Bulgaria

6

Anton Petrov

6.1 Introduction

This contribution discusses the domestic competition law, policy, and practice towards the grocery retail sector in Bulgaria. The report reflects the law and enforcement practice in existence as of the end of May 2013.

6.1.1 Economic Background

6.1.1.1 Agricultural Production

The first level in the grocery supply chain in Bulgaria—agricultural production—is characterised by extreme fragmentation.[1] It is composed of a large number of farmers operating under various legal forms (cooperatives, sole proprietors, commercial companies), managing relatively small holdings.[2] According to Eurostat data for 2010, almost 80 % of the farms in Bulgaria have a size of less than 2 ha (see Table 6.1).

Low degree of concentration is present in all food product markets. Taking dairy production as an example, it can be stated that in comparison with other EU Member States (probably with the exception of Romania), Bulgaria has the most fragmented market for row cow milk—more than 95 % of local farms produce less than 100,000 kg of milk per year.[3]

[1] Commission on Protection of Competition (CPC) decision no. 1125/2012, page 122.

[2] A holding is defined as a techno-economic unit under a single management engaged in agricultural production (including the maintenance of land in good agricultural and environmental condition).

[3] CPC decision no. 1641/2010, page 15.

A. Petrov (✉)
Djingov, Gouginski, Kyutchukov & Velichkov, Sofia, Bulgaria
e-mail: anton.petrov@dgkv.com

P. Kobel et al. (eds.), *Antitrust in the Groceries Sector & Liability Issues in Relation to Corporate Social Responsibility*, LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition, DOI 10.1007/978-3-662-45753-5_6

Table 6.1 Number of agricultural holdings by size, 2010 (1,000 holdings)

	0 ha	<2 ha	2–4.9 ha	5–9.9 ha	10–19.9 ha	20–29.9 ha	30–49.9 ha	50–99.9 ha	≥100 ha	Total
EU-27	258,100	5,608,460	2,407,420	1,303,040	900,530	377,580	395,210	391,350	324,840	11,966,440
% of EU-27	2	47	20	11	8	3	3	3	3	100
Bulgaria	13,150	294,960	30,390	10,730	6,820	2,950	3,060	2,930	5,490	370,490
% of Bulgaria	3.5	79.6	8.2	2.9	1.8	0.8	0.8	0.8	1.5	100

Source: Eurostat [Eurostat Pocketbooks 2012 edition: Agriculture, fishery and forestry statistics – Main results – 2010–11 (ISBN 978-92-79-25431-4)]

At the same time, the statistical data indicate comparatively diversified production, with a slight focus on animal breeding (see Table 6.2).

Lack of concentration on the principal production markets stimulates the existence of many go-between traders, which serve as intermediaries with the next level of the supply chain—food processing. The market is not very matured, and financial derivatives (such as futures contracts) are rarely used, resulting in low-risk management and high-price instability in long-term sales of agricultural products.[4] Lack of commodity exchanges, directly accessible to farmers, also leads to distortion of price information between the different levels of the supply chain.

6.1.1.2 Food Processing

Since the majority of farmers do not have adequate storage capacity, they are forced on selling their production as soon as possible—either directly to large consumers or (more often) to wholesalers. The Bulgarian national competition authority—the Commission on Protection of Competition (the "CPC")—has conducted several sector inquiries analysing the supply chain for various foods (bread, dairy, cooking oil), and the recurring results indicate that the food processing stage is less fragmented and better organised. Indeed, the majority of market players are SMEs, but there are also certain large companies—mostly local subsidiaries of international groups (such as Danone, Nestle, Coca-Cola) and also independent Bulgarian producers.

Since in general the number of food processing companies is much lower than the number of farmers, the former can negotiate with a large number of suppliers, which increases their bargaining power. Negotiating inequalities are reflected in dynamics of price changes along the supply chain leading to certain asymmetries.[5] Observations indicate that in the majority of cases, individual agreements with pricing and delivery terms are not signed in advance and supplies are negotiated on the spot (e.g., during the harvesting campaign for crops and horticulture). In fact, many transactions are based on oral agreements, which subsequently are confirmed by invoices.

Food processing companies are better organised, and there are many industry (branch) associations. Although there are no indications of trends for increased sector consolidation, in recent years discussions within industry associations may have led to partial and/or temporary coordination of behaviour in certain sectors.[6]

6.1.1.3 Retail Market

According to a recently published study,[7] the Bulgarian retail market [all fast-moving consumer goods (the "FMCG"), food included] has shrunk by EUR 1

[4] CPC decision no. 1125/2012, page 123.

[5] For example, in the second bread supply chain sector inquiry (CPC Decision no. 1125/2012), it was observed that reduction in prices of wheat is not promptly and equally reflected in the price of flour and bread.

[6] So far, the CPC has investigated, found, and penalised cartels in vegetable oils (CPC decision no. 1150/2007), poultry meat and eggs (CPC decision no. 170/2008), dairy products (CPC decision no. 650/2008), and bread & pastry (CPC decision no. 662/2008).

[7] http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Retail%20Market%20Update_Sofia_1;Bulgaria_1-31-2012.pdf (last visited June 2014).

