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**MASTER THESIS**

# THE EVOLUTION OF THE COMPETITION LAW IN BULGARIA WITH VIEW TO THE ACCESSION OF THE COUNTRY TO THE EUROPEAN UNION

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## Introduction

Markets are contested fairly and freely in order that resources are allocated in an efficient way" (Alan Mayhew).

This short phrase encompasses the meaning that Western societies put in the notion of free market economy. It is the expression of the belief that only its main element - the free competition, could ensure the optimal functioning of the market and permits the consumers to buy more high quality goods, at lower prices.

This assumption served as a starting point for the creation of the European competition policy in 1957, when the Treaty establishing the European Economic Community was signed. Nearly half a century later, we witness the results of the broad powers attributed to the European Commission, as a guardian of the rules on competition – a Common Market, based on four freedoms aimed at ensuring the prosperity of its "citizens". The idea turned out to be profitable.

Parallel with the process of "creating an ever closer union among the peoples of Europe" the Union faced a new challenge – the dissolution of the so-called Eastern Bloc. An event entailing the expectations of millions of people for better life in one and the same United Europe - a moral and historical obligation marking the next decades.

This thesis reveals the process of European integration of my "former socialist" country – Bulgaria, in terms of competition law. As the title suggests the main idea of the work is how this new branch of the civil law develops, being stimulated by a long-term goal - the EU membership. It comprises three chapters and each of them covers three different periods.

I. The time before the opening of the accession negotiations

I will start with a short description of the economic reforms that took place at the beginning of the difficult transformation process and will then pass to the creation of the legal framework setting the pattern for the existence of free market economy. I will stress particularly on four legal documents

1. The newly adopted Constitution, laying down the bases of the future economic development of the country.

2. The first Protection of Competition Act of 1991 – establishing a mechanism characterised by inefficiency.

3. The European Association Agreement of 1993 – an all-embracing document regulating all possible relations between Bulgaria and the EU, including the competition related issues.

4. The second Protection of Competition Act of 1998 – whose adoption, in my opinion, is the pledge for the opening of the accession negotiations with the Republic of Bulgaria in 1999.

In this first Chapter I will use descriptive and comparative methods in order to prove that the PCA of 1998 is the result of both - the deficiencies of the first PCA and the long-term priority goal the EU membership.

II. The competition law during the accession negotiations

I will start with a brief overview of the main characteristics of the negotiations, in which way are they held, the complexity and the importance of Chapter No 6 in the whole negotiation process, etc. In this Chapter I will inspect the requirements of the European Union in the area of competition in three main directions:

1. The changes brought to the existing legal framework - to the PCA; the passing of a completely new State Aid Act in 2002; the further harmonisation with the secondary legislation of the EU, etc.

2. The creation of sufficient administrative capacity, in terms of both anti-trust and state aid - perceived to be a crucial complementary element of the whole system of protection of competition.

3. The enforcement record on anti-trust and state aid (it will be illustrated with some examples of the case law of the national competition authority).

The leading methods will be again the description and the comparison.

III. The competition law in the Republic of Bulgaria after the closing of the negotiations

Chapter No 3 is supposed to contain my personal input to the problem discussed. This time, the method will be analytical and will try to reveal the distinction between both, national and Community legal order, in terms of competition law. On this basis, I will extract the changes that will take place within the current Bulgarian system once the country accedes the EU. I will also take into account the ongoing reform within the Union (regulation No1/2003) and how it will influence the functions of the national

authority and the new vocation for the national jurisdictions and judges that will become "Community judges" as well. In this context I will figure out the challenges that new and old players will have to face from 2007 or 2008 on. The efforts of Bulgaria in the field of competition need to be continued in the future in order to give chance to the 2007 accession prospective.

The content of this thesis and its structure are new for Bulgarian scientific literature, or at least I didn't come upon such work during my research. The sources are generally deficient in information dealing with Bulgarian competition law. There is no research presenting the competition law in Bulgaria throughout the process of negotiations and EU-membership. I consider the setting of the topics discussed in the context of the EU accession to be my personal input, and especially chapter No 3 stressing on the changes that will take place after the accession of the country.

The drawing up of this work is the reflection of my personal interest in questions related to the system of protection of competition, a policy that is too new for a country in transition like Bulgaria. The topic is also very interesting with an eye to ongoing processes and recent events like,

- the signature of the Treaty on the accession of Bulgaria and Romania to the EU and the inclusion of a special safeguard clause in its content,
- the forthcoming parliamentary elections in Bulgaria, and the nomination of a new government. Will it continue working for the completion of the remaining tasks?

I would like to believe that Bulgaria will do its best and will deserve its place among the other Member States.

To work on the development of the competition law in Bulgaria gave me a great pleasure. I would like to express my thankfulness to Mr. Nicolas Chabrit, Harmut Marhold, Nizar Ben Aied, and Dimitar Kjumjurdgiev (former member of the CPC and lecturer at the Sofia University "St Climent Ochridski"). I dedicate this work to my parents who I consider to be successive people in still learning to go Bulgaria.

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## Abbreviations

Art – Article

BDZ – Bulgarian Railway Company

BTK – Bulgarian Telecommunication Company

CFI – Court of first instance

CPC – Commission for Protection of Competition

EAA – European Association Agreement

EEC – East-European Countries

ECSC – European Coal and Steel Community

EC – European Community

EC Treaty – Treaty establishing the European Community

ECJ – European Court of Justice

ECN – European Competition network

EU – European Union

IMF – International Monetary Fund

NEK – National Electricity Company

Par – Paragraph

PCA – Protection of Competition Act

Reg. No – Regulation No

SAA – State Aid Act

SAC – Supreme Administrative Court

Sec – Section

SME – Small and Middle Sized Enterprises

The Commission – The European Commission

UDF- Union of Democratic Forces

## Chapter 1

## The competition law in Bulgaria before the opening of the accession negotiations

### 1.1. General characteristic of the economic transition in Bulgaria

#### 1.1.1 The central planning economy and its inefficiency

The end of the 1980's finds Bulgaria in a situation typical for the rest of the Eastern and socialist part of Europe - a state owned and controlled by a single party and an economy, marked by a high degree of centralisation. The next pages are dedicated to the main characteristics of the centrally planed economy.

As D. Audretsch[1] observes, a single party - the communist party- ruled all Eastern European countries. The state, respectively the party, appropriated all means of production, and, thus, guides the production processes. The notion of private property didn't exist. Decisions emanated from the state authorities. This provided for the high centralisation of a numerous and bureaucratic system. The result was a great share of economic activity on the part of the state that allowed it to control both political and economic sectors. The production activities of the enterprises, largely state-owned, were guided by state-given plans.

Furthermore, this was a large-scale production, considered to be highly efficient in transforming inputs into outputs. As a result we had the so-called mass production economy that was interested mostly in the quantity, rather than in the quality of goods produced. In its turn, the large-scale mass production led to an increased specialisation in one or, rarely, two economic sectors. Most often the enterprises were specialised in heavy industry sector, thus neglecting services and light industry. In the case of

Bulgaria these sectors were - heavy industry, in particular steel production, and computers.

[1] Audretsch D.- ''Industrial policy and international competitiveness – the case of Eastern Europe'' in the book ''European competitiveness'', edited by Kristy S. Hughes , Policy Studies Institute press, 1993

The specialisation brought about to over-investment in capital projects aimed at constructing the equivalent of the giant conglomerate in the West – combines that included all stages of production from resources extraction to product expedition and consisted of hundreds of individual plants. This resulted in augmentation of the number of employees recruited by the gigantic enterprises having more than 2000 workers (near 60 per cent of the enterprises in 1988)[2]. This is the reason why the unemployment rate in socialist counties was reduced to very low rates and even didn't exist.

The model described above is viable only in 2 conditions. First, no free competition should exist. The centrally planed model was mainly characterised by the lack of competitive environment – market competition is undesirable. In times of socialism competition was seen as ''engendering needless duplication of productive capacities and wasting resources''[3]. The existence of giant monopolies was acceptable and even considered being efficient. The enterprises were not free to benefit with the value added to the goods they produced and the state, on its part, didn't leave them the possibility to reinvest the profit at their own discretion. On the contrary, the all-powerful state was using this profit in order to ensure its own existence and the existence of its loss making enterprises. Being centralised, they were easily controlled. The market structure was thus administrated by the state and no adequate procedures for entry into and exit of the market existed. In practice, state owned enterprises were ever lasting and were never subject to rival constraints, bankruptcy or failure. The second condition for a ''vigorous'' state controlled economy, the one that closed the vicious cycle, was the immense all-consuming Soviet Union's markets and inexhaustible resources. Whatever a socialist country produces, it is easily supplied on the market of the USSR.

Consequently, we can come to the conclusion that the state command economy was inefficient because it was not profit seeking and therefore was not forced to produce more and at lower price by using less resources.

Producing and even living efficiently was the difficult lesson that the Eastern European countries and their peoples had to learn in the following years.

[2] Ibid, p. 257
[3] Ibid, p.263

1.1.2. The difficult transformation process, the political consensus, and the will for economic reforms – two possible strategies

The collapse of the Communist system brought about to these countries hopes for prosperity, democracy and transition to market economy. At the very moment when the Cold War's most famed symbol – the Berlin Wall – was literally being torn down, Bulgaria's leader for thirty-five years, Todor Zhivkov, resigned from power on November 10, 1989. This event marked the beginning of modern democratic reforms in the country. Opposition parties and independent trade unions were quickly established. Starting from the bottom, Bulgarian governments in those days had to face the endless challenges the new decade presented.

At the very beginning of the transition Bulgaria wandered about between its communist past and its unclear future (the Bulgarian Socialist Party won the parliamentary election in June 1990) – and surprisingly, no real political changes came into the surface. The former communist elite remained in power and instead of concentrating itself on country's future, endeavoured to find new legitimisation[4]. The burden inherited by the communist economic system complicated the process additionally. As an immediate reaction most of the governments in the region kept the prices of many consumer products and services for households very low. Credits to state owned enterprises, specialised in heavy industry were granted by printing money, etc. These measures turned out to be inadequate - the living standards of the population collapsed, because of the high inflation. Some goods were increasingly unavailable at official prices, longer queues and bigger shortages became a daily round, imported consumer goods were absent, public services and basic utilities (such as heating and hot water supply) deteriorated.

These phenomena provoked some necessary reactions on the part of the governments. David Lipton generalises two possible strategies. "Either prices should be freed from centralised control quickly in order to cope with the shortages and the high inflation, or material legal basis, institutions and ownership structure allowing private property have to be created firstly''. He considers them to be equally important and speaks about

[4] . Lipton D. ''Eastern Europe'' The concise encyclopaedia of economics http://www.econlib.org/library/Enc/EasternEurope.html

reforms as for a ''seamless web'' – i. e. the governments in Eastern Europe, including in Bulgaria, have to launch liberalisation and structural reforms simultaneously.

In his opinion, the economic transformation in all of these countries has three common basic elements – ''stabilisation, privatisation and liberalisation''.

Stabilisation aimed at reducing budget deficits, establishing realistic exchange rates to foreign currencies and thus creating rapid domestic growth. In practice, the process of stabilisation in Bulgaria started shortly after the creation of the coalition government of Dimitar Popov in 1991. It found expression in price liberalisation; introduction of market-based exchange rates for the Lev *(BGN - the national currency) being freely traded on the newly established interbank market; export and import liberalisation; subsidies to most enterprises were cut. One-year program to contain inflation through deficit reduction and an austere income policy was agreed with the IMF[5].

The Privatisation in the Eastern European countries was, and remains, a long process of property right changing. The state launches legal procedures aimed at transforming state's ownership into private and thus to unload itself from the burden to manage unprofitable enterprises. The effect sought is efficiency of the production process and foreign direct investment flows. This process is also accompanied by the creation of high unemployment, result from the dismissal of many working places in the former state-owned enterprises. In the early transition period privatisation was not pursued with any vigour.

The ongoing Liberalisation consists in the introduction of new market-friendly conditions – i.e. in the future, natural and legal persons should be allowed to strike deals freely, buying and selling at prices set up by market forces and not by the state. In other words, the markets have to be opened up. It is related to the process of privatisation, and is directed to the demonopolisation of the highly concentrated sectors and the attraction of new market players.

In order to ensure the conditions for the existence of market-based economy Bulgaria had to come up to changes into the existing legal framework, as well. The next few pages are dedicated to the legal evolution of Bulgaria, taking into consideration 2 main

[5] Pishev O., "Bulgaria: The political economy of policy reform", Washington, D.C.; January 14-16, 1993, http://www.bg400.bg/bulgaria.htm

legal acts - the newly adopted Constitution and the Protection of Competition Act of 1991.

1.2. Bulgaria in the period between 1991 and 2000 – analyses in terms of law.

1.2.1 The Constitution of 1991 In January 1990, roundtable talks began between the socialist government and the opposition, and this set the stage for free elections for Grand National Assembly, which had for task the drafting of a new democratic Constitution. It was adopted on July 12, 1991 and, along with democratic institutions and procedures, citizens' rights and obligations, set up the initial conditions for free market economy. Chapter 1 of the Constitution entitled "Fundamental principles" gives the basis for the future economic development of the country, and the transition from centrally planed to market economy. It should be based on the right of property and free economic initiative.

Right of property Under the Bulgarian Constitution private ownership is inviolable (Art 17, par 3). Private and public ownership are equally and fully protected (Art 17 par 2). The hierarchy favouring the public property established by the previous Constitution (1971) is abolished. The state could establish monopoly by law over the use of nuclear power, railway transport, telecommunications networks, and radio and TV etc (Art 18, par 4). This text is very important with view to the provisions of the PCA of 1998 making reference to the Constitution because it allows the state to reserve itself the possibility of establishing monopoly over certain property and activities.

Free initiative The economy of the Republic of Bulgaria is based on free economic initiative, as stipulated in Art 19, par 1. All new laws passed by the National Assembly guarantee the same legal conditions for economic activity to all citizens and corporate entities (Art 19, par2). Investments and economic activities of foreign and Bulgarian citizens and legal persons should be protected by the law. The constitutional norms further guarantee equal legal conditions for economic activity to all citizens and legal persons, and provide for protection of consumers. The abuse of monopoly position and unfair competition should be prohibited by the law (Art 19, par 2).

The entering into force of the new Constitution made possible the adoption of many legal acts, regulating the basis of the economy in a new way (e.g. the Commerce Act of 1991), among which the Protection of Competition Act (PCA).

### 1.2.2. The Protection of Competition Act

For the need of a legal act dealing with the protection of the competition

Economic scientists conceive competition as a basis supporting the full functioning of the free market economy – which means to assure that "markets are contested fairly and freely in order that resources are allocated in an efficient way"[6]. This is why the basic principles laid down in the Constitution were reinforced by the creation of new competition office following the adoption of the Protection of Competition Act. The PCA of 1991 is the herald of the value that direct state intervention should be stripped away – this is how the demand and supply mechanism has to be granted and thus helping for the raise of productivity.

Another reason why for the adoption of a completely new PCA is promoted by the process of privatisation that, as mentioned above, took place in all former socialist countries, including in Bulgaria. State owned enterprises with monopolistic power on the market should be transformed in private ones but, however, private monopolies should also be avoided. The regulation system under the PCA has to reduce the power of all possible monopolistic structures, either state owned or private.

The competition law is thus called upon the regulation of the free market without setting the lines of its development but only intervening when the market equilibrium is destroyed or is threatened to be violated.

Substantive and procedural elements of the PCA

In this subpart I will stress on the simple description of the matters covered by the PCA. Critics to the existing framework will be avoided and examined subsequently in parallel with the adoption of the new PCA in 1998 that is to great extent marked by the EU-membership perspective of the country.

The PCA was promulgated in State Gazette No.39 of May 17, 1991 and entered into force three days later. In the process of drafting German and French legislation as well

[6] . Mayhew A. « Recreating Europe – the EU policy towards Central and Eastern Europe », Cambridge University Press, 1998

as provisions of the Treaty establishing the European Community have been borrowed[7]. It includes 6 chapters regulating the main fields of competition violations.

The PCA deals with the following aspects – monopoly position (Chapter 2), concerted practices (Chapter 3) and unfair competition (Chapter 4). Chapter 2 covers not only monopoly position but also dominant position and, to some extent, mergers. Monopolistic is the position of ''each person (that means natural or moral) that by virtue of law has the exclusive right to engage in certain kind of economic activity – production, services, trade, mediation, etc". Dominant is the position of ''each person that, alone or together with other persons, has a sale share that exceeds 35% of the national market'' (Art 3 of the PCA). All state entities are prohibited from adopting decisions that might, explicitly or implicitly, lead to the creation of monopoly position (Art 4). If mergers lead to such monopoly position, they are prohibited as well (Art 5). However, an exemption may be requested from the competent authority (Art 6). After being notified by the personalities concerned, and if no opposition on the part of the CPC is registered within 30 days of the notification, the authorisation is considered granted (Article 6, par.2). According to Article 7 abuse of monopolistic, respectively dominant position, exists when the persons under Article 3 restrict the competition with their actions. Classical cases listed by the law are price-fixing, restricting output or access to markets, tie-ins, market allocation etc.

Article 8 declares void "cartel agreements, as well as decisions of companies, economic groups, associations or persons, which explicitly or implicitly provide for the creation of monopoly situation in the country, or de facto lead to it". Paragraph 2 of the same Article prohibits "contractual terms restricting one of the parties with respect to the choice of markets, suppliers, buyers, sellers or consumers, except when the restriction from the nature of the contract and is not injurious to the consumers". Contract for agency, or for acquiring exclusive rights as a commission merchant, buyer or seller of

[7] Muller-Graf P-Ch, " East Central Europe and the European Union – from Europe Agreement to a Member State ", European Community Studies Association. Nomos Verlagsgesellschaft Baden-Baden, 1997

goods or services of competitors, could only be concluded if it does not lead to a reduction in competition (Art 10).

Chapter 4 of the PCA makes provisions for unfair competition in a very detailed way. Article 12, paragraph 2 lists twelve specific instances of unfair competition, including among others, spreading false statements about competitors; presenting true facts in a distorted way; disparaging the good name in competing goods or services; attributing non-existent properties to goods or services when comparing them with competing goods and services; using a competitor's business name, trade mark or special designations without permission etc. Divulgence of trade secrets is prohibited in Article 14 and defines when this constitutes unfair competition. Article 15 deals with unfair competition on behalf of natural persons – "no person is permitted to join the management and control entities of a competing firm operating in the same line of business as the person's original employer for the first three years after leaving an enterprise".

The Commission for protection of competition (CPC) is empowered to enforce the PCA. It is a committee of twelve persons (a chairman, 2 vice-chairmen and 8 members). The National Assembly appoints them for a five-year term. The CPC can self-initiate a case or do so in response to a claim brought by natural or legal person. The law makes this provision in order to entitle the CPC to observe practices that are likely to violate the law (through press reports for instance). Article 18, par 1 stipulates that "the CPC proposes, in due order, the abolishment of administrative acts drawn up by state organs when they infringe the law". It may also enforce by action the application of sanctions when "illegal creation or abuses of monopoly position, unfair competition or restriction of the competition occur".

