 2                          | 3.800.000 EUR             |
| 2015             | 42             | 2                            | 3                                 | /                          | 760.000 EUR               |
| 2016             | 31             | 3                            | 2                                 | 2                          | 297.000 EUR               |
| 2017 (up to now) | 40             | 4                            | /                                 | /                          | 8.503.000EUR              |

The decisions for mergers (concentrations) are enacted as administrative decisions and the decision in antitrust (prohibited agreements, abuse of dominant position and other procedural misdemeanors) are enacted by the CMM in misdemeanor procedure. The highest fines were imposed in 2014 (2.5 mill euro on 4 electricity traders for participating in a cartel on the market

for electricity trading) and in May 2017 (a fine of 5.8 million Euros and 2.7 million Euros in two decisions for RPM on two breweries).

### **Challenges and opportunities of the CPC**

The main challenges of the Macedonian CPC in the implementation and enforcement of the Law on Protection of Competition are judicial review of the decision of the CPC and insufficient resources (financial and staff).

#### **Challenges regarding judicial review of the decision of the CPC**

The CPC conducts administrative procedures (mergers and control of state aid) and conducts misdemeanour procedures. In both cases the decisions are final but not enforceable. A complaint before the administrative court may be brought against such decisions. Against the decisions of the Administrative Court the parties can lodge complaint to the High Administrative Court.

In the past experience, the CPC had positive and negative experience, in the beginnings the courts mainly took into account the procedural aspect of the decisions and if that aspect was ok, they confirmed the decisions of CPC. In the last few years the courts started to take into account the material aspect of the decisions of the CPC, when reviewing them.

In this part I would like to emphasize that the biggest problem CPC is facing is proving cartels with indirect evidence. Namely, CPC enacted 3 decisions in which tried to prove existence of cartels through indirect evidence – fulfilling in its analysis the principle of the European Court of Justice *although parallel behaviour may not by itself be identified with a concerted practise, it may however amount to strong evidence of such a practise if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and the number of the undertakings and the volume of the said market.*

Additionally, the European court of justice stipulated that: *although parallel conduct in respect of prices may well have been an attractive and risk-free objective for the undertakings concerned, it is hardly conceivable that the same action could be taken spontaneously at the same time, on the same national markets and for the same range of products.*

All three decisions of the CPC were confirmed by the Administrative Court which found that there is enough indirect evidence to prove the existence of cartel, which is concerted practise. But the High Administrative Court in all three cases overturned the decisions with the explanation that there is no direct evidence for communication that lead to concerted practice.

The first 2 cases of CPC were for bid rigging (drugs cartel). The CMM in February 2012 enacted two decisions against two undertakings finding that these two undertakings were participated in cartel for the drugs etoposide and drugdocetaxel and fined them in total for both drugs 750.000 euro. The main evidence was the fact that the involved companies during the public procurement offered the same price (up to two decimals) for the drug they bid, although according to the public procurement procedure the offers are submitted in closed envelopes and the bidders could not know the price of the competitors, till the public opening of the bids. CMM considered that in this case it is hardly conceivable that the same price (up to two decimals) could be offered spontaneously at the same bid by two competitors.

As I already said, the Administrative Court approved the decision of CMM. But the High Administrative Court stipulate that there is no direct evidence for the infringement, the indirect evidence is not enough and returned that case back to the CMM. CMM in repeated procedure again enacted decision for existence of cartel. The Administrative Court confirmed the decision but the High administrative Court again overturned it with the same explanation. This was repeated 5 times and at the end in 2017 when the case was overturned 5 times and returned to CMM, CMM had to obey the decision of the High Administrative Court and **stopped the procedure**.

In the third case for bid rigging (electricity trading cartel), the CMM in October 2014 adopted a decision finding that 5 (five) undertakings engaged in electricity trading have participated in prohibited concerted practice which distorts competition in the Republic of Macedonia. CMM established that the 5 undertakings, when taking part in public procurements of AD ELEM Skopje for purchase of electricity for the needs of tariff customers in the Republic of Macedonia (households and enterprises connected to the distribution electricity system), supplied offers for sale of electricity with prices and quantities previously determined in a way that allowed them to share the quantities of electricity which were to be delivered to ELEM Skopje in a manner of directly submitting bids and indirectly by concluding mutual sales agreements for the electricity that was subject of the public procurements of ELEM Skopje. These actions had an effect of distortion of competition through price fixing and market sharing of the relevant market for supply of electricity for the needs of tariff customers in the Republic of Macedonia. CMM fined all five undertakings with a total fine amounting to approximately **3 million Euros (184,858,733 denars)**.