Table 6.2 Number of holdings by farm type, 2010 (1,000 holdings)

	Field crops	Horticulture	Permanent crops	Mixed cropping	Grazing livestock	Granivores	Mixed livestock	Mixed crop-livestock	Non-classifiable holdings	Total
EU-27	2,935.1	234.3	2,392.7	503.9	1,762.0	1,388.8	777.6	1,502.7	238.0	11,734.7
% of EU-27	25	2	20	4	15	12	7	13	2	100
Bulgaria	63.4	18.2	32.1	14.6	88.6	28.6	50.2	73.8	1.0	370.5
% of Bulgaria	17.1	4.9	8.7	3.9	23.9	7.7	13.5	19.9	0.3	100

Source: Eurostat [Eurostat Pocketbooks 2012 edition: Agriculture, fishery and forestry statistics – Main results – 2010–11 (ISBN 978-92-79-25431-4)]

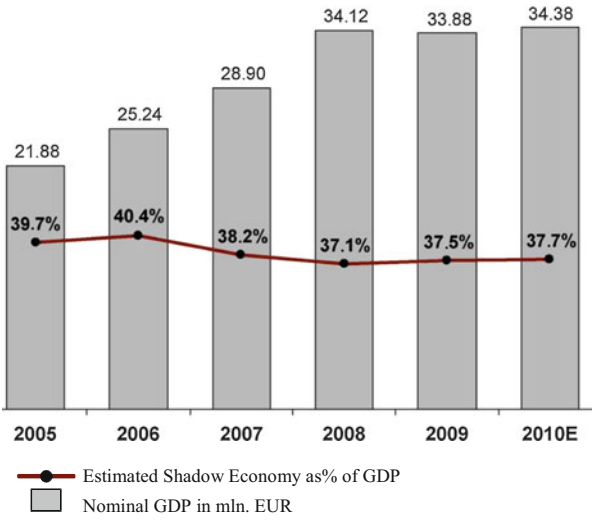

Fig. 6.1 Evolution of shadow economy in Bulgaria as percentage of GDP. *Source*: AT Kearney, Bulgarian National Bank [see The Shadow Economy in Europe and Bulgaria, Study Results Presentation – a complete version available at http://www.bblf.bg/uploads/files/file_372.pdf (last visited June 2014).]

billion for the last 3 years due to declining consumption. While in 2008 the market was estimated at BGN 12 billion (EUR 6.6 billion), in 2010 it was estimated at BGN 10.7 billion (EUR 5.5 billion) and, respectively, BGN 10.5 billion (EUR 5.4 billion) in 2011. Grocery goods account for the majority of purchases, indicating constant increase in value in contrast to the general retail trend—BGN 6.2 billion in 2008, BGN 6.4 billion in 2009, and BGN 6.5 billion in 2010. However, there is also a significant portion of grey market transactions, which according to an AT KEARNEY estimation account for about a third of all deliveries (see Fig. 6.1).

With respect to the market structure, there is a visible trend in the increase of the share of commercial chains and the so-called modern trade, for the expense of traditional retail, represented by small grocery shops and minimarkets. Despite that, the Bulgarian retail market is still characterised by very low level of consolidation, and in 2010 about 60–70 % of all grocery sales in Bulgaria were channelled through traditional retail establishments (see Table 6.3).[8]

"Modern trade" outlets (hypermarkets and supermarkets above 300 m^2) have a low degree of penetration (customer access) in comparison with small supermarkets and "on-the-corner" type convenience shops. According to recently published GfK surveys,[9] while "modern trade" channels have become well developed in the capital and regional centres, they remain less prominent in smaller towns and villages across the country.

Proximity to home or workplace still determines the type of store where customers make the largest proportion of their purchases. The majority of Bulgarian consumers prefer to go to a nearby neighbourhood shop to buy their essentials on "as-the-need-arrive" basis, instead of going to a large hypermarket

[8] CPC decision no. 1199/2010, page 13.

[9] GfK Shopping Monitor 2010, Bulgaria – The expansion of modern trade.

Table 6.3 Grocery retail market

Sales in grocery retailing by category, value 2005–2010, million BGN						
	2005	2006	2007	2008	2009	2010
Total grocery retailing	5,109	5,506	5,777	6,227	6,443	6,526
Discounters	–	–	–	–	67.2	103.4
Food drink/tobacco specialists	919	935	953	1,085	1,120	1,147
Hypermarkets	206	352	459	644	756	839
Small grocery retailers	3,040	3,120	3,075	2,980	2,912	2,841
– Convenience stores	150	312	348	386	395	405
– Forecourt retailers	81	92	98	117	121	124
– Independent groceries	2,810	2,716	2,630	2,478	2,395	2,312
Supermarkets	689	847	1,039	1,265	1,330	1,335
Other grocery outlets	255	252	248	252	258	261

Source: Euromonitor International, 2010 [Extracted from GAIN Report no. 1203/31 January 2012, available at http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Retail%20Market%20Update_Sofia_Bulgaria_1-31-2012.pdf (last visited June 2014)]

once or twice a month.[10] For many "daily necessities" (such as bread or meat), Bulgarian customers prefer to go to traditional specialised establishments. Finally, fruits and vegetables are also usually purchased from local specialised grocers.

As a result of this in recent years, most retail chains began to open new format of stores—smaller convenience-type outlets, closer to consumers, in downtown or in highly populated residential areas.[11] Until a few years ago, these locations belonged to independent groceries, while modern retailers grew in the outskirts. However, it turned out that the consumer shopping habits do not change quickly, and Bulgarians still prefer to shop more frequently in smaller volume. These stores have longer work hours adjusted to the usual work hours of costumers, and assortment is limited to staple products. Unlike in other foreign markets, in Bulgaria prices between such convenience stores and hypermarkets are not substantial because the market is highly fragmented. Convenience stores also bring benefits to traditional retailers. Most are not able to withstand the double pressure from the "modern" chains and from the economic crisis. Instead of going out of business, these players prefer to rebrand by franchising. Smaller outlets, especially in small towns, have the advantage to have loyal customers; often, shop owners and assistants know many consumers by name and try to cater to individual consumer needs. Finally, rebranding helps foreign retailers that sometimes face the resistance of local communities that feel that foreign investors may put local independent groceries out of business.

[10] In a GfK survey, made in 2011, consumers respond that they shop in convenience stores/minimarkets in neighbourhoods 18 times per month and at hypermarkets/discounters once per week. About 25 % of consumers do not shop at discounters—usually the youngest and the oldest consumers. Regular consumers of discounters are those at 20–49 years age, households with more than one member, and those with higher income. At the same time, often in smaller towns, groceries are also informal places for socialising (see GAIN Report no. 1203 of 31 January 2012).