Violations are under the jurisdiction of the judicial system. Persons, whose interests might be concerned or engendered by a violation and the CPC, are allowed to bring suits (Art 21, par.1, sections 1 and 2). The court of first instance should be the district court according to the place of execution of the violation. This is why penalties could be imposed or abolished only by the competent courts, and not by the CPC. It is only given the right to propose the imposition of property sanction. Appeals against its decisions could be beard before the Sofia City Court. By violation under Articles 4, 5, 7, section

1, 2 and 4, and art. 10, 13 the offenders are expected to pay fines of an appropriate size – to the amount from BGN 5000 to BGN 250 000 (in 1991 it is about $200-$10 000). By repel, the amount is between BGN 20 000 and BGN 1 000 000 (about $800 to $40 000).

This simple description is far from being enough to reveal the practical aspects concerning the application of the PCA. This is why it seems to me useful to explore this problem.

A. External factors impeding the enforcement of the PCA. The activity of the CPC.

In their research paper on the "Competition Law in Post-Central planning Bulgaria" B. Hoekman and S.Djankov[8] investigate the activities of the Bulgarian competition office, during 1991-1995. They argue that there are many factors that influence the process of free market creation and the role of the CPC as its main guarantee. As I have already mentioned, Bulgarian governments since February 1991 have undertaken immediate measures – stabilisation and structural reform programme, price liberalisation, and so on. Despite the reforms, two main factors characterise this early transition period.

First, the process of privatisation was very slow. "Only about 10 percent of some 3 800 state owned enterprises were privatised between 1992-95, accounting for just 2,5 percent of total assets. The most inefficient closed"[9]. Under the newly adopted Commerce Act (1991) 1, 100 limited liability and about 400 joint-stock companies were registered. Many state firms (the former combines) were broken up into smaller public sector entities. But nevertheless, many small firms were created. "As of mid-1994, some 330 000 private firms were registered, up from 24, 000 at the end of 1989". Most of these firms focused on the provision of services – both at the retail level (e.g. distribution, restaurants) and business services[10].

The second factor consisted in the state subsidies granting (e.g. budget transfers, soft budget constraints) to large loss-making enterprises mostly concentrated in the utilities, mining, and construction sectors. There was no legal framework dealing with state aid granting at that time.

[8] Hoekman B., Djankov S « Competition Law in Post-Central Planning Bulgaria », The World Bank and Centre for Economic Policy Research, University of Michigan, 1997
[9] Ibid
[10] Ibid

B The practice of the CPC in the period 1991-1995 There is, of course, direct interdependence between these two factors and the practice of the CPC at this time (1991-1995). The research paper of Djankov and Hoefman reveals the early practice of the CPC. It dealt with some 910 petitions but accepted for investigation only 57 percent of them (512 petitions). Service industries account for two-thirds of all petitions examined by the CPC and represent 70 percent of cases accepted for investigation – among them retail trade and education account for the highest number of complaints. From the digits presented above, one can come to the following conclusions.

First, the less a given sector is concentrated (there are many players in it), the more petitions are filed with CPC, and vice versa. Consequently, in high concentrated sectors (like utilities and transport) remaining public in this period, competition forces didn't occur. This conclusion is supported by the first factor – the slow privatisation. "The absence of privatisation may imply that there is less cause for concern regarding the exploitation of market power by privatised dominant entities, the state owned enterprises remaining subject to Ministerial control and oversight. At the same time, it may also stifle entry, which in principle was opened up with the introduction of the new Commerce Act in 1991. Moreover, the prevalence of soft budget constraints and subsidies (the second factor) could result in attempts on the part of the beneficiaries to use the CPC to ensure that "subsidies are passed through them..."[11].

Second, unfair competition accounts for the largest share of all cases (72 percent of all investigations), followed by abuse of dominant position[12]. Collusive arrangements such as price fixing and market allocation are rarely the subject of investigation – only 15 of the 512 investigations launched concern such practices. The total number of decisions rendered by the CPC in this period is 521. Violations have been found in some 21 percent of the cases, again more frequent in cases of unfair competition (25 percent) and, however, cartel practices (33 percent). These figures suggest that CPC doesn't deal with the core of the competition law as such (the cartel practices), but with matters that are away from being the vocation of this institution. As a result much of the caseload

[11] Hoekman B., Djankov S
[12] see reference table 1

concerns “private contracts enforcement and property rights”, something that in most market economies would involve the judicial system.[13]

And third, in this period the establishment of competition law in the country is confronted with the lack of experience and knowledge on the part of both enforcement institutions and firms. As Djankov and Hoefman observe “it takes time for participants to become aware of and take into account the new rules of the game”.

Therefore, the general conclusion is that the activity of the CPC in this period is not efficient.

The creation of the competition protection framework is the response given from 2 Bulgarian governments to the challenges faced by Bulgaria at that time. It is the expression of the value that the competitive environment is the basis for the existence of the free market economy. However, it is obvious that successive reforms need their time and follow their own logic. Further efforts in this respect have been made once the EU-membership perspective became reality.

### 1.2.3. The European Association Agreement of 1993-95

The very first years of the transformation process are common to all Eastern European countries. Sharing the same problems and resolution practices they are not completely abandoned in the efforts aimed at overcoming the obstacles. One of the most powerful catalysts stimulating the whole process of political and economic changes in these countries turned out to be the European Union. The long-term perspective – the EU membership - is conceived to be a historic obligation that engages both parties.

The conclusion of a set of second generation agreements[14] between the EC, on the one hand, and each of the EEC, on the other, is a step forward in deepening the process of integration. The establishment of new rules, policies and practices is a basis for integration of these countries in the Community.

The association as such is regulated in Article 310 of ECT according to which “The Community could conclude with one or more countries or international organisations agreements establishing association that is characterised by mutual rights and obligations for the parties”. This wide juridical framework is used in order to regulate

[13] Ibid.

exhaustively various relations that could arise between them – political dialogue (part I); general principles (part II); free movement of goods (part III); free movement of workers, freedom of establishment, provision of services (part IV); payments, capitals, competition, legislation approximation (part V); economic co-operation (part VI); cultural co-operation (part VII), political and institutional provisions (VIII) etc. As far as the full membership is concerned, a very prudent formulation has been used - membership is conceived as a final goal of the respective country. That excludes every obligation on the part of the EC. Nevertheless, a careful analysis shows that most of the provisions in the EAA aim at preparing the countries to assume the obligations, sounding in the Treaties. In my opinion, the EAA and the elaboration of the Copenhagen criteria are the main EU initiatives recognising the EU future of the Eastern European counties. Consequently, they mark the whole development of the region not only for the next few years, but also for decades and generations afterwards.

The EAA and the competition related rules – The EAA with Bulgaria was signed on March 8, 1993 and entered into force on February 1, 1995. It follows the general model, described above. The EAA establishes a free trade area between the European Community and the Republic of Bulgaria. As far as the trade relations between the parties are concerned, the competition related rules are of primary importance. They could be found in the general regulations concerning the free movement of goods (Art 33), as well as in the special Article No 64, relative to the competition rules. A. Mayhew[15] argues that one of the reasons for the inclusion of the competition rules in the EAA is that the Community was "afraid" of competition pressure on the part of countries where state monopolies and aids were traditionally the rule. In times of world trade liberalisation, goods coming from such countries could undermine the EU-Common market. The other concern, in his opinion, is that "associated countries require support through agreements with the Community for their effort to establish this regulatory framework as a cornerstone of the market economy". Anne-Marie Van den

[14]There is a first generation of association agreements between the EC and the Eastern European countries dating back to 1988/90, Popova Z. "The basis of the EU law", 2001, Planeta

[15] Mayhew A. « Recreating Europe – the EU policy towards Central and Estern Europe », Cambridge University Press, 1998

Bossche[16] adds: “free trade provisions contained in the EAA have to be supplemented by competition provisions, in order to prevent private trade barriers from coming into existence and distorting harmonious economic relations between the Parties”.

Article 64 follows closely the rules of the EC Treaty, reproducing Articles 81, 82, 87 and 88. The agreement says that the assessment of practices violating, or capable of violating the trade relations between the parties, will be based on the criteria arising from the application of these articles within the Community (Art 64, par 2), i. e. “Community case law will be applied”.

In the field of State aid, Article 64 specifies that during the first transition period (the agreement provides for two five-year transitional periods) state aid to the associated country will be assessed on the basis of Art 87, par 3, sec A of the EC Treaty – in other words Bulgaria is considered to be a region with standard of living abnormally low. The highest level of aid allowed has been fixed at 75 percent of the net grant equivalent of initial investment. The five-year period could be extended for another five years.

Transparency should be ensured through “full and continuos exchange of information, reporting annually to the other party on the total amount and the distribution of aid given and by providing, upon request, information on aid schemes, including information on particular individual cases on public aid (Art 64, sec 4 b).

“The Association Council will ensure that the rules established by Articles 81 and 82 of the EC Treaty should apply to public undertakings or undertakings to which special powers have been granted.” This will happen within three years of the entry into force of the agreement.

The competition provisions do not apply to agricultural and fisheries’ products. For ECSC products, there are special provisions in a separate Protocol 2 annexed to the agreement.

[16]Van den Bossche A-M, « The competition provisions in the Europe Agreements. A comparative and critical analysis in the book « Enlarging the European Union. Relations between the EU and the Central and Eastern Europe » of Maresceau M, Longman London and New York, 1997

All these provisions refer to violations that could affect trade relations between EU and Bulgaria. As far as the trade relations between Bulgaria and a third country are concerned, internal or other specific bilateral provisions should be applied.

Bulgaria agreed to introduce the rules necessary to implement these articles. The Association Council should adopt them within three years from the entry into force of the EAA (Art 64, sec 3). Each Agreement explicitly specifies what should be understood by the term "date of entry into force". For Bulgaria this date is January 1, 1993. Consequently, the three-year time limit for adoption of these rules expires on December 31, 1995. The question arises then how practices incompatible with the competition provisions of the agreement are to be assessed during this three year term. By contrast with the Czech, Slovak and Slovenian Agreement, in the case of Bulgaria there is not an explicit provision on this problem. According to A-M Van den Bossche "the competencies of the respective competition authorities should be left intact ". In 1997, behind the schedule, this document was adopted. An overview shows that it concerns mainly the relations between both the European Commission and the CPC while implementing the provisions of the EAA depending on the "competencies evolving from the existing provisions in the respective legislations".

The EAA is not bounded in terms of duration. This is why, it will remain in force until Bulgaria becomes Member of the EU. The provisions of the EAA (including the norms on competition) regulating the relations between both the EU and the Republic of Bulgaria paved the way for the future development of the competition law in Bulgaria.

### 1.2.4 The Protection of competition Act of 1998

In 1998 the National Assembly adopted a completely new Protection of competition Act (PCA). The following paragraphs reveal the reasons that provoked its creation. The main topics it covers will be presented in parallel with the previous PCA and the EU competition policy, because I consider it to be the result of both.

#### The reasons for the adoption the PCA of 1998

I consider the long-term goal, namely the EU membership of the country, to be the engine of most of the reforms that took place in Bulgaria since 1997. The year 1997 was a cornerstone for the final and the most decisive stage of reforms that took place in Bulgaria. The consensus that Bulgaria should finally become a modern, democratic and

prosperous country, found expression in the events of January and February of the same year (massive strikes all over the country). Thousands of people showed the newly elected UDF government that the state machine is not allowed to make any step back in this respect. Together with the stabilisation of the country (the inflation of the last months achieved 200 percent) the new government determined the integration of the country I the existing Euro-Atlantic structures as one of its priorities. When the Kostov government finished its four-year term in June 2001 Bulgaria has already been negotiating its future EU membership. Originating from a right wing party, he conceived the creation of a free market economy as a conditio sin e qua non for the successful reforms launched by his government (e.g. the introduction of currency board, enhanced privatisation process). One of the principle tasks on the agenda was the adoption of a new PCA.

Besides, there were other reasons that finally led to the adoption of the new PCA. First, as mentioned previously, the PCA of 1991 didn't complete the expectations of its authors and didn't respond to the tasks attributed to it, both in terms of substance and procedure, as well as implementation. A simple comparison between the two acts would allow us to distinguish the obvious differences and the improvements brought by the new one - e. g. detailed regulation of the concentration of economic activity has been introduced.

Second, I would like to point out the obligation that Bulgaria undertook under the EAA – "to extend the approximation of laws to the following areas in particular:.., rules on competition, ..." – in other words, Bulgarian legislation in general, and the provisions related to competition in special, should comply with those of the EU. It is noteworthy that this is a one-sided obligation - only Bulgaria is expected to "adjust" its legislation according to the "acquis communautaire". This is the first example in relations between EU and Bulgaria that the latter engages itself with the process of approximation in general. In terms of competition the message is very clear – the existing framework (PCA of 1991) is not efficient enough, it should be changed, taking into account the provisions of the EC Treaty.

Another justified question would be why not to change the existing framework, but to adopt a completely new law. One should bear in mind that the initial proposal of the CPC consisted in amending the PCA of 1991. Possible explanations could be:

- as far as content and efficiency are concerned the old PCA is absolutely out of date (this statement coincides with the opinion of the Commission in its Agenda 2000).
- the EAA gives only the general parameters in the matter, and is adapted to a relationship that is nothing but an association and is far from being a full membership; nevertheless Bulgaria is expected to ensure the proper implementation of the EAA, consequently the procedural provisions of the PCA need to be improved. The EAA doesn't refer to the competition environment in the interior of the country.
- the future membership of the country supposes Bulgaria will become part of an integrative model such as the Common Market of the EU. Consequently, it has to provide competitive conditions for both national and EU undertakings operating on its territory.

The passing of the PCA in 1998 is part of the short- term goals of the National Programme for harmonisation of the national legislation with the acquis. This is why it regulates matters such as concerted practices, abuse of monopolistic and dominant position, and concentrations in a way similar to the EC Treaty and the secondary law of the EU. Some of the institutes introduced are completely new for Bulgarian legal order – e.g. concerted practice; bloc exemptions, others have not been regulated sufficiently by the former PCA (merger control). Nevertheless, the unfair competition related issues remained.

The description bellow aims at exploring the existing legal framework right after the adoption of the Law in 1998 until the opening of the accession negotiations at the beginning of 2000. I will seek to provide for the direct interdependence between the old PCA, the process of EU integration at that time and their influence on the new PCA. The numerous changes (after 2000) won't be discussed in this section but in Chapter No.2, which is especially dedicated to the negotiation process. The shortcomings of the

law will be discussed on the appropriate place in this Chapter. For the analyses I will make reference to the "Commentary on the Protection of competition Act"[17].

**Substantive elements of the PCA**

Subject matter

Article 1, par 1 stipulates that "the objective of this Act shall be to ensure protection and conditions for expansion of competition and free enterprise in economic activities". Noteworthy is the use of the word "protection". The former PCA didn't use it, and speaks about "to ensure conditions providing for the freedom of entrepreneurship" (Art 1, par 1, PCA 1991). That could be explained by the idealistic early conception that the sole declaration of the competition would allow it to function as a self regulating market mechanism. The analyses of the CPC practice shows that nothing of the kind has happened. So, the explicit use of "protection" is an appropriate one. The second paragraph of the same Article provides for protection against agreements, decisions and concerted practices, misuse of monopolistic or dominant position on the market, concentration of economic activities, unfair competition and other actions which may result in prevention, restriction or breach of competition". This is the first time in the short history of the Bulgarian competition law when one legal act explicitly states the "concerted practices" ranging them between the possible violations of the law. This inclusion is a sign for the direct impact of the EU competition law and the legislation approximation covered by the EAA. The detailed provisions concerning the above mentioned institutes will be deepened in the following pages.

Scope of application

Article 2, par 1 figures out the circle of subjects of law to which the PCA should be applied. They are regrouped in four categories:

1. Undertakings (Art 2, par1, sec 1)- the legal definition of this notion is comprised by sec. 1 of the Additional provisions of the PCA – "natural or legal person under civil law which carry on economic activities on the relevant market, regardless of its legal and organisational form". The notion of "undertaking" as such is again a new one but it is not an invention of the Bulgarian legislator. Articles 81, 82, etc of the EC Treaty also

[17] Stojanov I. "Komentar na zakona za zashtitia na konkurenziata"; "Commentary on the Protection of competition Act", Sofi-R, 2000

use this term. The advantages of the use of the term «undertaking», instead of "persons" (as it used to be in the PCA of 1991), lie in the criteria of "economic activity" and "relevant market", both newly included in the PCA. That allows a more precise selection of the subjects to which the PCA is applicable. According to the first criterion -"economic activity", undertakings could be:

- natural persons, if the result of his or her activity has market realisation (inventors, professional sportsmen, artists, liberal professions, or

- legal persons, the biggest part of the market operators. Most of them are companies operating on the relevant market and liable to violate the law (traders according to their legal and organisational form (Art 1, par 2 of the Commerce Act).

The persons who do not exert any economic activity are brought out of the application scope of the PCA.

The second criterion - "relevant market" will be further discussed in details.

2. Authorities of the executive and the local self-government –The PCA of 1991 prohibited these bodies from establishing only "monopoly position that could lead to the affection of the competition on the market". By contrast, Article 2, par 1, sec 2 of the new law covers all violations that prevent, restrict, breach competition in the country or may do so (Art 2, par 2).

3. Undertakings assigned by the State to provide services of public interest – this text is directly influenced by Art 86 of the EC Treaty. It expresses the will of the legislator to put under competitive pressure all the undertakings operating in the country. On the one hand, the application of the law should not lead to the prevention of the activities of these undertakings, and the competition in the country should not be destroyed, on the other (Art 2, par 1, sec 3).

4. Natural persons who support the establishment of dominant position or unfair competition. That doesn't mean necessarily every natural person but officials because they could commit official misconduct (Art 2, par 1, sec 4).

The second paragraph of Article 2 deals with the cases to which the PCA is not applicable. Section 1 reads as follows: "relations governed by the legislation relative to the protection of industrial property, copyright and related rights, to the extent that they are not used to restrict or distort competition". The relation between the rules on

competition (fighting against the monopolies) and the rules on copyright (seeking to favour the rights of a single author) is one the most conflict topics in all modern legal systems. Clear distinction is difficult to be made, and this is the reason why the legislator, using the example of the EU, introduced this provision that should manage the future problems to some extent[18]. Section 2 is the result of the EU case law: the PCA should not be applied towards "operations, the consequences of which restrict or might restrict the competition in another State, unless otherwise provided in an international treaty, which has entered into force and to which the Republic of Bulgaria is a party". In the case Woodpulp vs. Commission (case No. 125-129 of 1985) the ECJ finds that "the jurisdiction of the Community to apply its own rules on competition overlaps with the principle of territoriality that is recognised by the international public law". The conclusion here is that a county could impose sanctions on undertakings of other nationality, restricting the competition in the former country, even if the actions relative to its creation have been undertaken out of it. The PCA provides for the possibility to countries interested in preventing such conflicts on their territories to conclude bilateral or multilateral agreements[19].

Commission for protection of Competition

Chapter 2 of the PCA contents the provisions related to the CPC. I will briefly present the formation rules, and will go in depth with its powers.