As I already mentioned, the Administrative Court approved the decision of CMM. But the High Administrative Court overturned stipulating that there is no direct evidence for the infringement, the indirect evidence is not enough. After this, the CMM had to obey the decision of the High Administrative Court and **stopped the procedure**.

In these three cases CMM used indirect evidence only and no dawn raids were performed.

These cases and the decisions of the Courts especially of the High Administrative Court are of great importance for the CPC which point out two big problems on which in the future CPC should be focused: education and trainings of judges for the competition policy (ensuring that judgments will be sound, fair and incontestable) and increasing the resources (human and financial) of CPC. Namely, CPC receives indications for existence of cartels but there are not enough resources to do the dawn raid. For a dawn raid to be done, CPC need more people to perform the dawn raid and special forensic equipment, for which CPC don't have resources.

Another challenge of the CPC is insufficient resources (financial and staff)

Regarding the first issue, the insufficient staff (case handlers) and leave of qualitative staff from CPC are the main problems. Since the beginning of the existence of CPC, four employees with huge experience left the CPC, because of the low salaries. The total number of the employees within the CPC is 28. 7 of them are case handlers working on protection of competition. This is still not enough for efficient implementation of the legislation.

Regarding the second issue, the budget of CPC since the beginning constantly is decreasing, irrespective of the CPC needs. The budget (in 2005 it was about 70.000 euro, in 2010 380.000 euro and for 2017 it is 306.000 euro) is not enough for normal functioning of the CPC as well as for implementation of the legislation. The insufficient resources limit the scope of the action of CPC and the quality of work that can be expected from CPC. CPC must have the necessary tools and resources to uncover illegal practices and impose sanctions for infringements, to prevent or remedy mergers that may lead to reduced competition and to advocate a more competitive environment.

Insufficient resources to perform dawn raid and to get direct evidence from one side and overturning of cartel decisions with indirect evidence by the courts are resulting in situation of inefficient cartel enforcement and non functioning of the leniency program in RM. Namely, the leniency program exists since 2010 (in the LPC) and the bylaw on conditions and the procedure for leniency was enacted in 2012. Also in 2016 CPC enacted leniency guidelines. Leniency program is fully harmonized with the EU legislation. Up to now there was only one leniency application. It was an international cartel that was also applied in EU and as we know in Serbia and Turkey, but CMM didn't initiate procedure because the time limits has expired.

### **The bilateral and International cooperation**

The bilateral and international cooperation includes the activities of the CPC related to the process of approximation to the EU, bilateral and multilateral cooperation as well as the

participation of the employees of the CPC on international seminars, workshops and conferences.

The cooperation with the competition authorities from the countries of the region is important element of the international cooperation of the CPC, based on exchange of different experience on issues for implementation of the competition law and policy as well as experiences of those countries in assessing EU. Namely, the CPC signed memorandum for cooperation with the Bulgarian Commission for Protection of Competition, the Serbian Commission for Protection of Competition, the Croatian Competition Agency, the Council of Competition from Bosnia and Herzegovina, the Albanian Competition Authority and with the Kosovo Commission for Competition.

Regarding international cooperation, CPC is attending the OECD RCC Seminars in Budapest Hungary, then on Sofia Competition Forum as well as on International Competition Network seminars.

Since September 2017, the CPC is also using the RCC Request for Information instrument which facilitates exchange and co-operation between the OECD-GVH Regional Centre for Competition in Budapest's Beneficiaries, such as competition authorities from Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Georgia, Kazakhstan, Kosovo, Kyrgyzstan, Moldova, Montenegro, Romania, the Russian Federation, Serbia and Ukraine. It is not obligatory and also the data received cannot be used in the decision.

The bilateral and international cooperation of the CPC in the future should be deepened in the sense of future exchange of experience and information in order for more efficient and effective implementation and enforcement of legislation for protection of competition and state aid control.

At the end I would like to emphasize that the free market competition is a dynamic matter which should be subject to continuous improvement and development. I believe that the Eurasian countries are on the right way to establish effective system for protection of competition and that at the end of this working day we will all be richer for the experiences and the challenged that the other countries face.