[11] See GAIN Report no. 1203/31 January 2012.

6.1.2 Legal Background

Bulgaria introduced competition legislation in 1991 with the adoption of the first Protection of Competition Act[12] (the "PCA"). It was revised several times in line with developments in EU competition law doctrine and finally replaced by a new law in 1998.[13] Ten years later at the end of 2008, following Bulgaria's accession to the EU on 1 January 2007, a new PCA[14] came into force, which further harmonised Bulgaria's competition regime with EU law in line with the changes that were introduced by Regulation 1/2003 and Regulation 139/2004. The third version of the act was drafted with the assistance of the Italian competition authority[15] and EU financial support under the PHARE programme.

The PCA is the primary legislative act governing competition law in Bulgaria. It comprises the substantive rules on restrictive horizontal and vertical agreements, abuse of dominance and monopoly, merger control, sector inquiries, compliance review of legislation and administrative acts, and unfair trading practices. The PCA also constitutes the national competition authority—the Commission on Protection of Competition—and sets out the procedural rules for investigations, sector inquiries, enforcement, and imposition of penalties for breaches of competition regulations.

Pursuant to its Art. 2, the PCA applies to any relationship resulting from operations on the territory of the Republic of Bulgaria, or beyond it, as long as it does or may prevent, restrict or distort competition in Bulgaria. The act does not contain rules dedicated specifically to grocery retail or another business sector. There are also no sector-specific rules in other laws and regulations pertaining to grocery retail.

6.1.2.1 Unfair Trading Practices

Rules against unfair competition have existed in Bulgaria since the first enactment of a PCA in 1991, and they are regarded as a traditional element of the competition protection regime, together with antitrust enforcement and merger control. The original regulation of unfair trading practices was quite basic, and in 1998 the second PCA introduced a major upgrade by implementing in itsChapter VII detailed rules based on accumulated case practice. They were preserved in the third and currently effective statutory version with minor additions, the most notable being the introduction of specific prohibitions against misleading and comparative advertising.[16]

[12] Promulgated in State Gazette 39/17.05.1991, in force as of 20 May 1991.

[13] Promulgated in State Gazette 52/08.05.1998, in force as of 11 May 1998.

[14] Promulgated in State Gazette 102/28.11.2008, in force as of 2 December 2008, as subsequently amended and supplemented.

[15] Autorità Garante della Concorrenza e del Mercato, http://www.agcm.it/.

[16] Prior to 2008, advertising messages were regulated by the Consumer Protection Act, but the national legislator concluded that adverse effects of misleading advertising practices damage competitors as much as consumers and decided to implement Directive 2006/114 by consolidating its rules into the PCA's chapter on unfair competition (see Sec. 2 of the Supplementary Provisions of the PCA).

Pursuant to the statutory definition, "unfair competition" is any act or omission to act in the course of business activity that is inconsistent with fair business practices and harms or may harm the interests of competitors.[17]The PCA further defines and prohibits in its Chapter VII the following specific forms of unfair competition: (1) prejudicing of the trade reputation and good will of competitors; (2) misrepresentation with respect to goods or services; (3) misleading and prohibited comparative advertising; (4) imitations related to product appearance, trade names, trademarks or distinctive symbols, domain names or webpage design; (5) unfair solicitation of clients (e.g., promotional games with high rewards); and (6) use or disclosure of trade secrets in a way that is inconsistent with fair business practices.

Unfair competition is a form of tort, which is subject to the presence of the following prerequisites, applicable to all forms of unfair competition, envisaged in Chapter VII of the PCA:

- there is an act or omission to act within the course of business;
- the act or omission to act is inconsistent with fair business practices[18];
- the parties involved are competitors on the relevant market; and
- the act or omission to act has harmed or may harm the legitimate interests of competitors.

The general prohibition is regarded as subsidiary to the specific rules, but according to court interpretations, a violation of the latter must exhibit the general features of the former.[19] Thus, even if a particular case does not qualify under one of the specific forms of unfair competition (Arts. 30–37 PCA), it may still fall within the scope of the general unfair competition tort (Art. 29 PCA).

At first glance, unfair trading practices (the "UTPs") between undertakings operating on different levels of the supply chain seem to be left outside the scope of Chapter VII PCA. However, examples from case practice indicate that some types of unfair conduct between non-competitors (e.g., abuse of reputation and goodwill,[20] abuse of confidential information,[21] etc.) may also qualify as administrative violation under Art. 29 PCA. Moreover, the CPC has held explicitly that where proceedings are initiated without a petitioner (*sua sponte*), there is no need to analyse competitive relations in order to establish the existence of unfair competition.[22]

[17] Art. 29 PCA.

[18] According the statutory definition (Sec. 1, para. 2 of the Supplementary Provisions of the PCA), "fair business practices" means the rules regulating market behaviour, which originate from laws and common commercial usages and do not infringe the accepted principles of morality.

[19] Decision of the Supreme Administrative Court no. 7966/2006 on case no. 3345/2006, 2nd Grand Chamber.

[20] CPC decision no. 846/2009.

[21] Decision of the Supreme Administrative Court no. 8730/2008 on case no. 5489/2008, 2nd Grand Chamber.

[22] See, e.g., CPC decision no. 345/210 and CPC decision no. 375/2010.

Finally, it should be noted that the existing regulatory framework in Bulgaria is geared towards prevention of "unfair competition", which as a concept is somewhat different from UTPs as defined in the Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe.[23] Practices that indicate misuse of bargaining position to the detriment of the other contracting party seem to fall outside the PCA, as far as such unilateral conduct is not linked to a position of dominance.