1. Formation

"The CPC is an independent state body financed through the state budget" (Art 3). It is composed of eleven members, elected and dismissed by the National Assembly for a five-year term. The CPC is created as a body independent from the Executive. There are also special requirements for the education of its members – either jurists, or economists. This is justified because the competition relating cases are a mixture of both economy and law. They should respect "high professional and moral standing, and should not be sentenced to imprisonment for intentional crimes prosecuted on indictment. They may not take any paid position, unless they exercise scientific or teaching activities" (Art 4, par 3). This is a new moment, as far as the formation of the

[18] Ibid, p 23
[19] Ibid, p 24

Commission and the status of its members are concerned. The ambition of the authors has been to put on an equal basis the requirements towards the members of CPC with the rest of the magistrates in the country and to thus render the competition law its due.

2. Competencies

It is comprised by Article 7 of the PCA. The CPC is empowered to:

- "establish the offences and impose the penalties provided by the law". As mentioned previously the CPC under the PCA of 1991 didn't have this power and that resulted in inefficiency of its actions,
- "issue the authorisations provided for in the law". It is speaking about the notifications under articles 13, 20 and 24. These texts will be further discussed.
- "submit proposals to the competent authorities of the Executive and the local-self government, or bring actions before the court for the reversal of individual administrative acts issued in contravention to this law". By contrast to the previous PCA, the CPC was not given the right to bring claims before the court (Art 18, par 1 of the PCA 1991).
- "pronounce to other request relating to this law" – it is expected to give opinions on privatisation deals for example.
- "order the termination of the offence and restoration of the initial situation
- "to declare invalid the agreements and the decisions prohibited by the law. This provision has been declared unconstitutional[20]. According to the Court "non-judicial authorities and administrative bodies in particular, including CPC, are prohibited from administrating justice". The newly adopted Constitution excludes such a possibility, as a reaction to the Constitution of 1971, who allowed the creation of the so-called "particular" authorities.

The wide powers given to the CPC reflect the model established within the EU and especially the role of the Commission in it. The national competition authority received new competencies aimed at making its work more efficient. The powers of the CPC were subject to further changes during the negotiation process.

Prohibited agreements, decisions and concerted practices

[20] Constitutional Court of the Republic of Bulgaria, decision No. 22 from September 24, 1998, State Gazette No. 112 -1998).

Article 9 prohibits "all kinds of agreements between enterprises, decisions of related or united enterprises, as well as the concerted practices of two or more enterprises, aimed at or with intended result to prevent, restrict or breach competition on the relevant market, such as:

1. direct or indirect setting of prices or other commercial terms;
2. allocation of markets or sources of supply;
3. restriction or control of production, trade, technical development or investment;
4. application of different terms for the same type of contracts in respect of certain partners, whereas they are set in inequitable position as competitors;
5. setting the conclusion of contracts under condition for undertaking of additional obligations or conclusion of additional contracts by the counterparty, which by their nature or according to commercial practices are not related to the subject of the main contract or the execution thereof.

Article 9, par 2 declares these practices void.

This text is the direct reception of Art 81 of the EC Treaty. It regulates the matter of "concerted practices" in a new way that is far more detailed and clear than Art 8 of the PCA of 1991. If the latter focuses only on agreements and decisions whose purpose is to "explicitly or silently establish monopoly position in the country", the new text is wider and encompasses three forms of collusion that "could prevent, restrict or breach the competition..." and lists the several examples. Article 9 is the fruit of Art 64 of the EAA according to which, Bulgaria took the engagement to apply in its anti-monopolistic practice the criteria elaborated by the institutions of the EU in this field.

The notion of "relevant market" is extremely important in this respect. Its introduction evolves from the proposal for amendments of the former CPC. If Article 9 only mentions it, paragraph 1, sec. 5 of the "Additional provisions" gives the exact definition for "relevant market". The meaning is again "borrowed" by the case law of the ECJ[21]/[22]. Thus, according to the article, mentioned above, the "relevant market shall comprise:

[21]*(case No 27/76) United Brands vs. Commission
[22] Iv Stojanov

- “product market” comprising all goods or services which could be accepted by the consumers as interchangeable in terms of their properties, designation and prices;
- “geographical market” comprising a certain territory, where the relevant interchangeable goods and services are being offered, and where the terms of competition are the same and differ from those in neighbouring regions”.

The PCA of 1991 used the notion of “national market”; it is logical then that certain restrictive and abusive practices operating on local level would easily escape from the application scope of the law. This situation made senseless some of the provisions of the PCA.

Article 9 also talks about “concerted practices”. Again this is a new institute for Bulgarian legal order, drawn on the EU competition rules (art.81 EC Treaty). It was added to the already existing “agreements between enterprises, decisions of related or united enterprises” with the main purpose to embrace, in exhaustive way, the whole range of eventual relations between the undertakings[23]. Ultimately, it is the result of the “restrictive agreement” that matters.

Article 9, par 1 lists 5 possible manifestations of such activities. They are so similar to the provisions of Article 81 of the EC Treaty to the extent that almost copy them out. But sometimes, they do it in a wrong way, because paragraph 1, sec1 of the same article talks about “setting the prices”, while Article 81 prohibits the “fixing of prices”. Setting the prices of their goods and services is a normal business activity[24]. So, there is an obvious translation mistake that has never been corrected even during the negotiation process.

It looks like the old PCA is much more precise in using the appropriate legal terms (“impose prices” art.7, sec.6).

Section 2 (allocation of markets or sources of supply) of the same paragraph is not a new one and doesn’t need further explanations. The possible forms of restriction under this rule are numerous and are not the subject of this work. The same holds true in respect of sections 4 and 5 of the same paragraph.

Article 10 regulates the agreements of minor importance:

[23] Ibid,
[24] Ibid p. 51

"(1) The prohibition under Article 9, paragraph 1, shall not apply to agreements, decisions and concerted practices with insignificant effect on the competition.

(2) The effect shall be considered insignificant where the total share of the enterprises - participants on the market of goods or services, subject to the agreement, the decision or the concerted practices, does not exceed five percent of the relevant market".

This time we witness an example for a reception of the secondary law of the EU. In 1970 the Commission published a Report on the agreements between undertakings having insignificant position, that don't fill within the scope of Article 81, par 1. This opinion resulted in the adoption in 1997 of the so-called "Notice on Agreements of minor importance"[25]. The "de minimis rule" is to be calculated depending on the market share and the turnover of the undertakings concerned. Thus, the market share has been fixed at 5 percent of the relevant market and the annual common turnover should not exceed ECU 300 million. Article 10 pursues the same approach, but neglects the turnover criterion. This provision suffers another shortcoming – namely, in which way the market share is to be calculated. Article 10 didn't give answer to this question, neither in 1998, nor after the closing of the negotiations in 2004. The reasons for this remaining lapse will be discussed in Chapter 2.

Article 11, par 1 contains a requirement for the "undertakings to notify the Commission of the existence of agreements, decisions or concerted practices under Article 9, paragraph 1, within 30 days following the conclusion, adoption or application thereof. The notification may also contain request for exemption from the prohibition pursuant to Article 13".

Ivan Stojanov considers this text to be a victim of the mechanical borrowing of foreign legal norms - whereas giving the exact word correspondence without translating the sense of the provision. The text of Article 11 copies the old Council regulation No 17/62 (abolished by the new 1/2003), but in a wrong way. Article 1 of the regulation states: "agreements,..., within the meaning of Article 81 of the EC Treaty, shall be

[25] OJ C 372, December 9, 1997

prohibited, no prior decision to that effect being required". Prior notification to the Commission is required only for exemption under Article 81, par 3.[26]

The Bulgarian version, melting the notification for exemption with the nullity of such practices, creates the obligation for violators to give up on their own. In practical terms, no violator, who is sure to be in violation, will notify the CPC on its own free will, because it will be punished for sure. Something more, the PCA has already declared them void in Article 9, par 2). This provision has been changed during the negotiation process. Therefore, it will be discussed again in the second chapter of my thesis.

The text of Article 12 clearly says that the CPC may either declare that there are no reasons for prohibition under Article 9, or prohibit of the agreement, the decision or the concerted practices.

The qualitative exemptions are comprised by Article 13, par 1: « agreements, decisions of undertakings or concerted practices, which foster the growth and enhancement of the production of goods and provision of services, the technical and economic development or the improvement of competitiveness on foreign markets, ensuring fair share in the benefits obtained for the consumers, and provided:

1. they do not impose on the relevant enterprises restrictions, which are not needed for attainment of the above objectives, or

2. they do not create opportunities for elimination of competition in respect of a substantial part of the relevant market",

will be exempted from prohibition under Article 9, after permission of the CPC. That means the social interest should dominate the private one and the reasons for the exemption should be justified. This is also the leading idea of the EU competition law (Art 81, par 3 of the EC Treaty). Noteworthy is the expression "technical and economic development or the improvement of competitiveness on foreign markets", added to the original provision of Article 81 of the EC Treaty. This logic seems to be senseless, and not surprisingly this norm has been removed during the negotiations.

[26] Mueller Felix "The new Council regulation (EC) No. 1\2003 on the Implementation if the rules on Competition" – German Law Journal http://www.germanlawjournal.com/article.php?id=457

The second paragraph of the same article treats the small and middle-sized enterprises preferentially. Such an inclusion is based on the conception that the SME are less effective in terms of production than the bigger. But nevertheless, their existence is justified from social point of view because they create job places, which are of vital importance for a young market economy system like Bulgaria. Mainly the German competition law inspired this provision. It serves as a model for the EU competition law that is famous for its tolerance towards the SME.[27]

Paragraph 4 of Article13 provides for the possible consequences, in case if the undertakings concerned do not comply with the conditions granted by the CPC in its permission. It may revoke or amend the permission, "as well as prohibit the agreement, the decision or the concerted practices".

The next article (Art 14), following the example of the EU, regulates the so-called "group exemption from prohibition". The idea comes out of the numerous similar requests for individual exemption under Article 81, par 3 of the EC Treaty that the Commission has faced in its practice. It is not speaking of the usually stated "agreements, decisions, etc", but of some categories of contracts, concerning the trade with certain products, especially defined in the blocking exemption decisions of the European Commission. They comprise the so-called "black" and "white lists" – clauses that could be included in an agreement, and respectively clauses absolutely forbidden, and aim at facilitating the work of both the Commission and the national competition authority. The adoption of such decision on behalf of the CPC has been a requirement during the negotiations. This is why the concrete examples will be provided in Chapter No 2.

Monopolistic and dominant position

Part four of the PCA deals with the notions of dominant and monopolistic position. At the same time it makes distinction between them. There are two articles dedicated to the definition of one and the same institute – dominant (monopolistic) position - (Articles 16 and 17). Most of the modern legal orders consider the notion of dominant position to cover completely the meaning of monopolistic position, the latter being only a variety of the former. I think a possible explanation could be the socialist inheritance, which

[27] Souty, Fr. "Le droit de la concurrence de l'Union européenne" 3e édition Montchrestien, 2003

left many monopolised sectors behind. The former PCA created the impression to be drawn up to contend against the abuse of monopoly position like against a huge enemy. To the extent that all other possible violations have been submitted to this one. This is the logical conclusion if one has only a short look at the previous PCA.

Actually, the legislator makes this distinction in order to underline the way in which a monopoly could be created:

"(1) Monopolistic shall be considered the position of an undertaking, which has by law the exclusive right to pursue a certain type of economic activity.

(2) Monopolistic position may be granted only by law in the cases where it has been provided to the State pursuant to Article 18, paragraph 4 of the Constitution of the Republic of Bulgaria.

(3) Any other granting of monopolistic position shall be considered null and void" (Art 16).

In other words, Article 16 opens the possibility for non market-based decisions taken by the state. It might sound dangerous, but the state is quite restricted in doing so, because this article imposes to it the possible instances, recognised in the Constitution of the country. The possible cases have been previously discussed. Noteworthy is that Article 16 doesn't restrict the state to the creation of state monopolies, but allows the creation of private ones. Nevertheless the prohibition of abuse under Article 18 refers to both monopolistic (under Art 16, par 1) and dominant position (under Art 17, par 1), as a reflection of Article 86 of the EC Treaty, according to which rules on competition are applicable to undertakings with special and exclusive rights.

As previously discussed, Article 17 gives the definition of dominant position. There is dominant position if an undertaking that "in view of its market share, financial resources, opportunities for access to the market, technological level and business relations with other enterprises may prevent competition on the relevant market, since it is not dependent on its competitors, suppliers or buyers". What matters here is the independent position of an undertaking, i.e. if it may behave without taking into account the existence of its competitors. But Article 17 goes further, introducing a second precaution measure. In its second paragraph, it stipulates that unless the conditions under paragraph 1 are not at hand, it is assumed that "an undertaking has dominant

position, if it has a market share exceeding 35% of the relevant market". This is borrowed again of the German competition law[28]. However, this is an inconclusive presumption, i.e. the law admits the possibility for a given undertaking to have a market share of 35 percent and not to be in dominant position. So, it is up to the suspected undertakings to prove that they don't have dominant position. Furthermore, we witness an obvious difference in terms of approach. This time the threshold differs from the one under EU competition rules. The EU case law does not fix thresholds. The ECJ considers that incontestably dominant is the position of undertaking that has 75 or more percent of the market share. Respectively, there is no dominant position of undertakings when they have less then 25 percent share market. For instance, in the case United Brands vs. Commission, the market share was estimated to 40-45 percent. In this scope the European Commission needs additional criteria in order to estimate whether or not an undertaking is in dominant position – entry barriers (technical advantage), price strategies of the undertakings, market structure, etc.[29]

The eventual violations that could emerge under the prohibition article are specified in Article 18 of the PCA. It gives the exact meaning of Article 82 of the EC Treaty and lists the possible violations non-exhaustively. It doesn't worth quoting the text of the article because it is identical to Article 82 and it is not a new one for Bulgarian legislation – (art 7 of the previous PCA). But nevertheless, noteworthy is that it does not forbid the dominant position as such. Reflecting the EU approach in this field, it prohibits undertakings with dominant position on the relevant market from behaving in an abusive way. Thus, there is less risk for "the champion to be punished".

Concentration of economic activity

The PCA of 1991 only touched (its Art 5) the questions relating to the concentration of economic activity and put it in the context of the establishment of monopolistic position. The new PCA of 1998 regulates this matter in a detailed way. For that purpose, the authors used the secondary law of the EU, dedicated to the concentration

[28] Souty, Fr. "Le droit de la concurrence de l'Union européenne" 3e édition Montchrestien, 2003

[29] Ibid.

practices. The definition of concentration, given by Art 1, par 1 of regulation of the Council No. 4064/89[30], is used in Article 21, par 1 of the PCA:

"(1) Concentration of economic activity shall be considered to occur:

1. in the event of merger or take-over of two or more independent enterprises, or

2. where one or several persons who already exercise control over one or more enterprises, acquire through purchase of securities, equity or property, by contract or by any other means, direct or indirect control over one or more enterprises or parts thereof".

Joint venture, which continuously implements all functions of an economically independent subject, is also considered to be a concentration (Art 22).

Article 23 makes provisions for the cases that are not considered to be concentrations. This is the exact text of Article 3, par 5 of reg No 4064/89[31]. It doesn't worth going in depth with this text, because it is clear enough, and has never been subject to changes.

The next article (24) makes provision for undertakings, intending to concentrate their economic activities, and put them the obligation to notify preliminarily the CPC if:

"1. the total market share of the goods or services involved in the concentration exceeds 20 percent;

2. the total turnover of the participants in the concentration for the precedent year exceeds BGL 15 million" (Art 24, par 1).

In EU competition law there is no requirement for market share. This text has been amended during the negotiations. Article 26 includes the essential elements of the notification blank and a "request to the Commission to approve the concentration" (par 2).

From this moment on, the CPC is expected to "assess the concentration within one month following the receipt of notification "(Art 27, par 1). A lot of factors have to be taken into account - the positions of the enterprises on the relevant market before and after the concentration; their economic and financial strength; the access to supplies and the markets for the relevant goods and services; the legal and other obstacles to the

[30] The merger control in the EU occurred after several years of application of art 86 (new art 82) of the Rome Treaty to concentrations. The first case in this respect is case No 6/72 of the ECJ Continental Can vs. Commission. The decisions of the ECJ finally led to the passing of reg. No 4064 of 1989 (ref. Stojanov Iv)

access to the markets and so on (the list is not exhaustive, Art 27, par 1). On this basis the CPC could

1. declare the concentration to be beyond the scope of Article 24;

2. permit the concentration;

3. begin investigation pursuant to Article 29". The last means that if the CPC founds it reasonable, i.e. the concentration gets into the application scope of Article 21, it is allowed to start the so-called investigation. By the time of issue of the decision, all actions pertaining to the planned concentration are prohibited (Art 29, par 4).

State aid and unfair competition related issues

Before I pass to the procedural elements of the PCA, I would like to make two remarks, concerning the following questions – the state aids regime, and the unfair competition. They represent parts 5 and 6 of the PCA.

As far as the state aids are concerned, it is true that it is with Article 20 of the PCA that this field is regulated for the very first time. But there is a huge gap in its provisions - it lacks the sanctions that could be imposed to the eventual violators, and is thus doomed to failure. This is the reason why, the most substantial topic during the negotiation process was related to the adoption and implementation of a completely new State Aid Act. The law and its main element will be discussed in Chapter No2 of this work. Nevertheless, the late invitation to Bulgaria to start negotiations bears the stamp of this weakness.

In terms of EU competition law the "unfair competition" is not subject related to the core of this branch of civil law. Bulgaria is one of the few states in which competition law and unfair competition are mixed on legislative and court level. When CPC deals with questions related to unfair competition practices it is inevitable to touch subjects, regulated by other legal instruments, like Protection of Consumers Act, Copyright and Neighbouring rights Act, Penal Code, etc. Noteworthy is that the initial proposal of the former CPC provided for the exclusion of this matter from the draft, but it remained, although shorted[32].

**Procedural elements of the PCA**

[31] Ibid,

[32] Stojanov Iv.

Preliminary remarks

Title 3 of the PCA makes provisions for the proceedings in terms of competition law.

Despite some exceptions, this is another example for a completely new regulation provoked by the long-term goal – the EU membership. In the old PCA this proceedings followed strictly the rules of the normal civil proceedings under the Code of Civil Procedure, in particular (Art 22 of the PCA of 1991)[33]. The CPC was not empowered to impose fines, only courts were invested to do so. As mentioned previously, this mechanism hindered the efficiency of the whole proceeding.

In order to get near to the EU proceedings model, the author of the draft (the CPC of that time) proposed changes that were expected to attribute to the CPC competencies allowing it to improve its regulating role and the efficiency of its activity. The current Bulgarian model borrows from the one established within the EU (or at least before the idea for reform of the centralised model, established by reg No 17/62)[34], according to which the Commission has the exclusive competence to deal with all violations liable to affect the competition on the Common Market, with the possibility of appeal of its decisions before the CFI and the ECJ. But the legislator has rejected some of the initial proposals. The following pages aim at describing the proceedings on competition cases.

First, I would like to note that "the competition proceedings" consists of 6 steps – initiation of the proceeding; evidence collection, preparation of the decision, elaboration and adoption of the decision, appeal, and finally, the execution of the decision. For the description of the proceedings I used the information provided by Ivan Stojanov in its "Commentary to the PCA".

Instigation of proceedings

Reasons for Instigation of Proceedings (Art 36)

(1) Proceedings before the Commission shall be instigated on the grounds of:

1. application in writing by the persons, whose interest has been affected or threatened by violation of this Act;

[33] Hoekman B., Djankov S « Competition Law in Post-Central Planning Bulgaria », The World Bank and Centre for Economic Policy Research, University of Michigan, 1997

[34] As from May, 1 2004 a new procedural regulation entered into force (reg No 1/2003). It annulled regulation of the Council No 17/62 and, thus, created a new decentralised system for protection of the competition

2. requests in writing for issue of permissions or for admission of unified general terms or Government aid;

3. of the Commission

4. request by the prosecutor.

There are two moments here that are worth discussing. First, the "persons" should have present interest, which means to be "directly concerned". Such could be the undertakings, or even the consumers (this is why this article speaks about persons, i. e. natural or legal persons). And second, it is speaking about persons "affected or threatened". That opens the question concerning the special role of the CPC in competition cases. It could play either the arbiter, as far as the some "affected" undertakings are involved in the litigation, or the side if the competition is threatened to be injured (this is the hypothesis of par 3). The latter is a very flexible instrument for protection of the interests of the society, because we could easily imagine an unorganised group of citizens, on the one hand, and a monopolistic undertaking affecting their interest, on the other. The consumers are not likely to pursuit their rights before the competition authority, although the PCA gives them this right. The early practice of the CPC (1998, 1999) shows many cases of self-initiation of proceedings (ex officio) and the rendering of decisions finishing with property sanctions for monopoly enterprises such as BTC, BDZ, NEK, etc.

Article 49 specifies clearly the elements of the application under Article 36, par. 1. The presence of all of them is crucial. Otherwise, the CPC could reject the application (Art 49, par 5 and 6).

Paragraph 2 of Article 48 gives the cases in which the regulator is not allowed to begin the proceedings. I would like to briefly comment the following text:

"(2) Proceedings shall not be instigated and the instigated proceedings shall be terminated by decision of the Commission in the event that:

1. the applicant - natural person, has died; or where the legal person has been deleted;

2. the terms provided for lapse of responsibility under this Act have expired;

3. the Commission is not competent to make a statement." (Art. 48)

First, the provision of section 1 is perplexing. It looks like it uses the principle "No person, no problem". Somebody's death could neither erase the infringement, nor leave

it unpunished[35]. Still, the vocation of the CPC is not reduced to indemnification of the aggrieved party, but to keep the competition and to punish the violators. And this provision abolishes such a function.

As far as the limitation term is concerned, the CPC could never be sure if the last known violation is the last committed violation as well. Consequently, it might use its right to start investigation. That means that the usual five-year term of prescription (Art 46) is not a reliable protection for undertaking infringing the law. This specificity comes out of the nature of the competition relating cases. In my opinion, this situation testifies to the specificity of the proceeding under the PCA, and thus distinguishes it from that under the Civil Procedure Code.

Evidence collection

Article 40 is relevant in this respect. According to it, the chairman could order the collection of a piece of evidence prior to the instigation of proceedings, if the collection of such piece of evidence may be rendered difficult or if there is danger of losing. This situation could arise if the CPC comes upon on a piece of evidence by chance, in the framework of other investigation. Indeed, it looks like logical. What is strange here is that the legislator makes pointless this provision by the introduction of Article 42 that stipulates: "the documentation and information obtained by the Commission in the course of the survey may be used by the Commission only for the purposes of the respective survey".

The second paragraph of Article 40 raises the important question concerning the way in which evidence should be collected. The initial proposal of the former CPC followed closely the model of the EU, namely regulation No 17/62, where the European Commission is entitled to search the offices, the apartments or the conveyance of the suspected, at that, by surprise. Contrary to the examples given, paragraph 2 of Article 40 renvoit to the Civil Procedure Code. One could argue that the legislator made a step back in investing the CPC with the respective powers as far as the evidence collection is concerned. Obviously, the violation of the competition is not perceived as crucial. Instead, Article 41, par 1 introduces the obligation for co-operation – "by providing access to premises, providing verbal and written explanations, as well as providing

[35] Ibid

documents and other information media". The non-observance of this provision is fastened with sanction under Art 60, par 2. In the event the suspected deny access or fail to provide information, "the Commission shall seek the co-operation of the bodies of the Prosecutor's Office and the Ministry of Interior" (par 2). But this is a post factum reaction. The time necessary for the arrival of these bodies will be enough for the evidence withhold. This is why the CPC should insure their co-operation in advance.

Preparation of the decision

This is the next stage of the proceedings. When preparing the decision, the CPC should bear in mind the text of Article 51, par 3: "all facts and circumstances collected in the course of the investigation or survey shall be considered of confidential nature, if they are trade secret or another protected secret of the parties". This provision concerns the cases when the information used during the investigation should remain away from the years of the competitors. But it is not clear how exactly this should happen; when after the completion of the investigation the parties will be given the possibility "to get acquainted with the materials collected in the file" (Art 51, par 5). The example of the EU shows that European Commission divides the confidential material in a separate folder, which is not given to the respective opposite party[36].

Paragraph 4 of the same article gives the terms in which the CPC is expected to complete the investigation: "the investigation shall be conducted within sixty days. In cases of factual and legal complexity the term may be extended by not more than thirty days by order of the Chairman of the Commission". Here again, the term is not bound by sanctions – there is not answer to the question ''What will happen if the CPC doesn't conduct the investigation in the respective terms?"

This stage is completed by the elaboration of conclusion by the reporter that should be presented to the chairman of the CPC (Art 52, par 1). The former set a date for open meeting within two weeks thereafter (Art 52, par 2).

Elaboration and rendering of the decisions

The CPC issues its decision at a meeting *in camera* (Art 55, par 1). The meetings may conduct business provided they are attended by at least seven members of the CPC (Art

[36] Ibid.

38, par 1). The Commission may take decisions provided that a majority of six votes has been achieved (Art 38, par 2). With its decision it could:

1."ascertain the committed violation and the violator, and determine the type and amount of the sanction as provided by law;

2. ascertain that no violation of the Act has been committed or that the term under Article 46 has expired, and shall not grant the application;

3. announce that there are no reasons for imposing the prohibition pursuant to Article 9;

4. exempt certain agreements, decisions or co-ordinated practices from the prohibition under Article 9;

5. prohibit certain agreement, decision or co-ordinated practices;

6. permit or prohibit the unification of general terms;

7. permit or propose to the relevant body or institution to cancel or change the project for granting Government aid;

8. permit or prohibit certain concentration." (Art 55, par 10).

There is nothing new in this text. It just lists again the actions that the CPC is empowered to take. Article 57 provides for the elements of the decision – it should comprise "disposition with specification of the rights or obligations, the type and amount of the sanction" (Art 3, sec 3).

Appeal

According to the previous PCA the decisions of the CPC were subject to appeal before the Sofia City Court within one month of the rendering of the decision. Since the adoption of the PCA became reality the decisions of the CPC are subject to appeal before the Supreme Administrative Court within fourteen days following their notification pursuant to the Civil Procedure Code (Art 43). Here, we witness another example for the approximation of the legislation. This model is the reflection of the system established in the EU where the decisions of the European Commission are subject to appeal before the CFI.

Currently, the SAC is the sole national court empowered to deal with competition related cases under the PCA. The previous PCA stated that "all claims are under the jurisdiction of the district courts" (Art 21), excluding in practice the CPC from the

power to impose sanctions. Its role was reduced to the right to bring claim before these courts for violations of the law together with the public prosecutor.

The new text doesn't say a word about the liability of the CPC, as far as its activities are concerned. One should bear in mind that it takes actions with great effect on the economic activities of the undertakings, and sometimes on the national economy as a whole. It is possible to be wrong. According to Ivan Stojanov the only way for the affected persons to seek responsibility for the actions of the CPC is the one prescribed in Article 36, par 2: "claims for indemnities to persons affected by violations of this Act shall be lodged pursuant to the procedure of the Civil Procedure Code". Consequently, one could prosecute the CPC, when it takes actions breaching the law. This text represents a possibility for all affected persons to search the indemnities for any violation whatsoever.

Execution of the decision

The decision of the CPC enters into force, if

1. they are not subject to appeal (according to Article 43 the decisions under Article 13, par 5 and Article 27, paragraphs 2 and 3 could not be subject to appeal);
2. they have not been appealed within the term under Article 43;
3. the appeal has not been granted" (Article 44).

Sanctions

The respective articles here are the last two texts of the PCA, namely Article 59, par 1 and Article 60. The former lists the articles the violation of which could lead to the infliction of property sanctions. We find among them collusive practices, abuse of dominant position, violations relating to unfair competition and cases when undertakings conduct actions under Articles 11, 13, 15, 20, and 24 without the permission of the CPC. In all these cases the CPC should impose property sanctions in favour of the State to the amount from BGN 5 000 to BGN 300 000 (2,500 to 150,000 Euros). "In the case of repeated violation the Commission may impose property sanction to the enterprise to the amount of BGN100 000 to BGN 500 000" (Art 59, par 2). If the undertaking fails to comply with the decision of the CPC, the fine will be the same as for repeated violation (Art 59, par 3). The question concerning the preventing effect of the fines will be discussed in Chapter No 3.

With the sanctioning mechanism we close the circle, named protection of competition, as it was established in the Republic of Bulgaria in 1998. Of course, it is not expected to be perfect. But the greatest lack of this law is namely its obscure philosophy. Most of the defects were subject to changes during the negotiation process, preparing the country for full the EU membership.

## Chapter 2

## The competition law in the Republic of Bulgaria during the accession negotiation process (2000 – 2004)

### 2.1 Bulgaria and the European Union – general information

#### 2.1.1. The beginning of the negotiations

Bulgaria applied for membership in December 1995. This act of the Videnov government is the expression of the will of our country to join an integrative model based on democratic values and institutions on the one hand, and on the Common Market in which goods, services, capitals and people are moving freely. The inclusion in this pattern supposes the adoption, on the part of the state, of a set of reforms aimed at responding to numerous criteria. These essential thresholds have been established on the Copenhagen Summit in 1993 when the European Union assumed its historical responsibility to welcome in its home the Eastern European countries: "The associated countries in Central and Eastern Europe that so desire shall become members of the European Union". Taking a decisive step towards the current enlargement the Member States agreed that membership requires that the candidate country has achieved:

1. Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
2. The existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union;
3. The ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

As described in the first chapter the relations between the EU and the candidate countries have been previously regulated in the EAA, who set up a reliable framework, and in which the association countries promised to approximate their legislation with that of the European Union. Agenda 2000[37] is a noteworthy document in this respect. For the first time after the conclusion of the EAA it opens the accession way for some of the advanced applicant countries inviting them officially to begin negotiations on accession, and closes it for the rest of them, e.g. Bulgaria. In this legal document, the

[37] Agenda 2000, Document of the European Commission in which it assesses the capability of a country to assume the responsibility of the membership July 16, 1997

European Commission recommended the opening of the negotiations with 5 countries to be postponed because they still don't respect some of the conditions necessary to this effect. The green light for Bulgaria has been switched on in December 1999. On the Helsinki Summit the European Council decided to open negotiations with 6 other counties. The official beginning of the negotiations with Bulgaria took place on February 15, 2000 during the intergovernmental conference on the accession of the Republic of Bulgaria.

2.1.2. Preliminary information concerning the negotiation process, chapters, structures for negotiations, etc

**A.** The legislative body of the EU is subdivided into 31 subject chapters. Covering the following areas[38]:

**political issues** – e.g. Chapter No. 27 "Common foreign and security policy"

**legal issues** – e.g. Chapter No. 24 "Justice and Home Affairs"

**cultural issues** – e.g. Chapter No. 20 "Culture and Audio-visual policy"

**economic issues** – e. g. Chapters No. 1, 2, 3, 4 "Free movement of goods, services, etc", and Chapter No 6 "Competition policy" in particular.

**B**. There are four principles of the negotiation process:

**Firstly,** the negotiations focus specifically on the terms under which candidates adopt, implement, and enforce the acquis.

**Secondly**, transitional arrangements may be possible, but these must be limited in scope and duration and should not have a significant impact on competition or the functioning of the internal market. In addition they should be accompanied by a plan with clearly defined stages for the application of the acquis.

A **third** underlying principle in the negotiations is the concept of differentiation. The decision to enter into negotiations simultaneously with a group of countries does not imply that these negotiations will be concluded at the same time. The negotiations with the candidate countries are conducted individually; the pace of each negotiation depends on the degree of preparation of each candidate country and the complexity of the issues to be resolved.

**Finally**, there is the principle of catching up.

**C**. Mechanism of the negotiations

The negotiations sessions are held in the form of inter-governmental conferences of EU member countries with the candidate countries, at the level of ministers or deputy ministers, i.e. permanent representatives of the Member States and Ambassadors or Chief Negotiators for the candidate countries

At the very beginning of this process, each candidate country (including Bulgaria) is expected to present the so-called general position on each negotiation chapter. In it the respective country confirms that it accepts to fully implement the acquis of the EU from the date of its official membership. It also contains the current situation in the respective area from the point of view of the country. Further, the current presidency of the Council of Ministers presents the position of the Member States, that most often, is radically different from the candidate's one because it put the requirements before the candidate country. Then the latter takes the engagement to work for the further approximation of its legislation with that of the EU. It is also allowed to ask for transitional periods

2.2. Negotiations on Chapter No. 6 "Competition Policy"

2.2.1 General remarks. Why is Chapter No 6 so important?

*For the need of competition* "Effective competition is crucial to the open market economy. It cuts prices, raises quality and expands customer choice. Competition allows technological innovation to flourish. For this to happen, fair play on the part of businesses and governments is essential. The European Commission has wide powers to make sure they stick to European Union rules on fair trade in goods and services". This is how the Commission summarises the importance of the competition policy of the EU on its official web site[39]. The rules in the field of competition aim at creating the conditions necessary for the effective competition environment on the Common Market.

**The competition policy and the candidate countries** In my opinion, both the EU and the candidate countries are interested in the establishment of competitive environment on the national market of the latter. First, the EU needs to be sure that the undertakings operating in Bulgaria will be treated in the same way as in the Union. Bulgarian

[38] www.evropa.bg Delegation of the European Commission in Bulgaria
[39] http://www.europa.eu.int/pol/comp/overview_en.htm

economic agents do not have to be tolerated neither by the State, nor by the lack of an appropriate legal framework dealing with the protection of competition. This would provide unfair comparative advantage for the former. The protection mechanism in each Member State has to be uniform and to follow the pattern established on EU level. On the other hand, Bulgaria is interested in adopting and applying EU acquis in this area, because only free competition, regulating the market in an appropriate way, is able to increase the competitiveness and the effectiveness of the national undertakings and thus to respond to the second economic membership requirement. And finally, in order to ensure a proper enforcement of these rules the national authority should co-operate with the European Commission. Each candidate country is expected to satisfy these criteria throughout the introduction in the respective national legal order the provisions of the acquis and to ensure their effective implementation.

The purpose of the complete harmonisation in the period before the accession is to ensure that undertakings and national institutions and authorities have got accustomed with the discipline in the area of competition. That supposes it should be prepared both in terms of administration and implementation skill

**The mechanism for negotiation holding described above is applied on the competition-related issues. But nevertheless, the requirement towards the candidate countries is to having adopted the necessary legislative texts, fully in compliance with the respective acquis, and to be able to implement them sufficiently.**

The European Commission, in the so-called «Regular reports on Bulgaria's progress towards accession» assesses the progress made by each candidate in a year time[40]. A short look at them would allow us to pull out the topics considered from the Commission to be relevant and crucial to the individual preparation. It seems to me useful to list them briefly, because the rest of Chapter 2 will follow the model used by the Commission in its annual reports.

**Requirements towards the candidate countries in terms of competition policy**

[40] Regular reports on the progress made by Bulgaria towards EU membership, normally published in October or November of each calendar year

1. The legislation of a given candidate country should be in full compliance with that of the EU. Relevant to this requirement are the anti-trust and state aid substantive and procedural provisions comprised by the respective Treaty articles and secondary law. Noteworthy is that the Commission pays a special attention to state aid control, because the state subsidies are more than practice in the transition countries - they are a traditional way to revitalise loss-making enterprises.

2. Each national authority should have at its disposal the appropriate administrative capacity able to implement the existing legal framework.

3. The third one stems from the previous one – the enforcement record. This is the final result from the good or bad implementation of the national provisions.

And finally, I would like to make the following remark. The adaptation of the competition law on behalf of each candidate country is subject to two parallel processes: on the one hand, the harmonisation of the legislation is happening according to the existent EU competition framework. It seems to be "easier" because "the new coming" could borrow the EU practice in the respective matter. On the other hand, the "internal" process, related to the modernisation of the EU competition policy as such, is far more defiant to these countries, because they have to reflect the process of reforms and innovations, that is happening in the EU and that will concern them in the future. One should not forget that the negotiations are not a self sufficient process, but aim at preparing the country for the time after the accession, and to ensure it will be able to "take on the obligations of membership". Consequently, the new coming countries have a double challenge and this complicates the negotiation process additionally. It is coming up next to reveal these challenges and to answer if the Republic of Bulgaria managed to face them properly.

2.2.2. Bulgaria and the negotiations on Chapter No 6

In its 1997 opinion (Agenda 2000) the European Commission concluded, that in the field of anti-trust "Bulgaria has made some progress with the institutional and legislative requirements". It was speaking about the PCA of 1991 and the "Rules on implementation of the competition rules", adopted by the Association Council as it was promised in Article 64 of the EAA, but behind schedule. The European Commission went further and stressed that "the implementation, enforcement and control of the

legislation would require sustained structural reforms". In the field of state aid the progress was assessed to be limited in all aspects and "considerable efforts were needed to meet the requirements of credible control of state aid, in particular as regards transparency of granting state aid and the establishment of a well functioning monitoring authority with sufficient powers to control state aid and a sufficiently qualified staff".

In other words Bulgaria does not fulfil the requirements and is expected to do a hard work in order to comply with them.

The next section will go in depth with the following topics:

-Harmonisation of the competition related legislation of the Republic of Bulgaria with that of the EU

-Development of sufficient administrative capacity

-The enforcement record of the institutions in charge with the implementation with the legislative framework

These three topics will be presented consecutively, starting with the development in terms of anti-trust and then considering the big changes in the field of state aid granting. This division follows the distinction under EU competition law.

## 2.3. Anti-trust

### 2.3.1. Harmonisation of the legislation of the Republic of Bulgaria with that of the EU in the field of anti-trust

In its regular reports the Commission underlines repeatedly that in terms of anti-trust Bulgarian legislation "is largely in line and covers most of the acquis provisions" (rep 2001). But nevertheless, every year the Commission stresses that further efforts are needed. In its general position[41] it recommends to Bulgaria to make amendments to the PCA. On its part Bulgaria took the engagement in its position papers to continue the harmonisation of the legislation in 2 directions.

- to correct the defects of the PCA and to adjust them to the acquis, and
- following the modernisation processes taking place in the core of the EU competition policy to reflect the new provisions and standards in Bulgarian legal order

These 2 aspects will be stated right after.

1. The amendments made to the PCA in 2003 The Law on amendment to the PCA entered into force on February 4, 2003. There were 77 amendments to the PCA, including changes, supplements, and abolishment of some provisions. For the needs of this work I will focus on some of the most important.

**1. Changes concerning the CPC.** The total number of commissioners is reduced to 7 – "four of them jurists and 3 economists" (Art 4, par 1). This reduction is the expression of the desire of the legislator to stop the misuse of material resources. The practice of the CPC has shown that the national authority could cope with fewer commissioners.