6.1.2.2 Antitrust Enforcement

In its Chapter III devoted to illegal restrictions of competition, the PCA contains an open prohibition against all types of agreements between undertakings, decisions of associations of undertakings or concerted practices, which by object or result prevent, restrict or distort competition.[24] The general provision is supplemented by a non-exhaustive indicative list of anticompetitive practices.

Certain "hard-core" restrictions are regarded as *per se* anticompetitive due to their inherent ability to distort competition on the relevant market. Examples include price fixing, market and customer allocation, and output limitations. A mere plan or negotiation of hard-core restraints constitutes an infringement, even if no actual negative effect can be observed on the relevant market.[25]

6.1.2.3 Exemptions from Competition Law Prohibitions

The grocery sector is not exempted, and all restrictions of national and EU competition laws apply in full. Furthermore, no exemption exists for small farmers and suppliers, and SMEs in general are subject to the same competition law restrictions as large undertakings.

6.1.2.4 Contemplated Amendments to Competition Law

On September 2012, a draft bill for PCA amendment was submitted to the Parliament, with the stated purpose of countering unfair B2B practices in the retail supply chain. This draft was a product of long public discussions, spanning more than 2 years. Following the announcement of the European Commission's report on competition in the food supply chain, the Bulgarian Ministry of Finance asked the CPC whether in the light of the report specific national regulation was required. On May 2010, the CPC issued an official opinion stating that the existing rules for protection of competition are sufficient and any problems in the retail supply chain should be best handled by self-regulation within branch organisations.[26] Later the same year, however, in response to complaints from local suppliers alleging abusive practices in the distribution chain of consumer goods, the Ministry of

[23] See http://ec.europa.eu/internal_market/consultations/2013/unfair-trading-practices/index_en.htm (last visited June 2013).

[24] Art. 15(1) PCA.

[25] CPC decision no. 1150/2007.

[26] CPC decision no. 495/2010.

Economy and the Ministry of Finance created a Joint Task Group (the "JTG") to investigate further whether legislative intervention was necessary.

The JTG concluded that competition in the retail supply chain is distorted due to the existence of retailers with "significant market power" (the "SMP") that apply too much pressure on weak suppliers. The JTG dismissed without much discussion soft approaches (as industry self-regulation and special dispute settlement procedures) and started deliberating legislative intervention through an amendment to the PCA. Several proposals for PCA overhaul were circulated for public discussion, within which two principal approaches could be distinguished: (1) introduction of prohibitions against specific clauses within supply agreements (such as listing fees, deferred payment, labelling requirements, buy-back agreements, long-term resale below supply cost, etc.) and (2) adoption of a general prohibition against unfair business practices by SMP operators, following the approach for combating abuse of dominance. Within the second camp there was a debate on how to define SMP—whether to use strict criteria (such as annual turnover or number and size of outlets) or to implement an open definition, mirroring the respective rules on dominance.

Proponents of the second approach prevailed, and in the middle of June 2012 a draft bill was published on the Ministry of Economy's website, proposing a set of fresh rules on prohibited use of SMP to be integrated into the PCA chapter on abusive unilateral behaviour. By the end of the month, the CPC published its official opinion on the text, which though critical of the drafting quality was generally in support of the core ideas.[27] In September, a slightly revised version of this bill was submitted to Parliament, and it was sponsored by politicians from the four principal political parties—both majority and opposition.

The idea of the legislator was to introduce the concept of "significant market power" as a new category of market position (distinct from monopoly and dominance) that may support anticompetitive behaviour. According to the originally proposed definition, SMP is attributable to an undertaking having no dominant position, which nevertheless may distort competition on the relevant market due to the fact that its suppliers or customers depend on it. But despite the fact that SMP was differentiated from dominance, the draft did not envisage specific rules for it. The intention was to expand the scope of Art. 21 PCA, which contains an open prohibition and an exemplary list of abusive practices for dominant undertakings (similar to Art. 102 TFEU), to cover both abuse of dominance and abuse of SMP. In addition, it was proposed to add to the current list of potential abuses (price fixing, output limitation, tying, refusal to deal, etc.) "behaviour in violation of good faith commercial practices, which harms or may harm the interests of competitors". In short, the idea of the legislator was to impose on both dominant and SMP undertakings the obligation to refrain from UTPs.

The bill entered the agenda of the parliamentary committees, but the discussion progress was very slow. According to the publicly available information, until 15

[27] CPC decision no. 716/2012.

March 2013 (when the 41st National Assembly was officially dissolved) the internal review process was not completed in neither of the relevant committees. Following elections in May 2013, under its new composition the legislative body was striving to cover a lot of diverse hot topics and the PCA amendment was shelved until March 2014, when a new revised draft was presented, thus resuming discussions.

The new draft from 2014 contemplated introduction of three-tier control over grocery retail: first, it reinstated regulation on SMP; second, it provided for ex ante control of supply contracts and general terms of all large retailers, to be exercised by the CPC; and third, specific types of clauses were to be expressly prohibited. While SMP regulation was seen as universal, the two other sets of rules would be sector specific and would affect only food retailers with annual turnover of over BGN 50 million (approx. EUR 25 million). Such retailers would be obliged to send their contract templates to the CPC for review and approval, following which they were to be published on a website and made publicly available. Deviations from the authorised templates would not be permitted unless expressly authorised by the CPC. Last, but not least, the new draft also introduced the possibility for protection of the identity of complainants, if so requested.

As can be expected, the legislative proposal triggered strong opposition from modern trade, but retailers were supported by many other industries. It should be noted that the bill was marked by numerous drafting faults[28]—most of the texts were very ambiguous and allowed the implementing authorities considerable freedom to interpret the rules and expand their scope as seen fit. Therefore, many perceived the new regulation as another tool for exercising pressure on specific businesses.