In its third paragraph, Article 4 introduces a new prohibition towards the members – "they could not ..., be favoured by undertakings in any form whatsoever" (Art 4, par 3). Taking into account the specific ground that the CPC is dealing with, and the scope of economic agents touched by its decisions, one should admit that the commissioners are expected to become subject to corruption practices. Of course, it is not 100 percent sure that this provision will be able to guarantee the independence of the members of the CPC, but nevertheless, the law provides for the possibility for sanctions. Article 5, par 1, sec 4, amended in relation to article 4, par 3, says: "if such a practice occurs – the powers should be terminated before the expiry of the mandate".

According to Article 7a, the CPC is obliged to prepare the so-called Operating account report for its annual activities. The purpose of this provision is to ensure transparency and to arise public awareness. This document should be presented to the National Assembly (it elects the commissioners), and should be published on the official Internet web page of the CPC and in any other appropriate way.

Another novelty is the competence of the CPC to appeal before the competent court administrative acts or decisions repugnant to the PCA. This is a new competence for the CPC, because in its previous redaction the text was saying, "bring claims" (Art 7, par 3). The appeal should follow the procedure under the Administrative procedure Act.

**2. Amendments to the substantive provisions of the PCA**

*Concerted practices*

The main change here is related to the "de minimis" rule brought in 1998 to Article 10 of the PCA and the requirement for notification under Article 11.

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[41] CONF- BG-18\04

According to Article 10 the prohibition under Article 9 is not applicable to agreements with insignificant effect on the competition. In the first redaction of the PCA in 1998 only one criterion was taken into account – the market share of the undertakings taking part in the concerted practice. It was fixed at 5 percent. The 2003 changes concerned nothing but the market share of the participants. The effect is insignificant if the common share market of the undertakings does not exceed 5 percent, if they are competitors, and 10 percent, in the opposite case. In my opinion, the legislator endeavoured to ensure that horizontal concerted practices would be restricted in a maximum way. This change reflects the new Notice on agreements of minor importance[42] of the Commission replacing the one of 1997.

Paragraph 3 of Article 10 of the PCA, being completely new, introduces a double restriction. According to it, insignificant effect, on the on hand, and price fixing and allocation of markets and supply sources, on the other, are incompatible notions. If a concerted practice results in the two latter, de minimis rule is not applicable.

The second big change has to do with Art 11 of the PCA. In the previous chapter I described the misunderstanding created by the mechanical transfer of norms. Having realised that there is a substantial mistake in the use of "obliged" to notify, the legislator changed it by replacing "are obliged to notify" with "may notify" (Art 11, par 3). Something more, this notification is bounded by the request for exemption under Article 13. All actions related to the agreement shall be stopped till rendering of the decision. The meaning is that the undertakings are given certain discretion to decide whether to notify their actions or not. This approach has been used in the EU - undertakings having previously notified the European Commission are not sanctioned even if subsequently it finds that there is a violation[43].

*Abuse of dominant position*

Here again a lack has been fulfilled. Article 18, prohibiting the abuse of dominant position, widens the scope of subjects to which this article is applicable. From now on the abusive behaviour of two or more undertakings with collective dominance is prohibited as well.

[42]OJ C 386/13, 22. 12. 2001

[43]Souty, Fr. "Le droit de la concurrence de l'Union européenne" 3e édition Montchrestien, 2003

*Concentration of economic activity*

As far as the compulsory notification on behalf of undertaking willing to concentrate their activities is concerned, a significant change has been introduced during the negotiation process. On the insistence of the European Commission the 20 percent market share threshold of goods and services has been abolished. The reason was that Article 24, in its previous redaction, didn't comply with the provisions of regulation 4069/89[44]. Therefore, currently Article 24 comprises only a turnover criterion to the amount of BGN 15 million per year for all undertakings concerned. There are no more cumulative conditions leading to an obligation for notification. In my opinion, this is rational formulation, we can easily imagine a case in which two undertakings cover only one of the criteria and thus escape from the application of this article. Some cases of the practice of the CPC reveal that some undertakings escape the notification under Article 24 because of the soft accounting or fiscal legislation.[45] One could conclude that the abolishment of one of the conditions makes the regime stricter.

Furthermore, this regime is reinforced because the CPC received the explicit power to annul its own decision if it finds that the previously given authorisation was grounded on false or incomplete data provided by the notifying undertakings, or if they do not respect the remedies laid down in its decision (Art 27, par 5)

**2. Amendments to the procedural provisions of the PCA**

The changes in terms of proceedings are crucial, and reflect the ongoing reform of the EU, namely regulation No 1/2003. As previously discussed, the authors of the PCA didn't opt for the introduction of on-site inspections in 1998. The 5-year experience of the CPC showed that this lack has been a substantive obstacle for the appropriate implementation of the competencies that have been attributed to it. During the negotiation process the European Commission underlined repeatedly that the proper enforcement of the anti-trust related provisions depends on the investigation powers of the CPC. In order to comply with the EU acquis, and to prepare the participation of the CPC in the ECN under reg. 1/2003, the National Assembly adopted new articles – Articles 41a, 41b, 41c, 41d dealing with this matter. Now, the CPC is empowered to

[44] There is no such requirement neither under reg.4064/89, nor under its revision reg. No 139/2004

collect evidence, threatened to be hidden or refused under article 41, throughout rummage of premises, used by the suspected for their business activities, or for keeping accounting and trade documents (art 41, par 2). The circle of premises is very wide, that could be even the homes of the suspected. Subject to an on-site inspection may become the personal conveyance of the persons involved (art 41 a, par 2). Nevertheless, could be suppressed only the copies of the above mentioned documents, including electronic data. Oral reason taking is also permitted. The evidence collection is possible only after the order of the district court relative to the residence of the undertaking when there are probable causes that a piece of evidence will be locked. The writ is immediately executed (art. 41b, par 1 and 3). The inspection is taking place in the presence of a member of the CPC, as well as the person using the room or the conveyance (art 41c, par1). Noteworthy is that the persons subject to the investigation could not rely upon any secret whatsoever. There is one exception – if the documentation under art 41a is classified, the provisions of the Law on the classified information are applicable (art 41d).

Chapter eleven (property sanctions) has also been amended. Article 59a makes the possible a property sanction under art 59 for volition of art 9(concerted practices) to be reduced if, during the investigation, an undertaking provides voluntarily for a proof that could be crucial for the determining of the infringement, and if at that moment the undertaking is no longer part of the concerted practice, the so-called leniency. An undertaking, part of concerted practice under art 9, could be fully relieved from administrative and penalty liability if it is the first, before the other participants, to present a proof, that the CPC might consider a sufficient reason to instigate proceedings (art 59b). This is another typical example for the influence of the EU competition law during the negotiation process.

Furthermore, subject to appeal before the Supreme Administrative Court will be all decisions of the CPC, including those rendered under articles 13, par 5 and 27, par 2 and 3, relative to the exemption from prohibition for restrictive agreements and assessment of concentration (Art 43, par1)

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[45] Such is the case with the “MM Beer” and “Ledenika” that concentrated their production of beer, because they have hidden the real amount of their joint turnover

2. Harmonisation related to the ongoing processes in the EU competition policy itself

In order to ensure a closer alignment with the EU competition provisions, the CPC adopted 3 main decisions in order to reflect the innovations within the competition policy after the passing of the PCA. Decision No 44 (10.04.2001), transposing regulation No. 2790/1999 adopted in application of Article 81, par 3 of the EC Treaty who deals with block exemption of vertical agreements. The next two decisions of the CPC No188 and 119/08.07.2003 transpose regulations No. 2658/2000(on agreements for specialisation) and No. 2659/2000 (on research and development agreements)[46]. In April 2004 the CPC adopted an additional decision for block exemptions of agreements in the motor vehicle sector - Decision No. 221/2004. Same month, the CPC adopted the so-called "Methodology for the determination and application of fines" in which it explains the criteria on which it bases its decisions when assessing the violations. In all decisions the CPC includes explanatory part dealing with the amount of the property sanction justified with the criteria set up in the Methodology.

2.3.2. Administrative Capacity

**General remarks**

The title of this work stresses on the evolution of the competition law in Bulgaria. But the sole introduction of rules is not sufficient for the achievement of the purposes laid down in Article 1 of the PCA. These provisions need the respective potential in order to be implemented in an appropriate way. The notion of "administrative capacity" encompasses all administrative and judiciary[47] structures involved in the system aimed at protecting the competitive conditions within the country before and after the accession of the country to the EU.

They are all expected to ensure the effective implementation of the legal instruments they have at their disposal. In order to fulfil these conditions, they should:

-work for the establishment of a qualified staff who will be able to deal with competition cases. The same is true for the judiciary.

-raise public awareness

[46] "Additional information to the general position of the Republic of Bulgaria on Chapter No 6" CONF-BG-05/03

[47] The question relative to the future role of the national courts will be discussed in chapter 3 dealing with the changes in the system after the accession)

-exercise competition advocacy

As a rule, the European Commission has always been critical towards the administrative capacity of the authorities in all candidate countries from the very beginning of the negotiations until the official closing. On its part, Bulgaria undertook some measures in order to respond to the expectations of the Commission. The next paragraphs reveal the results achieved at the end of the period 2000-2004. For the drawing up of this subpart I used information from the Regular reports of the Commission, the positions presented by the Republic of Bulgaria, the Operating accounts report for the activity of the CPC for the year 2004.

1. Establishment of qualified and skilled staff

With the newly adopted PCA in 1998 the CPC received new and broader competencies, which have been strengthened with the amendments of 2003. The newly adopted Officer of State Act (2000) changed the status of the servants in the state administration. This status increased their remuneration and decreased the fluidity of labour. On October 10, 2003 the National Assembly elected the new 7 members of the CPC, according to the changes from the beginning of the year. Four of them are jurists, and three are economists. The administration that supports the CPC has new structure, established in conformity with the newly adopted Rules on Organisation and Procedure (State Gazette No. 99 of November 11, 2003). Nowadays, there are 5 departments within the CPC: “Antitrust and Concentrations”; “Unfair competition”; “Politic of state aid support for undertakings”; “Sector analyses” and “European Integration and Competition Policy”. This structure is based on functional principle and allows team specialisation. The number of officers runs to 99 at the end of 2004. By contrast, at the end of 1998 this digit was of 48. All newly recruited officers are included in the training project under the PHARE programme. For the period 2000-2001 CPC experts participated in common training projects together with the judges from the SAC. In order to reinforce the administrative capacity of the CPC numerous activities took place in the framework of the PHARE programme project for the year 2001. As a result, some officers have been trained in the respective competition authorities in the Member States. Judges from the SAC, public prosecutors, officers from national ministries, and representatives of the trade houses took part in seminars held as part of the project. A

three-day seminar took place at the beginning of June 2004. All members of the CPC and the experts working for it took part in this activity. The legislation in the field of competition and the practice of the CPC related to its implementation were the topics discussed.

In order to ensure the training up of the staff in making investigations on place, the CPC developed the project "Twinning light-2004". It has been approved by the European Commission and started at the end of 2004. The German Bundeskartelamt was chosen for experienced twinning partner. The activities under this project are ongoing.

The above mentioned initiatives aim at improving the expert skills and knowledge of the CPC officers and to respond in an appropriate way to the criticism of the European Commission in its regular reports. The CPC established contacts with DG "Competition" for exchanging its experience. This initiative is possible under Article 7 of the Rules on implementation of the rules of Article 64 of the EAA.

2. Raising public awareness which means the popularisation of the competition legislation. In order to raise public awareness, in 2001, the CPC published a luxurious brochure in Bulgarian language, under the PHARE programme. A new Competition law Dictionary was published, a well as a multimedia CD-ROM containing Bulgarian and EU competition legislation, and which provided some of the decisions of the CPC. This project contributed to the enrichment of the CPC library with the yearbook of records of the ECJ and the CFI, as well as subscription for ECLR for the year 2002.

An information centre was established in the building of the CPC. As a result of its activity communications related to the daily work of the CPC are published. The CPC does out for the satisfaction of the public interest in the person of the media representatives. Each decision rendered by the CPC is communicated to the main media in the country – 16 newspapers and periodicals, 7 TV stations, 5 radio stations, and 5 information agencies. The communications are published on the specialised official web site of the CPC, that has been renovated on March 26, 2003 - www.cpc.bg. It was presented before the media, Bulgarian Chamber of commerce and industry, etc.

3. Competition advocacy is a substantial part of the CPC activity and is also related to the process of opening up of the markets and their liberalisation. The active role of the

CPC consists in the delivery of opinions on the drafts related to the ongoing process of liberalisation. The advantage of the preliminary co-ordination with the competition authority is undoubted. It contributes to the precise formulation of the provisions prepared the limitation of the cases capable of affecting the competition, increasing the openness of the markets and the abolishment of the needless barriers for entry into the market, and the liberalisation of the respective economic sectors.

In 2003 and 2004 the CPC delivered opinions on drafts or enactment like: the Draft for amendments of the Privatisation and Post Privatisation Control Act; the Draft Ordinance on prices' regulation of the thermal energy, the Drafts for amendments to the Telecommunications Act and the Energy and Energy Efficiency Act, etc. The opinion becomes a part from the Council of Ministers' bill introduced to the national Assembly. A good example in this respect could be the passing of the Draft for Amendments to Foreign investment encouragement Act. With view to its harmonisation with the acquis, a member of the CPC was invited at the discussions in the economic parliamentary commission. The CPC signed a number of agreements with institutions, business organisations and regulatory agencies - Commission for regulation of communications, National statistic Institute, Privatisation Agency etc, in order to deepen the co-operation with them.

2.3.3. Enforcement record

Anti-trust

With the intent to bring clarity to the trends on the enforcement on anti-trust I created some tables[48] using the information published on the web site of the CPC. It is impressive that the number of decisions taken is increasing. So is their complexity. The tables reveal the following trends. The CPC continues to render decisions on unfair competition. The introduction of specialised structures within the CPC is expected to allow it to concentrate its efforts on serious competition distortions. Consequently, at the end of 2004 we see that the anti-trust cases represent near the half of all investigated and decided files. One could notice that the total rate of merger related cases is decreasing in the past two years. This is due to the recent change of the PCA and the abolishment of the market share as an assessment element for undertaking willing to

concentrate their economic activity. Hopeful prospect gives the increase of cases relative to concerted practices. Actually, the number of claims brought before the CPC is higher. The differences between the number of decisions rendered and claims brought evolve from the substantial difficulty of the restrictive agreements and the fact that it is not easy to be proved. There is a firm trend to steady increase in the total amount of property sanctions. In my opinion, this is the result from the repeating recommendation of the Commission, i.e. more deterrent sanction policy to be implemented.

Noteworthy is that in its practice the CPC respects the EU acquis and follows closely the practice of the European Commission and the ECJ\CFI, as specified in the EAA. This statement, expressed by the Republic of Bulgaria in the "Additional information to its General position on Chapter No. 6"[49], could be illustrated with one example. In decision No 28/14.03.2000, rendered against "GIPS" OMC, the CPC takes into account the case law of the EC and the ECJ in the field of "fidelity rebates" and in particular the following cases - United Brands (27/76) and Irish Sugar (97/624). In order to improve the quality of its decisions the CPC works in contact with experts from the DG "Competition" of the European Commission

The next paragraphs will illustrate some of CPC's anti-trust decisions all attached with substantial sanctions for serious violations

Enforcement record on Article 9 of the PCA.

Concerted practices

Decision No 28/2004 For violation of Article 9 the CPC imposed sanction to the amount of BGN 80 000 (40 000 Euros) to "Overgaz Holding" JSC and "Bulgaria 2002" JSC for having engaged to abstain from competitive activities. It is speaking about a written contract according to which the latter engages not to undertake competitive actions on the market of construction and development of local gas distribution systems for a five-year term. "Overgas Holding"JSC on its part took the engagement to ensure monetary compensatory amounts to "Bulgaria 2002" for the omission. The CPC found that this is a typical anti-competitive clause in a written contract having for a single object the restriction of the normal market behaviour of one of the undertakings.

[48] see ref tables 2, 3, 4
[49] CONF-BG 45\01

Something more this is not the first time when the CPC finds these two undertakings guilty of the same violation (Decision No 144/30.11.2000)

Case law on Article 18 of the PCA (abuse of dominant position)

1. The CPC imposes a BGN 100 000 property sanction to the newly privatised Bulgarian Telecommunication Company[50] for violation under 18, which found expression in purchase and sale price fixing, and other unfair terms of trade. That affects trade on the Internet supply market. This is a very interesting case because of several reasons. First, it is question about BTK's policy in the period 1999 – 2000, i.e. before its privatisation. This is possible under the five-year period of prescription established in Article 46 of the PCA. Second, the initial sanction was to the amount of BGN 50 000. The heavy fine (BGN 100 000) was imposed after the SAC refereed the case back to the competition authority. The CPC found that BTC holds 60 percent of the relevant market of Internet supply and had abused its dominant position by not offering alternative Internet suppliers with regard to charging the service. This harmed the interests of the consumers[51].

2. The CPC imposed property sanction to "Alexandra Group Holding" JSC to the amount of BGN 210 000 (110 000 Euros) for violations of Article 18, sections 1 and 3. During the investigation the CPC established that, seizing its dominant position on the market, "Alexandra Group Holding" set the conclusion of contracts with the video store under conditions in contradiction with the good trade practice. If conditions such as, the use of one and the same software, the prohibition for the performance of other activities without the authorisation of the company etc, are to be kept, the interests of the consumers and the competitors will be damaged[52]

Enforcement record on Chapter No 6 (Concentration of economic activity)

3. The competition authority imposed BGN 100 000 (50 000 Euros) property sanction to "Nafteks-Petrol"Ltd for non-compliance with the conditions laid down in a decision allowing the concentration between them.

**2.4. State Aid**

[50] 2003

[51] « Competition law alert », Competition law Development in Eastern and Central Europe, January 2005, Coudert Brothers Global legal Advisers, January 2005
http://www.coudert.com/publications/newsletters/050115_CEEC.pdf

2.4.1. Harmonisation of the legislation of the Republic of Bulgaria with that of the EU in th field of State aid granting. The adoption of the State aid Act

In the Additional information to its general position on Chapter No 6 from July 16, 2001 Bulgaria took the engagement to harmonise its current legislation by enacting the respective documents reflecting a long list of EU primary and secondary legislation.

The renovated "National Programme for the adoption of acquis" set the passing of a completely new State aid Act to be a short-term legislative priority. It was promoted by the critics of the Commission in its regular reports, and the engagement taken by Bulgaria during the negotiations.

**General remarks**

The main concern of the European Commission while assessing the provisions dealing with state aid control refers to the obvious lack of sanctions and transparency of state aid granting in Article 20 of the PCA, adopted in 1998. The law could be able to react only "if the granting may affect the trade relations between the Republic of Bulgaria and the states with which it has established regime of Government aid" (Art 20, par 2 of the PCA 1998). The organs granting the aid are obliged to notify the CPC for their actions, and to assess on their own if they affect the relations in question. As a whole, this article could not ensure the protection of the affected, nor sanction the violators or compensate losses.

In order to provide for the appropriate regime in this area, in one of its positions the Republic of Bulgaria committed itself to elaborate a draft on State aid, which was prepared and voted in 2002. It entered into force on June 20, 2002[53] and annulled Article 20 of the PCA. Its provisions aim at establishing a hopeful control and transparency on State aid granting, a well functioning control authority with wide powers and qualified staff.