The public campaign mounted by various business organisations was not sufficient to discourage the majority coalition from proceeding with the plan, though between first and second reading significant changes were introduced in the draft text. The final version, as adopted by the Parliament on 18 June 2014, contains the following three new types of rules: (1) prohibition against abuse of superior bargaining position, defined as a form of unfair competition; (2) administrative oversight over general terms of large retailers; and (3) specific requirements and limitations for contracts concluded by large retailers.

On 30 June 2014, the President imposed a partial veto, motivated by concerns that the contemplated regulation neglects consumer welfare for the benefit of selected businesses, while at the same time lack of precise legislative definitions

[28] For example, it was intended that the ex ante control over contract templates would follow the CPC procedure for "intercession for the benefit of competition". However, this procedure was originally intended to allow the NCA to adopt opinions on the compatibility of laws and decisions of other authorities with competition law. Since such opinions have purely advisory character, they are not subject to judicial control. But if the same procedure were to be applied to review and approval of contractual terms, the absence of possibility to appeal the CPC decision would amount to uncontrolled administrative intervention in violation of fundamental economic freedoms and due process rights.

providing broad authority for the CPC to issue implementing regulations was regarded as violation of the principle of separation of powers. The bill was discussed again in the Parliament on 11 July 2014, but sufficient majority was not present to overcome the presidential veto.[29] Thus, the legislative procedure was reinitiated once again, and a third reading is expected in the near future, but this time discussions will be limited to the texts covered by the presidential objections. Considering the political situation in the country and the fact that the government is expected to resign before the end of July, following which the 42nd National Assembly should be dissolved and new parliamentary elections should be held, it is quite likely that the discussion process over the bill will not be completed before the end of 2014.[30]

The principal features of the bill in its latest version can be summarised as follows:

New Regulation on Superior Bargaining Position

The original idea to regulate abuses of SMP as a form of antitrust violation was replaced by new rules on unfair competition, introducing the regulatory category of "superior bargaining position" (or "SBP"). According to the proposed definition for a new Art. 27a PCA, an undertaking would be deemed to have SBP where its commercial partners are dependent on it due to the characteristics of the relevant market, the specific relations between the undertakings concerned, the type of their activities, and the difference in their scale of business. The new regulation would prohibit any act or omission of a company with SBP that contradicts good faith commercial practices and harms or may harm the interests of the weaker contractual party. The criteria for SBP analysis and precision of the forms of abusive behaviour should be devised by the CPC in a special methodology. In case of violation, the CPC may impose on the undertaking concerned fines of at least BGN 10,000 (approx. EUR 5,000), up to 10 % of their aggregate annual sales in the affected product group for the preceding year (or up to BGN 50,000 in the absence of turnover).

It is clear that unfair trading practices are not a problem resulting from "market power" per se since in many cases abusive terms can be forced upon weaker contractual parties by companies commanding small market shares. Therefore, a regulation focusing on the specific contractual relationship indicating harmful effects seems more appropriate than antitrust rules, which only look at market structure. Still the statutory definition has many problems that open the room for discriminatory implementation. These flaws were among the principal reasons that prompted the President to refuse to promulgate the bill and return it for further deliberation.

[29] According to the Bulgarian Constitution, an absolute majority of all MPs is required to overcome a presidential veto.

[30] These observations are valid as of mid-July 2014.

First, elimination of bargaining power cannot be a goal by itself. It is completely possible that a behaviour that at first glance seems to exhibit the traits of an unfair practice is actually beneficial to consumers. For example, pressure for lowering procurement prices that is accompanied with a parallel decrease in retail prices is a gain for consumers. For this reason, SBP in itself and pressure on the weaker party should not be deemed to represent a violation of competition law, as far as there is no harm or threat for consumers.

The core objective of competition law is protection of consumer welfare, while promotion of economic efficiency is only the tool to reach that aim. The new statutory rules against abuse of SBP discuss only the interests of businesses and their inability to obtain better deals. Thus, the actual effects of bargaining power on consumer welfare are completely neglected. As a result, the contemplated regulation is not in compliance with the principle of consumer protection.[31]

Second, it was noted that delegation of competence to the CPC to devise all criteria for implementation of the new rules on SBP is not in line with the constitutional requirement that all material socio-economic relations are regulated by statutes. The contemplated legislative delegation would grant the CPC complete freedom to assess, in its discretion, which situations fall within the purview of the prohibition for abuse of SBP and which do not. Moreover, the possibility for frequent modification of the criteria would lead to lack of foreseeability with respect to the applicable requirements for exercise of economic activity and thus devaluate legal certainty and destabilise the very foundation of economic relations.

Administrative Oversight over General Terms of Large Retailers

The second regulatory line[32] introduced a general obligation for all food retailers with annual turnover exceeding BGN 50 million (approx. EUR 25 million) to submit their contracts and general terms used in food procurement transactions before the CPC for review. The templates must be published on the company websites and used in all relations with suppliers. The same notification procedure must be followed for all modifications. Clearly, the original idea for ex ante control was abandoned in favour of simple notification. However, the bill also states that the CPC must open proceedings on suspect abuse of SBP if it finds that some of the clauses in a template are not in compliance with the law. Moreover, deviations from the official templates are prohibited under the threat of severe sanctions that may reach 1 % of the average daily turnover calculated with respect to the preceding fiscal year.

The first problem identified in the presidential veto is the discriminatory scope of the new regulation: the rules impose obligations only on food retailers, disregarding the abusive potential of the behaviour of food manufacturers and traders. This is in sharp contrast with all market analyses, which indicate that unfair practices are

[31] Art 38 of the EU Charter of Fundamental Rights.

[32] The bill was designed as an amendment to the PCA, but it also supplements the Foods Act, where all new sector-specific rules would be introduced.

possible on all levels of the food supply, as indicated by the European Commission in its Green Book.[33]

In addition, the President supported the objections raised by businesses that the law would effectively limit the freedom of economic initiative in the food retail sector. The result would be super-regulation, which would affect only selected companies. The discriminatory approach finds no justification since the addressees are the largest companies, which are also the most transparent in their dealings, while the less law-abiding market players would not be affected. Thus, the contemplated regulation would in effect stimulate the grey economy.

In addition, it should be noted that the prohibition for deviation from the published templates is so broadly formulated that if interpreted literally could mean that the contract parties cannot negotiate any conditions that could take precedence over the general terms. Such a broad limitation of freedom of contract seems out of proportion with the declared legislative goals. The very requirement for uniform terms of dealing, with the additional obligation that such terms be announced publicly on a website, negates all freedom to rationalise economic behaviour in line with the market specifics. Moreover, this could lead to harmonisation of procurement terms of retailers, with an outcome that could hardly be expected to be pro-competitive.

Sector-Specific Contract Law Rules

The bill also introduced a new Art. 19a in the Foods Act, which regulates procurement agreements of large retailers by mandating written form and prohibiting the following type of clauses:

1. exclusivity arrangements, which ban or restrict the ability of a supplier to offer or purchase goods or services to or from third parties;
2. MFC clauses, which prohibit or restrict the ability of a supplier to provide the same or better commercial conditions to third parties;
3. sanctions for providing the same or better commercial conditions to third parties;
4. clauses for unilateral amendment of the contract;
5. fees or discounts related to services that are not actually rendered or with a value that does not correspond to the service actually rendered:
6. transfer of unreasonable or disproportionate commercial risk towards one of the parties;
7. payment terms, longer than 30 days as of the date of issuance of a supply invoice;
8. prohibition or restriction on a contracting party to transfer receivables to third parties;
9. clauses permitting the retailer to return to supplier goods with expired shelf life and/or to impose penalties on supplier for in-store shelf life expiry.

[33] Green paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe (COM(2013) 37/2), pages 7–8.

The bill further requires that all grounds and procedures for unilateral termination shall be expressly set in the agreement. In case of unilateral termination without prior notification or in case of breach of the notification period, the aggrieved party shall be entitled to compensation for the damages caused by the termination.

All these rules have mandatory character, and any agreement in deviation shall be null and void. In addition, the food safety authorities are empowered to supervise compliance with the new contractual requirements and to impose fines in the range of BGN 2,000–3,000 (approx. EUR 1,000–1,500) for each case of established violation.

While some of the sector-specific rules seem straightforward, others are quite ambiguous, which was the reason for the presidential veto in this respect. It was noted that the prohibitions are too broadly formulated and may restrict perfectly legitimate practices. For example, the prohibition on unilateral modification of the agreement could prevent use of price update clauses in case of achieved turnover targets or pursuant to changes in official benchmarks. Similarly, the prohibition on return of goods with expired shelf life in effect prevents the use of consignment trading models. The rule concerning shifting of commercial risk is also ambiguous as there is no definition of what is "reasonable" and what is "proportionate".

More importantly, the authorities would be allowed to evaluate and balance counter-obligations of the parties and may declare that a specific fee is illegal (in whole or in part) because it is deemed disproportionate to the value obtained by the supplier. And while such an analysis could be theoretically possible with respect to services and the respective fees, it is not clear how anyone can measure the countervalue of a discount, which by its very essence means reduction of the price. It is also unclear what degree of discrepancy in the two values could lead to nullity of the specific arrangement—whether it should be significant or any (even formal) difference would suffice.

The President also asked the MPs to reconsider whether it is prudent to empower the food safety authorities to exercise control over the contents of commercial agreements. Considering that their primary competence is to supervise production and trade with foods with respect to hygienic and quality standards, it seems rather naïve to expect that the same officials could possess adequate knowledge to analyse the legal and economic effects of clauses in procurement contracts. At the very least, that would require building new administrative capacity, which in turn would have budgetary consequences that were discussed neither in the bill itself nor in the motives thereto.

New Approaches to Self-Regulation

In its final sections, the statutory amendment envisages the creation of a new National Consultative Council (the "NCC") on the better functioning of the food supply chain, comprising associations and professional organisation from the sectors of food production, processing, and retail. It should be supplemented by a conciliatory committee that would receive the task to resolve disputes between companies in the food supply sector through mediation.

The creation of a consultative body that would analyse the food retail sector and assist in the determination of best practices was supported by all principal stakeholders. This was clearly the preferred option for businesses, which vigorously opposed state intervention on the market. Still it must be noted that this last part of the bill is the least developed. Many essential issues with respect to the composition and functioning of the new bodies remain unsettled. Thus, the provisions are only declaratory in nature, and there are no clear solutions that could be effectively implemented.

Moreover, parallel introduction of the new administrative oversight with ambiguous self-regulatory mechanisms would undermine any possibility for development of the latter. The two types of regulation contradict with each other to a large extent, creating a risk from overlapping competences leading to over-regulation.

Short Comments

"Levelling the playing field" was among the principal reasons for the establishment of the JTG, which led to the conception of the first PCA amendment. The text of all drafts (including the latest regulation on abuse of SBP) also refers explicitly to "violation of good faith commercial practices". However, until the bill becomes an actual law, these phrases would not be scrutinised by the administrative or judicial authorities and their meanings will remain unclear.

There are significant fears that the latest legislative approach, introducing three separate new forms of state regulation, would result in duplication and even triplication of statutory restrictions, expanded to an unclear range of situations, falling within the scope of the ambiguous concept of "superior bargaining position". This would create double jeopardy risk of multiplied sanctions in clear violation with the principle of proportionality.[34]Over-regulation could limit competition instead of protecting it. The proposed amendments may result in deterioration of the business environment by increasing administrative burden and investment risks owing to the gross interference of the state into the freedom of contracting.