**Substantive elements**

Article 1, par 1 of the newly adopted SSA stipulates: "This Act regulates the terms and the procedure for monitoring and control of State aid, as well as for determining the compatibility of State aid with the principles of free competition". This is a direct

[52] www.cpc.bg
[53] State Gazette No 28 of March 19, 2002

reaction to the critics of the European Commission that "there is not efficient control system for State aid and no compliance with the acquis".

The text of the second paragraph of Article 1 makes a special "reference" provision. Obviously, the authors of the SAA have chosen an easier approach, introducing a wider formulation[54]: « An assessment under paragraph 1 shall be made in conformity with the commitments assumed by the Republic of Bulgaria by virtue of international treaties "(Art 1, par 2 of the SAA). That includes Article 64 of the EAA until the accession and the acquis in the future, i.e. in conformity with the criteria established by Article 87 of the EC Treaty and other secondary legislative acts, as well as other international regimes. Paragraph 2 of Article 1 of the SAA is the legal basis for the CPC to use the EU acquis in the field of State aid, but also the case law of the ECJ. The text of paragraph 2 doesn't restrict Bulgaria to the EU acquis. The external relations of the country could not be exhausted with the EU membership.

The notion of State Aid

By contrast with the definition given in Article 20, par1 of the PCA, the new Article 1, par 3 of the SAA, repeating Article 87 of the EC Treaty, widens the scope of application of the term, by using: "any aid granted by the State or a municipality, or for the account of state or municipal resources, whether directly or through other persons, in any form whatsoever". On the one hand, these could be tax concessions, granting loan-money or remission, state guarantees, export subsidies etc. On the other hand, "in any form whatsoever" means that state aid could also be an administrative action. In this case not the material resources of the state are directly involved, but its discretion powers, used in order to influence the market in someone's favour, e.g. the ban for export of lather. The national manufacturing industry will produce lather with higher surplus value, but the foreign consumers of the material will be excluded from the market[55].

The law is applicable to aid granted to enterprises which are "entrusted by the state or a municipality with the provision of services of public interest, insofar as the said application does not impede, de facto or de jure, the performance of the particular tasks

[54] In its Additional position (CONF-BG –45/01) the Republic of Bulgaria states that such provision will be included but the reference was limited to assessment according to the respective Treaties and secondary law of the EU

[55] Stojanov Ivan

assigned to the said enterprises" (Art 1, par 4). This text has been borrowed per analogia from Article 86, par 2 of the EC Treaty. On EU level, the above mentioned undertakings should respect the competition rules comprised in the Treaty. If the provisions concerning the State aid are considered to be integrand part of these rules, one could conclude that these undertakings have to respect the rules regulating the State aid granting, as well. In my opinion, this is the logic used by the national legislator. The very point of the inclusion of this text is to avoid future misunderstandings, and to stop possible violations from the very beginning.

State aid, which is granted in agriculture and in fisheries or is exclusively intended for the defence industry is excluded from the application scope of the law (Art 5). State aid to an aggregate value not exceeding BGN 200,000 for a period of three years "is considered compatible with the principles of free competition..."(Art 6). This text reflects the provisions of regulation of the Commission No.994/98 introducing the so-called "de minimis" rule for State aid granting[56].

Following the example of Article 87, par 2 of the EC Treaty, Article 3 of the SAA lists the cases in which State aid is permissible and compatible with the national market:

-if the aid has social character and is granted to individual consumers, provided that such aid is granted without any discrimination related to the origin of the products concerned;

-if the aid is intended to make good the damage caused by a natural disaster or other exceptional occurrences.

As far as the Federal Republic of Germany is concerned (Art 87, par 2, sec 3) in its initial negotiation position[57] Bulgaria asked to be considered an area identical to the regions under this provision.

The next group of exemption – aid that could be assumed permissible by the respective competent authority - is regulated in Article 4 of the SAA, respectively Article 87, par 3 of the EU Treaty:

1. promotes the economic development of areas where the standard of living is abnormally low or where there is serious unemployment;

[56] Souty, Fr. "Le droit de la concurrence de l'Union européenne" 3e édition Montchrestien, 2003
[57] CONF-BG-29/00

2. promotes the implementation of a project of significant economic interest for the Republic of Bulgaria and for the countries with which the Republic of Bulgaria has established a state aids monitoring regime, or theremedying of a serious disturbance in the economy of the Republic of Bulgaria

3. facilitates the development of particular economic activities or of particular economic areas, insofar as such aid does not adversely affect trading conditions between the Republic of Bulgaria and the countries with which it has established a State aid monitoring regime;

4. promotes the conservation of the cultural and historical heritage, provided that such aid does not affect trading conditions and competition to an extent that is contrary to the mutual interests of the country.

I won't go in depth with these provisions, because it is beyond the purpose of this work. Noteworthy is that the assessment should be based on some criteria, elaborated in the long practice of the European Commission: the aid should support the development in the interest of the society; the nature of the aid is expected to be such that the targeted goal wouldn't be achieved if it didn't exist etc. In the White Paper on the preparation of the associated countries for integration into the Common Market the European Commission states: "when the aid is granted for the realisation of common purposes like research and development activities preservation of the environment, it could be accepted providing that it creates positive effects for the whole society".

Article 2 of the SAA says explicitly that State aid may be granted only where authorised according to the procedure established by this Act. Excluded from the procedure under this article are only the examples of Article 3. The SAA makes distinction between two functions - the monitoring of the aids granted and the control exerted over the granting as such. According to Article 5 the control is entrusted to the Commission for Protection of Competition, "as a specialised and autonomous state body", while the Minister of Finance is "the authority responsible for monitoring and transparency of State aid at the national, regional and local level" (Art 21, par1). These two activities will be examined separately

**Procedural elements**

1. **Control system by the CPC**

During the period after the entry in force of the PCA and before the adoption of the new SAA, the CPC exercised its control functions on the limited basis permitted under existing legislation using the Europe Agreement and the acquis as points of reference.

As regards State aid the system of control in the EU is comprised in the procedural regulation No.659/1999 of the Council and this procedure is reflected in the SAA as well[58] . With the entry into force of the latter the CPC received additional powers in terms of implementation, something unthinkable for the former Article 20 of the PCA. Under Article 5 of the SAA it is allowed to "authorise and control the granting of State aid". This control is exerted in the form of proceedings, initiated by the Commission (Art 9). The proceedings won't be described in details because it is similar to that applied on anti-trust cases. I will satisfy to stress on the differences.

Proceedings initiation

The CPC initiates proceedings in the following cases:

1. After receiving a notification (Art 9, par1, sec1)

Article 7 introduces an obligation for preliminary notification: "any person, who intends to grant or to alter a State aid that has already been granted, shall be obliged to notify the CPC in advance»? This is the so-called ex ante control. The use of the term "persons" concern only public law subjects.

2. At a written request by a competing enterprise whose interests have been affected or threatened by a violation of the SAA (Art 9, par 1, sec 2).

3. On its own initiative – here we see a borrowing from the PCA, according to which the CPC has the power to initiate proceedings ex officio. These could be the case when the persons under Article 7 didn't comply with the obligation to notify the controlling body in advance. (Art 9, par 1, sec 3). In a week time the chairman of the CPC orders the initiation of proceedings (Art 9, par 2).

Investigation

This stage is different from the one referring to anti-trust cases. Under Article 10 the reporter examines the circumstances relevant to the case file. In contrast to the PCA, this time the CPC is bound with a two-month term in which it is expected to render a

[58] Souty; Fr. p. 92

decision. Otherwise, the State aid may be granted, unless the Commission has made a decision on initiation of an additional investigation (Art 10, par 4).

Additional Investigation

According to Fr Souty this is the substantial difference between anti-trust proceedings and State aid control proceedings. The additional investigation could start where, as a result of the investigation according to the procedure established by Article 10, suspicions arise that the aid may be incompatible with the principles of free competition (Art 11, par 1 of the SSA borrowing Art 88, par 2 of the EC Treaty). This time the proceedings should come to an end by the permission or the ban of the notified intention within three months of the beginning of the additional investigation. But if the proceeding has been initiated by the a competitor or ex officio the CPC is not bound by terms (Art 11, par 4)

Preparation and rendering of the decision

After completion of the investigation or the additional investigation the Chairman of the Commission appoints a date for open sitting of the CPC within three days (Art 12, par 1). According to Article 15 and as a result of the proceedings, the CPC has the following powers:

- to render a reasoned decision to the effect that the aid concerned does not qualify as State aid (Art15, par 1).
- to establish that the aid qualifies as State aid, and subsequently render a reasoned decision whereby:
- "declare that the aid falls within the scope of the permissible aid under Article 3 or Article 4 herein and shall authorise the granting of the said aid;
- authorise the aid under a condition, or gives mandatory prescriptions for use of the said aid;
- declare that the aid is impermissible and shall refuse to authorise the granting of the said aid;
- determine that the aid has been granted in non-compliance with the law, and shall order the restitution of the said aid, where this is possible" (Art 15, par 2). The modalities are prescribed in Article 17. Interest is recoverable as well.

Appeal and Execution of the decision

According to the SAA the decisions of the CPC rendered in relation to the control on State aid granting is subject to appeal before the SAC (Art 18, par 1). But there is an impressive difference in approaches used in this act and the PCA. In the case of the SAA "an appeal of a decision shall not stay the execution thereof" (Art 18, par 2). In contrast, Article 44 of the PCA, stipulated that the "decisions of the Commission shall come into force where they have not been appealed within the term under Article 43; the appeal has not been granted". That means that the execution of the decision is stopped for the time of the appeal.

Sanctions

They are determined in Chapter 4 of the SAA. For having granted State aid without notifying the CPC in advance or without respecting the ban under Article 6 "any person will be punished by a fine of BGN 2,000 (1,000 Euros) or exceeding this amount but not exceeding 5,000 (2,500 Euros)". For a repeated violation the fine will be imposed in an amount of BGN 5,000 or exceeding this amount but not exceeding BGN 10,000 (5,000 Euros) (Art 24, paragraphs 1 and 2). If the respective persons do not comply with the decisions of the CPC under Article 15 the fine is between BGN 5,000 and BGN 20,000 (10, 000 Euros) (Art 25). The general impression is that the amount of the property sanctions is very low. The deficiency of the sanction policy of the CPC has been criticised repeatedly by the Commission.

**2. Monitoring system**

As mentioned previously the control and monitoring systems are separated and the latter is confined to the Minister of Finance. The inclusion of the Ministry of Finance as institution is not a new one – the State aid department of the Ministry of Finance has been established in 1996 as the State aid monitoring authority. This happened in relation to the obligations taken by Bulgaria under the EAA. However, the rules on its functioning were lacking.

The mistake has been corrected with the inclusion of a special chapter, Chapter 3, in the SSA, which creates a clear framework for the competencies of the Minister of Finance and the department established within the structure of the Ministry of Finance, which is expected to support him/her in accomplishing the respective tasks.

According to Article 21 of the SAA "The Minister of Finance shall be the authority responsible for monitoring and transparency of State aid at the national, regional and local level". This is an ex post monitoring mechanism. It is not the institution of the Ministry of Finance, but the body of the Minister of Finance that is involved. There is certain logic in terms of body choice because when we talk about State aid it is speaking about money. The Financial ministry of each country, and its leader the Minister of Finance in particular, take part in the whole process of State aid granting. Normally, it is reflected in the State Budget of the Republic of Bulgaria Act, especially when it is speaking about money loans. The MF is responsible for the spending of the expenditure part of the budget. On the other side, the Minister of Finance is the co-ordinator of the pre-accession funds given to Bulgaria in order to support its regional development. As we have already seen a state aid granted according to Article 4, par 1 of the SAA may be assumed permissible and finally permitted. And finally, the concentration of so many functions makes clear each one's responsibility.

Furthermore, according to Article 21, par 2 the Minister of Finance is supposed to be a kind of informational devision, because the same article introduces the obligation for all administrative bodies concerned, and "the grantors of State aid in any form whatsoever" to submit to him/her all information required. As a result, the information received is generalised in the so-called "Annual report on the state aids granted in the Republic of Bulgaria". This report has to be submitted to the National Assembly, to the Council of Ministers, and to the European Commission (Art 22). Before the inclusion of this requirement in the SAA, the European Commission criticised Bulgaria acutely for the lack of transparent and credible information on state aid granting. The Commission emphasises that the report should be drawn up following the standards of the EU.

All data concerning State aid granted as well as proposals for the granting of State aid at national, regional and local level shall be entered in a "State aid Inventory established by the Minister of Finance "(Art 23). The inventory has to provide the information, concerning the whole amount of aid granted, its distribution in terms of branches, in which form the aid has been given and the purposes that it is seeking etc. This text aims at providing for transparency, because it would allow the affected undertakings to receive credible information about State aid whatsoever. The Inventory is regularly up-

dated, including all cases of state aid granting, as well as all the permissions given by the CPC.

The same Article creates the obligation for the two institutions to inform each other regularly in order to insure the co-operation between them. Noteworthy is that there is a Memorandum of understanding and co-operation signed between them in 1999.

Other measures concerning State aid compliance

According to the opinion of the Commission given in the 2002 Regular report the new SAA doesn't provide details on the substantive criteria that should be used for the assessment of notified aid. On July 5, 2002 the Council of Ministers of the Republic of Bulgaria adopted "The rules on implementation of the State Aid Act". It transposes regulation No 70/2001 of the Commission and deals with the conditions under which a State aid could be granted to different sectors of the economy: the intensity of the aid, the methodology for the calculation of the aid etc. This document has been amended in June 2004, by recommendation of GD "Competition" of the Commission, concerning the degree of harmonisation of the rules on State aid related to operative aid granted for environment protection, recovery and reconstructing of enterprises in embarrassment, and regional aid for big investment projects.

In March 2004 a Regional State Aid Map was adopted by the Association Comity, which has been established under the EAA mechanism. This map was drafted by the State aid department within the Ministry of Finance and the CPC, as a symbol of co-operation between them. According to it the whole territory of the Republic of Bulgaria is considered identical to the Community's regions under Article 87, sec 3 of the EC Treaty in which State aid is permissible. The regional aid in Bulgaria should be assessed on the basis of this map. The highest intensity of the aid, applicable to the whole territory of the country, is limited to 50 percent of the net equivalent of the aid.

On recommendation of the Commission, "Ordinance No 6 of the MF on the procedure for monitoring and ensuring transparency of State aid" was amended in 2004 by Ordinance No3 (State Gazette No 29/2004) in order to transpose the EU transparency

directive. The Commission estimated this document to be fully harmonized with the acquis[59].

The final assessment in terms of State aid is comprised in the last regular report of the Commission:

"As regards State aid, the overall assessment of the Commission is largely positive. The stated law with its recently amended implementation rules, provides a good legislative framework for the control of State aid"

Thus, we followed the evolution of one of the substantial competition topics and saw that the negotiations could lead to the appearance of a completely new law in order to fill in a huge gap opened with Article 20 of the PCA. But then the question arises "Is the control body ready to implement the rules and to ensure the respect of the control mechanism? The next section will allow us to give answer to this crucial question.

2.4.2. Administrative Capacity

1. Establishment of qualified and skilled staff

The administrative capacity in terms of state aid concerns two bodies: the State aid division within the CPC (the controlling body) and the State aid Department within the Ministry of Finance (the monitoring body). The efforts of Bulgaria target the improvement of the professional activity of both. They started with a course of 15 seminars and visits to EU Member States organised in the framework of the PHARE-99 project. Lately, the controlling and monitoring bodies took part in another PHARE-2002 project "Strengthening the administrative capacity to manage the acquis on State aid and improvement of the system for monitoring and control of State aid". In March 2004 six experts from the state aid division within the CPC and the State aid department in the Ministry of Finance participated in the training programme of the Institute for Public Administration in Maastricht, Nederland. In June same year, the second edition of the programme, for experts at advanced level, took place there as well. This activity is part of the PHARE programme BG 02\IB-FI 03 "Enforcement of the administrative capacity for application of the acquis and refining of the State aid control and monitoring system" between the DTI- United Kingdom on the one hand, and the CPC and the Ministry of Finance, on the other. It aimed at improving the professional skills of the

[59] Regular report of the Commission for 2004

officers from the CPC, MF, other institutions and bodies, as well as judges and public prosecutors and so on.

Currently, the State aid Department in the Ministry of Finance achieved its maximum by recruiting 9 officers, and the State aid division in the CPC has 20 experts at its disposal (jurists and economists). All newly recruited officers are included in the training scheme provided for by the PHARE programme. The relations between these bodies were improved and they work in close co-operation in compliance with the Rules on implementation of the SAA. Information concerning all notified State aid is exchanged regularly. The former are inscribed duly in the State Aid Inventory. The MF notifies the CPC every time when it budgets for State aid in any form whatsoever. The CPC established close contacts with officers from DG "Competition" aimed at exchanging information during the examination stage.

According to the Commission, the 2003 Regular report presented by the Ministry of Finance finally corresponds to the "Methodology" established by the European Commission. During the negotiation process a "De minimis State aid granting Inventory" was created as well.

The SAA makes provision for the decisions of the CPC to be appealed before the SAC. In this respect, in addition to the activities under the PHARE-99 and PHARE-2002 projects, were held several training seminars for the judges from the SAC. Two of them took part in the seminar entitled "Introduction in State aid" which has been held on May 16, 2003.

2. Arising awareness

Both, the CPC and the MF carried out wide informational campaign aimed at making certain target groups familiar with the principles of State aid granting. The main target groups were - the central administration, regional and municipal administrations, NGOs, economic operators, liberal professions (lawyers, accountants, university professors, economists, etc). Guidelines and Specialised Dictionary on State aid were published in 2002 as well as the brochure of the Commission: "The EU Competition Policy and the citizens" in Bulgarian language. These handbooks were sent to the target groups in order to increase their knowledge. Articles on topics related to state aid granting, State aid Inventory and State aid annual reports are carried in the periodical "Budget" edited

by the MF. At the beginning of September 2002 was created a rich web site of the State aid Department within the MF. It comprises Bulgarian and European legislation on state aid, information about the Inventory and the state aid schemes contented, and many others. This campaign resulted in increasing the number of notifications before the CPC, as well as a more precise filling in of the data required – something very important to the control exerted by the CPC.

2. Competition advocacy in the field State aid

In 2003 the Ministry of finance was involved in a screening process of the current legislation (including the drafts). Subjects of analytical review were all provisions comprising fiscal measures liable to represent state aid. The results of that process were summarised in a table that shows how many provisions should be considered State aid. The fiscal measures that have been found to be State aid incompatible with the rules on State aid were harmonised with the acquis at the beginning of June 2004 when the National Assembly adopted Amendments to Corporate Income Tax Act, leading to further amendments to the Value Added Tax Act etc. These amendments entered into force at the beginning of 2005 and abolished the groundless tax differentiation between the enterprises. As from 2005, tax concessions will be delivered under identical conditions for the respective enterprises, and no possibility on behalf of the body granting the aid will exist. Noteworthy is the role of the procedure of drawing of the State budget that became part of the notification system. During the draft the different institutions, ministries, and municipalities present their proposals before the MF, including the proposal of State aid. The projects for new State aid, proposed by the MF, as a principal, are notified to the CPC.