The stated purpose of the legislator is to combat unfair practices in the retail sector. However, the first group of rules, regulating abuse of SBP, is sufficiently broad to encompass any industry and every business in Bulgaria. If the PCA amendment is adopted by the Parliament (in this or in its next composition) and becomes the effective law of the land, the CPC would assume principal responsibility for the enforcement of the new rules against abuse of SBP. The latest bill leaves many issues open, which would need to be answered in implementing regulations adopted by the CPC. Due to the numerous imperfections of the draft statutory definitions, the NCA would have significant discretion to assess which situations fall within the purview of the prohibition for abuse of SBP and which do not. One may only wonder whether such broad delegation of competence is in line with the fundamental principles of separation of powers. Certainly, it would not enhance transparency of statutory requirements or foreseeability of administrative intervention.

[34] Arts 49 and 50 of the EU Charter of Fundamental Rights.

6.1.2.5 Other Laws and Regulations Applying to the Retail and Grocery Sector

Except for the contemplated new legislation discussed above, up until the present, in Bulgaria there were no special regulations governing the structure of grocery retail and behaviour of the market players. Indeed, there are many sanitary and quality regulations that require compliance with certain minimum production and distribution standards, and there are consumer protection regulations that govern advertising and marketing practices. All these regulations, however, do not limit the scope of competition among grocery retailers.

The only UTPs that are regulated by national commercial law are deferred payments between businesses. Following an amendment to the Commerce Act,[35] effective as of 3 March 2013, the new Art. 309a in its Sec. 3 prohibits limitation of liability for late payments where this would represent a clear abuse of creditor's interest or violate common morals. The rule is fairly new, and there is no published case law on its application.

Bulgarian law does not prescribe a specific legal form for retail operations. As indicated by the CPC in its merger control practice,[36] the Bulgarian retail market is characterised by significant fragmentation and great diversity of players organised in various legal forms—sole proprietors, partnerships, commercial companies, cooperatives—in fact, all legally permissible structures.

The activities of online merchants are governed by the same rules as brick-and-mortar shops. The only additional regulation comes from the E-Commerce Act[37] and Chapter III, Section II of the Consumer Protection Act,[38] which provide enhanced rights for consumers with respect to distance sales.

For the sake of completeness, it can be added that at the end of 2012, high-ranking officials from the Food Safety Agency made public comments that the government intends to restrict online sales of certain "homemade" foods. However, until the date of this report, no specific steps have been made in this respect or at least a draft bill has not been submitted to Parliament.

6.1.2.6 Pricing Regulations

Grocery products are not subject to price controls in Bulgaria, and all market participants along the entire grocery supply chain are free to determine unilaterally their prices and profit margins. There are no regulations that prevent or limit the ability of large-scale retailers from passing on discounts they obtain from suppliers.[39]

[35] Transposing into national law the rules of Directive 2011/7 on combating late payment in commercial transactions.

[36] See, e.g., CPC decision no. 284/2013.

[37] Transposing into national law the rules of Directive 2000/31 on electronic commerce.

[38] Transposing into national law the rules of Directive 97/7 on the protection of consumers in respect of distance contracts.

[39] In fact, the statement of objections in the Retail Cartel case (discussed in Sect. 6.2.1.2 below) highlighted the asymmetry in reductions in procurement prices with respect to retail prices as a principal anticompetitive effect of the alleged concerted practice.

The PCA, however, explicitly prohibits dumping sales, regarded as a form of unfair competition.[40] "Dumping" is deemed to exist where the following requirements are satisfied:

1. goods or services are offered at prices lower than prime cost—i.e., below production and marketing cost;
2. long-term sales—the duration of the campaign should not be insignificant; thus, long short-term promotions (for several weeks up to a couple of months) are in principle permissible;
3. significant quantities—according to CPC practice, the relative share of goods dumped on the relevant market must account for more than one-third of the overall turnover (if high-value goods—over 10 % may suffice);
4. for the purpose of unfair solicitation of customers.

On the objective side, sales below prime cost must be maintained for a significant period of time, and the overall quantities must be sufficient to "capture" customers. On the subjective side, the law requires that the seller acts with intention to drive competition out of the market. However, the violation does not require evidence of injury to competitors—i.e., the CPC does not investigate the result. It is deemed that maintaining unreasonably low prices, which do not cover the relevant production and marketing costs, is a form of bad faith behaviour in itself, unless an objective economic justification can be provided.

6.1.2.7 Laws Designed to Empower Consumers to Make Competition Work Better Among Retailers

No specific provisions in this respect exist in Bulgaria.

6.1.2.8 Laws Deregulating the Retail Sector

No specific provisions in this respect exist in Bulgaria. On the contrary, there is a trend in expanding administrative regulation over grocery retail.

6.1.3 Market Studies

So far, the CPC has completed four sector inquiries related to food supply and distribution, focusing on wheat and bread,[41] dairy products,[42] and cooking oil.[43]

[40] The PCA distinguishes between dumping as a form of unfair trade practice and predatory pricing as a form of abuse of monopoly or dominant position. Herein we only address dumping as a form of unfair trade practice.

[41] First in 2005 – CPC decision no. 50/2005, and again in 2012 – CPC decision no. 1125/2012.

[42] CPC decision no. 1641/2010.

[43] CPC decision no. 686/2012.

6.1.3.1 Reasons for Conducting Market Studies

All market surveys were triggered by sharp increases in retail prices of the respective products, and the declared aim was to establish whether this was a result of speculation or natural economic trends. It's worth noting that the focus of investigation in all cases was on the most important staple foods—bread, milk, and cooking oil. Upward price movements in these goods usually result in broad public outcry, especially in times of economic crisis. The former Bulgarian government was very sensitive to public pressure and hence proactive in all situations of adverse effects on poor members of the society. In most cases, there were public announcements from members of cabinet urging the CPC to start investigations in order to find "which cartel is behind the speculative price increase".