2.4.3. Enforcement record

In the period before the entry into force of the SAA, the number of notifications was too low. In 2000 the CPC received only 4 notifications. After the passing of the SAA the practice of the CPC on State aid granting has been enriched, compounded and improved. Whereas in 2001 the assessment decisions rendered on State aid were only 7, in 2002 they were 48 (14 of them under the new SAA). In 2003 the national authority gave 51 decisions, and during the time between January and March 2004 the respective number was of 69 (in one of the cases the CPC resorted to “additional investigation”,

one negative decision for refusal to the notified aid)[60]. In one of the cases the CPC determined that the aid has been granted in non-compliance with the law, and ordered its restitution. In some of the cases the CPC permitted state aid under conditions. When it provides reasons for its decisions the CPC follows the practice of the European Commission and the ECJ. The control exerted by the CPC covers all forms of State aid, and includes state-guaranteed loans for investment projects, aid for public undertakings, fiscal aid, growing increase of capital of enterprises with 100% state participation etc.

In 2003 the CPC presented detailed information concerning its practice on State aid enforcement record. The evaluation that has been made by the Commission for the last three years influences to a great extent the quality of its decisions. It is a corrective and a kind of training for the right interpretation of the rules on State aid. All State aid granted after the entry into force of the EAA and before the SAA was dedicated to the reconstructing and privatisation of the beneficiaries. In 2000 the "Financial recovery of State-owned enterprises Act" was annulled and the application of the existing schemes discontinued. Respectively, the beneficiaries were either privatised or went into liquidation. With the new SAA a new mechanism was introduced. According to it all existing State aid was aligned with the provisions of the SAA. As far as the State aid granting after the accession is concerned, Bulgaria made a list with State aid assessed by the CPC like compatible with the acquis. During the negotiation process Bulgaria was informing the Commission for all existing State aid, as well as for those remaining after the accession.

Conclusion

In its position papers Bulgaria used the year 2007 as a working hypothesis for the date of the accession. The 2004 Regular report is the first document recognising this hypothesis. In it, the Commission gave a very positive assessment of all aspects concerning the progress on Chapter No 6. I would like to notice that the qualitative progress in terms of State aid enforcement record became the pledge for the successive closing of the negotiations on Chapter No 6 on June 14, 2004, and consequently, of the negotiation process as a whole. The input of the national competition authority attached

[60] CPC, "Operating account report for the activity of the CPC for 2004", Sofia 2004

great importance to this success. But the Commission remained critical on this issue and required further efforts in this direction. It underlined that the non-respect of the obligations undertaken by the country may provoke the reopening of the negotiations n this Chapter, which means that during the period before the accession Bulgaria is expected to make further efforts in the field of competition in order to be ready for the challenges of the full membership. The next Chapter dedicated to these problems.

## Chapter 3

## The competition Law in Bulgaria after the closing of the accession negotiations. Bulgaria's membership in terms of EU competition policy

### 3.1 Preliminary remarks

Before I start with the last part of my thesis I would like to mention the following. There are two different legal positions, referring to the periods before and after the membership of a given candidate country. I consider this is the appropriate place to make this reference, because, as the title of this chapter suggests, it deals with both. In a first subpart I will reveal the meaning of these legal positions. In a second one I will discuss the changes in the current system with view to the membership of the country, i.e. from 2007/8 on. The third part will deal with the challenges for Bulgaria in the field of competition, and the efforts that it is expected to make, in order to cope with them sufficiently.

### 3.2. Before and after the accession – two different legal positions

Before the accession In the period between the closing of the negotiations and the accession, the system of protection of competition, which has been established in Bulgaria for the past seven years, remains the same. During the pre-accession period the EU competition law is not applicable on the territory of the country and the European Commission is not allowed to keep under control neither violation related to anti-trust, nor State aid granting.

As far as trade relations between Bulgaria and the European Union are concerned, the provisions of the EAA will be applicable. The "Rules on implementation of the competition provisions of the EAA" will continue to provide the basis for co-operation between the European Commission (DG"Competition") and the CPC. The provisions of the EAA will be annulled with the entry into force of the Treaty on Accession of Bulgaria and Romania to the EU and will be replaced by the respective provisions of the EC Treaty.

After the accession Once a candidate accedes to the European Union, the former undertakes certain obligations, evolving from the fact of the membership. As regards Bulgaria and the EU competition policy, noteworthy are the several positions presented by the country during the negotiation process on Chapter No 6 who declared: "The Republic of Bulgaria shares the common values, principles and objectives of the EU in the field of competition, as provided for in the Treaty establishing the European Community and other legislation that constitutes the acquis. The Republic of Bulgaria accepts and will apply in full the acquis in the area of competition policy. No derogation or transitional period will be requested"[61].

The capacity to assume the obligations evolving from the membership is a crucial condition for each candidate country. This obligation found place in Bulgaria's Accession Treaty. Article 2 of the Act of Accession that is integral part of the Accession Treaty stipulates: "From the date of accession the provisions of the original treaties and the acts adopted by the institutions and the European Central Bank before the accession shall be binding on Bulgaria and Romania and shall apply to those states under the conditions....". That means the entirety of legal provisions will concern Bulgaria in the same way as the other Members States, regardless the date of their accession or economic status.

In terms of competition policy, the provisions of Articles from 81 to 88 of the EC Treaty will have binding force on Bulgaria, as well as the secondary legislation adopted by the institutions of the EU. The texts of the EAA won't be applicable from the accession date. The provisions of the acquis, related to the different fields of activity of the EU, will regulate the relations between the institutions of the Union and Bulgaria, in its new capacity of Member state.

Let's harp on the topic and see how the membership of the country will change the current system for protection of competition in Bulgaria. One could ask the reasonable questions: "The PCA, the SAA – are they going to disappear? And what will happen with the CPC? What is the European Commission expected to do?"

The provisions of Articles 81, 82, 87 and 88 of the EC Treaty contain the answer of all possible questions. They introduce the distinctive criterion, according to which the

[61] CONF-BG-29/00 and next

acquis on competition policy is applicable provided the competition on the Common market is affected. Otherwise, national rules on protection of competition are the proper law. Thus, the applicability of both national and EU legal order are distinguished and apply in parallel. Nevertheless, they do not have to contradict to each other. In case of contradiction, i. e. the national law allows the existence of concerted practices for example, capable of violating the trade between the Member States but which are prohibited by Community law, the latter has primacy[62]

### 3.3. Bulgaria's EU membership and the competition policy

Before May 1, 2004 one could admit that all concerted practices and abuses of Community dimension are exclusively matter of the European Commission. At the stage of evolution of the EU competition law at which Bulgaria adheres, the answer of the question is no longer the same. The ongoing reforms in the area of competition as well as the above mentioned juridical changes influence the future of the protection of competition in Bulgaria.

The changes in the functioning of the national system after the accession concern the following aspects:

A. Changes in terms of anti-trust - the CPC will be conferred additional powers - repercussion from the entry into force of reg. 1/2003
B. As regards State aid, the CPC will part from some of its competencies
C. From now the national jurisdictions will be authorised to pass judgements upon competition related cases.

#### 3.3.1 Bulgarian competition law and the changes in terms of anti-trust. New tasks for the CPC

Let me come back to the question concerning the applicability of the competition related provisions. Currently, the PCA and the EAA are the acts in force. After the accession the acquis will be applicable to all anti-trust cases liable to affect the competition on the Common Market. Consequently, the PCA remains the law applicable to all violations "aimed at or with intended result to prevent, restrict or breach competition on the relevant market" (Articles 9 and 18 of the PCA). This

[62] one of the principles of the EU law, stipulated by the ECJ, in its historical Decision No 6/64; Costa vs. Enel. Popova, Z. « Osnovi na pravoto na Evropeiskia Sajus », « The basis of the EU law», Planeta, 2001

formulation is a very flexible one, because of the use of the notion relevant market. As previously discussed, one of the key elements of the relevant market is the geographical market that in some cases might go beyond the national boarders of the country. So, the national regulator is given the discretion to estimate the scope of the violation, and on this bases to apply the appropriate legal provisions. If the geographical market is narrower or coincides with the national one, then the CPC will deal with the violations according to the PCA, both in terms of material and procedural elements. The leading criterion for the CPC should be whether the trade between Member States is threatened of affection. As from 2007/8, the CPC will start its investigations with the assessment of this criterion.

*The reform introduced by regulation 1/2003*

In the field of anti-trust the CPC will act in accordance to the texts of Article 81, par 1, and Article 82 of the EC Treaty. By virtue of the case law of the ECJ these provisions are directly applicable[63], i.e. the national competition authorities and courts have the power to apply the prohibition established by them. The former regulation 17/62, abolished by regulation No1/2003[64], provided for a prior notification which may lead to an exemption under Paragraph 3 of Article 81, granted exclusively by the Commission. The system has been changed with a view to ensure efficiency and to relieve the European Commission from the burden of the notification system with view to the enlargement. As of May 1, 2004 "agreements, decisions, concerted practices caught by Article 81, par 1 are void, no prior decision to this effect being required". On the other hand, "all agreements, decisions and concerted practices, which satisfy the conditions of Article 81, par 3 shall not be prohibited, no prior decisions to that effect being required" (Art 1 of the Council reg No1/2003). The new regulation 1/2003, procedural act delivered in implementation of the original provisions of the EC Treaty, introduces direct applicability for paragraph 3 of Article 81. This is a switch to a directly applicable exception system in which the national authorities and courts are

[63] Mueller Felix "The new Council regulation (EC) No. 1\2003 on the Implementation if the rules on Competition" – German Law Joural http://www.germanlawjournal.com/article.php?id=457

[64] Reglement CE No 1/2003 du Conseil du 16 Decembre 2002 relatif a la mise en oeuvre des regles de concurrence prevues aux articles 81 et 82 du traite CE, JO L 001 du 4 Janvier 2003

empowered to apply also paragraph 3 of Article 81 of the EC Treaty directly (Articles 5 and 6 of the regulation). The fulfilment of the criterion "trade between member states – affected" will put into effect the mechanism under the regulation.

This new decentralised system sets new tasks to all national authorities, including the CPC in the future. Bruno Lasserre[65], Chairman of the French Competition Council, observes the necessary adaptations to the national authority, in order to ensure the proper implementation of the new system. I will use his analyses like a pattern in order to reveal the challenges for the CPC. In his opinion, the changes concern the following aspects.

1. The CPC will become member of the European Competition network

The CPC will become part of the so-called European Competition Network. This is a new co-operation framework with horizontal and vertical dimensions, including all national authorities and the European Commission. This principle is based on Article 11 of the regulation. It provides for two mechanisms aimed at ensuring the appropriate information that every single member of the ECN needs, including the CPC in the future.

The first one refers to the beginning of the procedure, and looks for the best distribution of tasks between the members. The purpose of this provision is to avoid unavailing parallel treatment of one case from many members of the ECN. It should be able to provide information that it deals with a case of EU dimension. On the other hand, it will be involved in the co-ordination and repartition of the tasks between the members of the ECN. Once the information is available each national authority is allowed to enter in contact with the authority of another Member State if it is interested in specific information etc.

The other mechanism concerns the obligation for preliminary consultation with the European Commission before the rendering of the decision. If the Commission finds the draft dangerous for the competition on the Common Market it may even divert the case and open itself a new procedure, thus depriving the CPC of the right to render the

[65]Bruno Lasserre « Modernisation : Les adaptations nécessaires du Conseil de la Concurrence », dans la revue « Concureences, Revue des droits de la concurrence », No 1 Decembre 2004

decision. The effect sought by the Commission is to ensure that the homogenous application of the EU competition provisions is respected (Art 11, par 4).

The new regulation ensures the optimal functioning of the system through the introduction of evidence exchange and the mutual assistance for inquiries. "Furthermore, any information, including confidential such, collected by whatever national authority within the application of Articles 81 and 82 could be used as a proof by the other members of the ECN" (Art 12, par1). If we have a look at Article 42 of the Bulgarian PCA we will find that there is a prohibition regarding the use of information collected in the framework of a given case for the purposes of another. Consequently, there is an obvious difference between the provisions of the regulation and the national one. This text won't be applicable in cases relative to violations under Articles 81 and 82 even if the information exchanged is confidential. The reason is the primacy of the Community law.

Furthermore, under the new regulation, every national authority could entreat its homologue to make an inquiry on behalf and account of the former. These investigations are made under the national procedure of the requested authority. So is expected to do the CPC in the future. A noteworthy fact in this respect is the introduction of on-site inspections, a power given to the CPC after the amendment brought to the PCA in 2003. These new possibilities aim at bringing together the national authorities and reinforcing their co-operation.

2. Regulation 1/2003 and the procedural rules of the Member states

Under the Founding Treaties there is not a clear obligation for the Member states to harmonise their competition protection systems with that of the Community. B. Lasserre considers that the procedural framework installed by the French competition law, (and many others – Belgian[66] and German[67]) needs to be changed in order to be coherent with that used by the European Commission until recently. As United Kingdom's Competition Act of 1998 states: " national legal system should ensure that competition issues are dealt with in a manner which is consistent with the treatment of

[66]. Belgian competition law report: Issue 9 Top news stories
http://www.freshfields.com/practice/comptrade/publications/complawreport/9/news.asp

corresponding questions arising in Community law in relation to competition within the Community" [68](Section 60 (1))

As regards candidate countries, one could admit that they made these substantial changes either with the very creation of their competition law, borrowing the model of the EU competition policy, or during the negotiation process as a "conditio sine qua non" for the successive result of the negotiations on Chapter No 6. In some respects they are even advanced. In confirmation of my position, I could give the following examples.

In imitation of the usual prescription term under the civil law, the period of prescription under Bulgarian PCA has been fixed at 5 years already in 1998 (Art 46). By contrast, the French Republic is expected to introduce this five-year term in order to "facilitate the articulation of the procedures within the ECN"[69]

Another example could be the right given to the CPC with the amendments, brought to the PCA in 2003, investing it to commit on-site inspections (Art 41 a, b, c, d of the PCA). These texts are the exact reflection of the reform still ongoing at that time[70] and of the conception that in the future the national authorities are expected to deal with violations as efficiently as the European Commission did in the past. The fact that Belgium amended Article 23 of the national Competition Act to align the powers of investigation of the Reporters and the members of the Competition Service in searching business premises with those of Commission officials, proves my position. "The Reporters and members of the Competition Service can now seal business premises and seize documents there for as long as and to the extent necessary for the inspection"[71] This change was made some weeks before the entry into force of the new regulation.

And last but not least, Bulgaria made substantial changes to Article 57 of the PCA during the negotiations, and thus, introducing such the so-called ''leniency'' (the first

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[67] Germany, Andreas Weitbrecht Latham & Watkins LLP, Global competition review http://www.globalcompetitionreview.com/ear/germany.cfm

[68] « An overview of EC regulation 1\2003 as the new implementing regulation for the rules on competition laid down in articles 81 and 82 of the EC Treaty ». Matthew Gream , 2003 http:\\matthewgream.net\content\overview-ec-reg-1-2003-paper.doc

[69] Bruno Lasserre « Modernisation : Les adaptations nécessaires du Conseil de la Concurrence », dans la revue « Concureences, Revue des droits de la concurrence », No 1 Decembre 2004

[70] Regulation 1/2003 was adopted on December 16, 2003

to betray the other participants in the concerted practice for example, will be exempted from liability and sanction). In the case of Belgium the national authorities[72] adopted a leniency programme setting up the conditions to this effect (into force from May 7, 2004).

However, further efforts are needed in terms of anti-trust, but they will be discussed in the next subpart

*3. Intensification of the relations between the national authority and the undertakings*

The author examines also the future relations between the national authorities and the undertakings that he considers will be intensified. The CPC will have to reorientate the plaintiff if another authority is competent to try its case. And vice versa, it should be able to ensure that a foreign plaintiff will be treated in an equal way, if the respective national authority has refused to deal with its claim. The CPC is expected to guarantee that it won't examine certain facts if another authority have to do with them.

*4. New powers for the CPC*

The CPC will be granted new powers under Articles 81 and 82. Up till now the European Commission was given the monopoly right to exempt throughout the notification system under regulation 17/62 all concerted practices, satisfying the conditions provided by paragraph 3 of Article 81. From January 1, 2007/8 the CPC will be empowered to apply the ban under Article 81, par 1 if the agreements don't comply with the conditions under Art 81, par 3 - a sign for the decentralisation of the system. Consequently, the CPC will have to stop, at request of a plaintiff or on its own initiative, a collusive practice, considering itself exempted under Article 1 of the reg. 1/2003, but which doesn't satisfy the conditional framework established by Article 81, par 3. This assessment should follow the guidelines of the European Commission[73]. The CPC will be allowed to make the following decisions under regulation 1\2003:

- to order an infringement to be brought to an end
- order interim measures
- accept commitments from the infringing parties

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71 Belgian competition law report: Issue 9 Top news stories
http://www.freshfields.com/practice/comptrade/publications/complawreport/9/news.asp

[72] the Competition Council, the Competition Service, and the Corps of Reporters are the responsible Belgian authorities

- impose fines or other penalties provided for in their national law (Art 5) “and all other measures pursuant their national provisions”[74]

As regards the affection of the competition within the country the CPC will reserve the right to exempt such practices according to the facultative notification system established in Article 11 of the PCA. The Member states are allowed to maintain the facultative regime of exemption, if it is not incompatible with the one established on Community level. This assumption explains why the notification system under Article 11 of the PCA remains but replacing the obligation by a faculty.

*5. A novelty in merger control*

Another change that will take place after the accession of the country evolves from the entry into force of the new Council regulation No 139/2004, amending reg. No 4064/89, on the control of concentrations between undertakings. According to it companies willing to concentrate their economic activities “may request the Commission to review transactions which do not have Community dimension, but which are capable of being reviewed under the national merger control regimes of at least three Member States. Provided no competent national authority objects to the referral request the transaction will be deemed to have Community dimension, and the Commission will have exclusive jurisdiction to review such transaction at the exception of the Member state. Currently, one concentration may affect the competitive environment in four, five, or more Member States, but to be short of having Community dimension. Consequently, the undertakings in question are obliged to notify their intention before each respective national authority and that only complicates the situation. The so-called one-stop-shopping system will lower the burden for both undertakings and national authorities[75].

3.3.2. The competition law in Bulgaria after 2007/8 regarding state aid

The changes related to the area of State aid granting, as integral part of the competition policy, will concern the national authority. As previously discussed one of the most

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[73] JO EU, C 101 of April 27, 2004

[74] Goldschmidt P, Thomsen J, “Le règlement No 1/2003 permet-il une application cohérente et uniforme des règles de concurrence prévues aux articles 81 et 82 du Traite CE », Maastricht, Eipascope 2003

[75] . Anniek van Zutren and Hans Urlus “The new EU merger regulation and the reform of EC anti-trust enforcement », Amsterdam Office, Alert Greenberg Taurig , June 2004 http://www.gtlaw.com/pub/alerts/2004/vanzutvena_06.asp

substantial consequences of the negotiation process resulted in the passing of the State aid Act in 2002, which according to the Commission provided a framework in which the CPC will be able to exert control on any kind of aid granted on behalf of the state. The CPC will be responsible for the control on State aid granting that may affect the competition environment in the interior of the country. In order to prevent Member States from disturbing the competition on the Common Market, all intended measure that could be qualified as state aid within the meaning of the Community law, aimed at privileging a given undertaking to the detriment of the others, will be subject to control on the part of the European Commission. This statement is grounded on Articles 87 and 88 of the EC Treaty and the regulations passed by the institutions in their applications. In order to assess the possible effect, the Commission will need at its disposal all information, relative to that aid. The European Commission will relay on the monitoring body established by the SSA, namely the Ministry of Finance. This is the reason why, during the negotiations on chapter No 6, this body was urged to improve the quality of its reports, following the methodology of the EU and standards in his respect?

3.3.3. A new role for the national jurisdictions in terms of competition law.

In my opinion, one of the biggest advantages that Bulgaria citizens will witness after the accession of the country to the EU is the new vocation of the judiciary. By virtue of the direct effect of some of the provisions of the EU legislation Bulgarian citizens will be allowed to seek for the preservation of their subjective rights, evolving from these provisions, before the competent national court, the national judges thus becoming "EU judges as well". In the course of time, the ECJ has had the occasion to judge on the effect of most of the provisions of the Founding Treaties. This is how the ECJ denied the direct effect of Articles 87 and 88, but declared Articles 81 and 82 for provisions with horizontal and vertical direct effect, i.e. they create rights and obligations with respect to the Member states, as well as to the private persons descended from them.[76]

The new regulation 1/2003 makes the role of the national jurisdictions in competition related cases more visible. After the example of the CPC Bulgarian courts will also receive the right to apply the third paragraph of Article 81. That means that

[76] Popova, Z. « Osnovi na pravoto na Evropeiskia Sajus », « The basis of the EU law », Planeta, 2001

undertakings or persons affected by the violation of Articles 81 and 82 will be given the possibility to bring claims for "damages, duty of performance, actions of nullity, interim measures"[77]. In the same document the Commission states: « the right of every victim to be recouped for damages is one of the means contributing to the dissuasion of the concerted practices and the full efficiency of the implementation of the Community competition rules». This is how the Commission justifies the inclusion of the national courts in the decentralised system under the new regulation[78]

The necessity of an appropriate application of the acquis on competition implies the co-operation between the CPC and the Commission, on the one hand, and the courts, on the other. According to Article 15 of the regulation the national authority and the Commission will provide any written and oral information necessary to the national court. The courts on their behalf are obliged under Art 15, par 2 to present before the Commission a copy of its decision; the latter will thus be given the possibility to make its own observations

However, the national jurisdictions may consult the opinion of the Commission and any other economic or legal information that the latter could provide them. The courts may also ask the European Commission questions relative to the implementation of the EU competition law, but which don't bind on the court when it is about to render the decision.

The new role of the national jurisdictions exhausted the question for the changes in the system after the membership becomes reality. The next section is dedicated to the efforts Bulgaria is expected to make in order to ensure the unimpeded infusion into the Common Market, whose functioning is based, as we know, on the competition rules.

### 3.4. Challenges and further efforts before the accession

I would like to bring the challenges before Bulgaria in the field of competition to two main. On this basis, I will reveal the future steps that the country is expected to make in order to cope with them appropriately.

77 « actions en dommages-interets, pour les demandes en paiement ou exécution d'obligations contractuelles, les actions en nullité de contrats et les demandes de mesures provisoires » in Communication de la Commission relative au traitement des plaintes

78 Canivet G.« L'organisation des juridictions nationales pour l'application du droit communautaire de la concurrence » Revue des droits de la concurrence », No 1 Décembre 2004

**Challenge No 1** - Regulation 1/2003 requires administrative capacity and further harmonisation of the procedural rules.

From the above-presented evolution of the system it becomes obvious that in the future the CPC will be in charge with more tasks than currently. Its participation in the ECN, along with the national competition authorities of the other Member States, will require effective use of all its potential, i. e. the CPC will feel increasingly the necessity of its administrative capacity. This is why, during the negotiations the Commission insisted on the creation of a qualified and skilled staff, able to resolve the problems that may arise from the membership. In the future the CPC will be requested to grant data for the rest of the ECN Members, and it should be able to collect and provide credible information in due time. The same holds true for the result of the investigations held on request of a member of the ECN. In other words, the CPC will have to work as efficiently as the national authorities of the old Member States that have been created a long time ago, and have enormous experience at their disposal.

The other very important moment in relation to reg. 1/2003 is the need of further development of the national procedural rules.

**Further measures and activities in this respect**

Administrative capacity

In order to prepare the staff of the CPC for joint work with the Commission and the national authorities of the Member States, united in the ECN, the CPC starts to edit a bulletin in Bulgarian language - "Operating account report for the activity of the CPC for 2004", presenting the novelties in the EU competition legislation and the case law of the EC[79].

Again to this effect, the CPC elaborated a project under the PHARE programme "Preparation of Bulgaria for direct application of the acquis". Twinning partner of the project is the Italian department for protection of competition. The concrete realisation of the initiatives under this project will take place in the second half of 2005.

Following the recommendations of the Commission in its last Regular report Bulgaria should ensure the independence of the regulator. It is not directly related to reg. 1/2003 but is extremely important for the strengthening of the position of the CPC as a

powerful body whose decisions are crucial for the economic life of the country and the EU in the future. It is speaking about the appointment procedure that should become faster – currently the delay is the normal practice. The National Assembly should elect commissioners strictly complying with the requirements under Article 4 of the PCA. There were cases between the former members of the CPC (1998-2000) who occupied other remunerated positions, namely in the Supervisory board of the Privatisation Agency[80]

Procedural rules.

The Member States are expected to fit the national authorities with the competencies necessary for the proper application of Articles 81 and 82 of the EC Treaty until May 1, 2004, the day of the entry into force of the new regulation. In the case of Bulgaria, this deadline should be the accession date. As previously discussed the process of harmonisation within the meaning of this regulation started with the negotiation process and will continue until the full membership. Most of the initiatives have already been examined in the course of the drawing up of the second Chapter. But nevertheless, Bulgarian competition law reveals some remaining procedural gaps that have to be fulfilled until the accession.

1. It its Regular reports the Commission declared that Bulgarian anti-trust legislation is largely in conformity with the acquis.[81] But, in order to avoid any confusion in the future, an explicit clause should be introduced in the PCA, making the distinction between national and Community legal order in terms of competition. It should clearly say that the application of the national provisions towards "restrictive agreements within the meaning of Article 81, par 1 of the EC Treaty should not lead to the

[79] CPC, "Operating account report for the activity of the CPC for 2004", Sofia 2004

[80] Stojanov I. "Komentar na zakona za zashtitia na konkurenziata"; "Commentary on the Protection of competition Act", Sofi-R, 2000

[81] By contrast, Germany changed its substantive standarts « Section 1, which currently applies only to restrictions of competition between competitors, is to become identical to Article 81 par 1 of the EC Treaty , with the exception, of course, that there need not be an effect on trade between Member States. Thus, it will apply to both horizontal and vertical relationships. The existing exemption provisions (sections 2 to 7) will be almost completely replaced by a clause that is identical to Article 81(3) » **Andreas Weitbrecht Latham & Watkins LLP « Germany »**

prohibition of these practices, if the Community law does not prohibit them as well[82]. In case of contradiction the Community law holds primacy. The purpose for this inclusion is to ensure the legal certainty in the application of Bulgarian and Community legal orders.

2. Article 35, par 1 of reg No 1/2003 contains the requirement for the Member states to designate the authorities responsible for ensuring the effective enforcement of Articles 81 and 82 EC Treaty. Belgium for exemple included this provision in the Royal Decree adopted on 25 April 2004 amending several provisions of the Belgian Competition Act of 5 August 1991 to comply with EU Regulation 1/2003 on the modernisation of the application of Articles 81 and 82 EC Treaty[83].

3. Bulgaria has already introduced within the PCA the possibility for on-site investigations, following strictly the provisions of Articles 20 and 21 of the regulation, in order to ensure the uniformity of procedural rules coherent with those provided under Community law (Art 22 of the regulation). However, the Commission recommends repeatedly that Bulgaria should stress on the better use of investigation tools. To this effect, the national authority adopted the so-called "Procedural rules on search, seizure, and oral explanations taking within the meaning of Article 41a of the PCA". This text was adopted on July 20, 2004 (in force from September 1, 2004) and makes provisions for the procedure manner for evidence collection by compulsion. The date of the passing of the Rules indicates that they were adopted immediately after the closing of the negotiations.

4. As regards the possibility for leniency towards collaborating undertakings, Bulgaria, in the person of the CPC, has to pass Leniency notice in which to describe the exact conditions for relief from responsibility, i. e. full immunity, and the method for reduction of fines. I would like to remind that Bulgaria has already introduced this possibility with the amendments to the PCA of 2003 (Art 59a).

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[82] regl1/2003, recital 8 « il est également nécessaire de définir, sur la base de l'article 83, paragraphe 2, point e), du traité, les rapports entre les législations nationales et le droit communautaire en matière de concurrence »

[83] Belgian competition law report: Issue 9 Top news stories
http://www.freshfields.com/practice/comptrade/publications/complawreport/9/news.asp

5. **Sanctions**. B. Lasserre pays attention to another topic related to the effective implementation of the EU competition law by the national authorities, namely the sanctions. This is one of the problems unresolved after the closing of the negotiations. In its 2004 Regular report the Commission made 2 suggestions regarding Chapter No 6 – "fine-tuning and a more deterrent sanction policy on behalf of the CPC".

As far as the fine-tuning is concerned, Art 5 of the new regulation stipulates that the national authority is empowered to impose the fines previewed in their national legislation when applying Articles 81 and 82 of the EC Treaty. Something more - the new regulation doesn't require from the Member state to change the provisions on this matter. Would this mean that in the future the CPC will impose property sanction to the amount of maximum 250 000 Euros, as provided in Article 59 of the PCA? It is obvious that this digit corresponds to violations of the provisions under the PCA and will be "ridiculous" for distortions of Community dimension. The prevention seeking character of the sanction will be condemned to failure. The Commission didn't precise the context of the fine-tuning. In my opinion, in the few months left before the accession Bulgaria has to change the PCA, throughout the introduction of a special provision dealing with the amount of sanctions set in respect to violations affecting the trade between the Member States. A possible approach could be the use of the "percent of the turnover" criterion[84]. This change should be reflected in the Methodology for fine setting adopted by the CPC in April 2004. In order to ensure the respect of the decisions rendered in application of Articles 81 and 82 of the EC Treaty, the CPC will have to follow the model established on Community level. Another innovation could be the right of the CPC to impose daily penalties not exceeding 5 percent of the average daily turnover of the violator for each day of delay, if it doesn't comply with the decision to bring to an end the concerted practice in which it is taking part.[85] This is the model used by the Commission. Among others, the daily penalties didn't find place in the draft of the PCA of 1998, although they could be a very useful coercive means for ensuring the immediate execution of the decisions of the CPC.

[84] « Under the Belgian Competition Act, the Council can impose fines of up to 10 per cent of overall turnover for restrictive practices under Belgian or EU competition rules" Belgian competition law report.
[85] Bruno Lasserre « Modernisation : Les adaptations nécessaires du Conseil de la Concurrence », dans la revue « Concureences, Revue des droits de la concurrence », No 1 Decembre 2004

The other suggestion of the Commission is related to the current sanction policy of the CPC. In the first chapter of my thesis, I mentioned the fines that the CPC is allowed to impose, after having found the material provisions of the PCA to be violated. Most of the decisions of the CPC are bind with very law sanctions – in the scope of BGN 2500 (1250 Euro). "The violators could even include the respective amount in the price formation of their goods or services"[86]. One should not forget that the vocation of the PCA is not to punish violators, but to ensure that competition environment in the country is prevented. Consequently, the CPC should follow more restrictive sanction policy within the framework of the PCA.

6. Another shortcoming of the PCA is related to the CPC and especially to the terms in which it is expected to deliver its decisions[87]. Such are the texts of Article 29, par 3 (three-month term to issue a decision) or Article 51, par 4 ("investigation shall be conducted within sixty days..."), and others. The concrete digits are not the most important. The problem is that the PCA doesn't say a word about the consequences of non-observance of these terms on behalf of the CPC. In the case of Article 29, relative to concentration of economic activity, a useful introduction would be the automatically exemptions of these undertakings, otherwise their interest will be injured[88]. In a way, this kind of sanction will stimulate the CPC to work faster and to comply with the provisions of the law. In the future the CPC will be expected to deliver information to its "colleges" within the ECN, so it is not desirable to get used with "bad habits".

**Challenge No 2 –** Community law and regulation No 1/2003 give new role to the judiciary

As mentioned before, currently the Supreme Administrative Court is the unique jurisdiction in the country dealing with competition issues. The rest of the court system takes part indirectly throughout Article 36, par 2 of the PCA. As from January 1, 2007/8 the national courts will be called upon the application of the EU law, including the

[86] Gjurov Iv, "A new decision of the CPC relative to concerted practices", article in the review Market and Law, 1999, vol. 3.

[87] Stojanov I. "Komentar na zakona za zashtitia na konkurenziata"; "Commentary on the Protection of competition Act", Sofi-R, 2000

[88] Ibid

provisions relative to the protection of competition policy. Consequently, appropriate training measures are necessary to this end.

**Further measures and activities**

Training and specialisation of the judiciary

The instruction should start from the faculties of law of the universities, who, at the moment do not hold out the discipline "Competition law". Different initiatives aimed at teaching the judges from the different levels of the court system should take place in order to make them familiar with the EU competition provisions and their application. As an example for such activity could be given the announcement for proposals on projects of training of national judges in EC competition law and judicial co-operation between national judges, published by DG "Competition" on the web page of the Delegation of the Commission in Bulgaria[89]. "With this programme, the Commission wishes to strengthen judicial co-operation between national judges and foster their training throughout: the organisation of conferences, seminars, symposia or meetings on EU competition law for national judges; short- or long-term training in EC competition law as part of study programmes for national judges; the distribution of documentation and information on EC competition law specifically tailored to the needs of national judges; co-operation, including the setting-up of networks, between judicial authorities or other public or private bodies responsible for encouraging or monitoring the proper application of the EU competition law by national judges. The projects may comprise activities intended for national judges from a single EU Member State, from another EAA contracting party or from Bulgaria or Romania".

After the accession the number of plaints will increase dramatically due to the decentralisation of the system under the new regulation 1/2003[90]. Probably a specialisation within the system of the courts will be necessary. It is a real fact that Bulgarian court system is not familiar with the so-called specialisation of the courts, to the extend that there is not administrative branch within the system. The current debate turn around the creation of specialised branches within the judiciary, able to deal with

[89] www.evropa.bg

[90] Bruno Lasserre « Modernisation : Les adaptations nécessaires du Conseil de la Concurrence », dans la revue « Concureences, Revue des droits de la concurrence », No 1 décembre 2004

one matter, and will thus ensure the better knowledge of competition related questions and efficiency in judgement rendering.

Relations between the CPC and the courts Provisions concerning the future relations between the CPC and the courts are still lacking in Bulgarian legal order. One of the priorities in the few months left until the accession will be the passing of these rules. As we see, from now on the functions of the CPC and the national jurisdictions will be interrelated and the co-operation between them will be a guarantee for the effective implementation of the EU competition provisions. This explains also the unrest of the Member States regarding Chapters No 6 and 24 of the negotiation process and the introduction of the safeguard clause in the Accession Treaty which could be used exactly if Bulgaria doesn't respect the obligations taken on these two chapters. We don't have to forget that chapter No 6 was the last to be closed, together with Chapter No 31 "Others"[91].

[91] Chapter 31 is a special chapter of the negotiation process. In the case of Bulgaria this Chapter includes all matters concerning the nuclear power station of Kozlodoui

## Conclusion

The second challenge closes the last Chapter of my thesis. On less than one hundred pages, I tried to reveal the evolution of the competition law in Bulgaria during the last fifteen years. Neither this process finished with the closing of the negotiations, nor will stop with the accession of the country to the Union. The negotiations turned out to be the crucial stick for successive economic reforms in Bulgaria and steady economic growth of five percent per year – the country with the highest indicator in the region.

To ensure the protection of the competition on the national market was the basic task for many governments since the beginning of the ninety's. Finally, their efforts resulted in the recognition given by the European Commission in its 2002 Regular report: "Bulgaria is a functioning market economy". The governing coalition gave hearty welcomes to this assessment. While the politicians made the most of dividend, the second sentence of the statement of the Commission said:"It should be able to cope with competitive pressure and market forces within the Union in the medium term, *provided that it continues implementing its reform programme to remove remaining difficulties*". I consider this phrase to be the real assessment of the Commission.

As previously discussed the crucial condition for the existence of functioning market economy is the availability of free competition. During the negotiations Bulgaria was called upon to prove its capacity to ensure its protection. This happened in the framework of Chapter No 6 that turned out to be the most difficult one, because of the importance of the EU competition policy – the mainstay of the Common Market. The text of this work shows that successive reforms need their time. The same is true for the establishment of competitive environment in the country. Bulgaria made a great progress on this chapter. But the difficulties still remain.

In my opinion we should search them among the business community, the judiciary, and the consumers, representing, all together, the greatest challenge for Bulgaria. Because their European future will make them face with new opportunities, rights and obligations, that they should be aware of. One should not forget that the EU membership is an end in itself. Something more it aims at bringing benefits to the EU citizens.

Will Bulgarian citizens be such in 2007 or later? It depends on “the further efforts in the field of competition policy” as well…

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| | **1991-1992** | **1993** | **1994** | **1995** | **total** | **%violations** |
|---|---|---|---|---|---|---|
| **Abuse of monoploy position** | 22 (2) | 20 (5) | 29 (4) | 33 (2) | 104 (13) | **13** |
| **Cartel-like agreements** | 1 (0) | 8 (2) | 5 (2) | 1 (1) | 15 (5) | **33** |
| **Unfair competition** | 103 (19) | 136 (36) | 50 (24) | 85 (13) | 374 (92) | **125** |
| **Price controls (art16)** | 0 | 0 | 0 | 2 | 2 | **N.A.** |
| **Trade quotas (Art 17)** | 0 (0) | 5 (0) | 5 (0) | 4 (0) | 14 (0) | **0** |
| **Total number of decisions** | 126 (21) | 167 (43) | 89 (30) | 139 (16) | 521 (110) | **21** |

**Note ; Number of violations found by the CPC in parentheses**

## Chapter 2

**Table 2** Interrelation between cases on anti-trust and unfair competition; Source - the CPC www.cpc.bg

| Years | Anti-trust cases | Unfair competition |
|---|---|---|
| 2000 | 56 | ? |
| 2001 | 58 | 69 |
| 2002 | 68 | 81 |
| 2003 | 64 | 94 |
| 2004 | 72 | 99 |

**Table 3** Imposition of property sanctions; Source – CPC, www.cpc.bg

| Years | 2002 | 2003 | 2004 |
|---|---|---|---|
| Total amount of property penalties imposed | 13, 500 Euros | 393, 000 Euros | 1, 400 000 Euros |

**Table 4** Trends in the practice of the CPC; Source – the CPC, www.cpc.bg

| | 2001 | 2002 | 2003 | 2004 |
|---|---|---|---|---|
| Concerted practices | 4 | 13 | 10 | 11 |
| Abuse of dominant position | 19 | 17 | 25 | 36 |
| Concentration of economic activity | 30 | 35 | 24 | 25 |
| Unfair competition | 69 | 81 | 94 | 99 |

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