The First Bread Supply Chain Inquiry

In 2003, the CPC started its first sector inquiry in food supply, focusing on three interrelated products—wheat, flour, and bread. The analysis covered the period from 2001 to 2004. The CPC aimed to analyse the effect of the market structure on competitive environment in production of and trade with wheat, flour, and common bread, as well as vertical links between these three sectors. Five separate relevant markets were defined: (1) production of wheat, (2) storage of wheat, (3) trade with wheat, (4) production and distribution of flour, and (5) production and distribution of common bread.

Among the principal issues in wheat production, the CPC identified the high share of grey economy and bad organisation and procedures of the state intervention agency.[44] Lack of access to funding was noted as the primary reason for small farmers to sell their harvest on "green", leading to limitation of free sales, while lack of effective commodity exchanges was highlighted as one of the main reasons for farmers to resort to intermediary traders.[45] Although there was sufficient free grain storage capacity, access was artificially restricted since most of it is owned by grain merchants, which exercise pressure on farmers to sell, often without proper documents and in violation of tax regulations. Low contractual discipline was also observed—payments were often deferred, leading to constantly increasing intercompany debt.[46]

With respect to flour and bread production, it was noted that the principal problem is also grey transactions. Competition with respect to the end product—bread—was further distorted due to a number of unfair practices, related to violation of trademark rights and misleading marketing announcements.[47]

[44] CPC decision no. 50/2005, pp. 143–145.

[45] CPC decision no. 50/2005, pp. 35–38.

[46] CPC decision no. 50/2005, p. 41.

[47] CPC decision no. 50/2005, p. 151.

Milk Supply Chain Inquiry

In 2010, the CPC adopted a sector inquiry of the competitive environment in the production, purchasing, and processing of raw milk, as well as in wholesale and retail distribution of dairy products. The authority established a significant lack of balance between the degree of concentration on the market of raw milk production and concentration on the market of milk processing.[48] According to the CPC, this asymmetry provides milk processors with a stronger bargaining position, and they are able to impose on farmers lower purchase prices and other unfavourable trading conditions.

Cooking Oil Supply Chain Inquiry

This sector inquiry was triggered by sharp increase in prices of sunflower cooking oil during the second half of 2010. Its purpose was to analyse the market structure and conditions for production and trade with sunflower seed and the oil derived from it and to evaluate to what extent pricing trends were influenced by objective factors or whether there was artificial distortion due to anticompetitive practices.

Similar to preceding inquiries, the CPC established that the first level of the supply chain—the market for production of sunflower seed—is highly fragmented, comprising numerous small farms.[49] In fact, the 50 largest producers accounted for less than 10 % of the total harvest. At the same time, there were a total of 10 seed processing and oil producing companies. The market shares of the first five of them were in the range of 10–20 % each.[50] The HHI index for the oil production market in 2009 was 1,108, increasing to 1,293 in 2010. According to the CPC, these values indicated low degree of concentration and absence of a clear leader, which in itself should signify presence of effective competition.[51]

Nevertheless, a comparative analysis of benchmarking data indicated that prices in Bulgaria do not follow the same fluctuation trends as EU and world averages. It was established that during the period of investigation, national prices exhibited much broader margins of change than the other EU 27 countries. The CPC concluded that speculative transactions are common on both investigated markets, thus creating price instability and greater short-term volatility.[52] The anomalies were explained with lack of transparency and inequality between the undertakings occupying different levels in the supply chain—production, processing, and distribution.

[48] CPC decision no. 1641/2010, p. 78.

[49] CPC decision no. 686/2012, p. 10.

[50] In fact, for the analysed period (2007–2010), none of them had reached a share in excess of 20 %.

[51] CPC decision no. 686/2012, p. 18.

[52] CPC decision no. 686/2012, p. 53.

Second Bread Supply Chain Inquiry

The fourth CPC inquiry in the food sector was triggered also by hysteric publications alleging asymmetric movement in prices of wheat and bread. This time the authority reviewed the composition and pricing trends in the three interrelated markets (for wheat, flour, and common bread) during the period 2008–2010.

The second analysis confirmed that the (wheat) farming level of production remains highly fragmented, trade is extremely unsophisticated, and there is no price transparency or stability.[53] Advanced risk management tools (such as futures and other financial derivatives) are rarely used. Absence of effective commodity exchanges also contributes to distortion of price information.

The number of market players is significantly reduced on the next level of the supply chain—wheat storage and trade. However, the majority of grain merchants are export oriented, and their operations do not have significant effect on the related national markets for flour and bread. In fact, the CPC concludes that there is no separate national market for grain storage since such services have become too expensive. Larger farming cooperatives use their own storage capacity, but small farmers (which account for the biggest part of all producers) are forced to sell shortly after harvest. Most milling and processing enterprises purchase directly from farmers, and the clear asymmetry in numbers between participants on the supply and demand sides of transactions[54] grants them a serious advantage with respect to bargaining position. In many cases, advance written contracts are not used and prices and quantities are negotiated "on the spot" during the harvesting campaign.

There is also a steady decrease in the number of bakeries, with only 824 registered in 2010, out of 2,500 in 2005.[55] There is a trend towards consolidation, but concentration ratios are still low.[56]

However, despite the evidence indicating comparatively healthy market structure on all levels of the supply chain, the CPC also observed the presence of asymmetries in dynamics of wholesale prices of wheat and flour. In particular, during the second half of 2010, the price of flour increased more sharply than the price of wheat. More importantly, the increase of flour prices occurred simultaneously with the increase of wheat prices—there was no time lag, which was considered common under normal market conditions. Suspecting prohibited coordination, the CPC opened parallel investigation against the Union of Bulgarian Millers and its members.[57]

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[53] During the period of investigation, the 15 largest producers account for less than 5 % cultivated area and none of them has individual share exceeding 0.5 % (CPC decision no. 1125/2012, p. 19).

[54] In 2009 and 2010, the 12 largest milling companies processed more than 65 % of all grain sold on the national market. However, there is no actual concentration on this level either since only the three largest companies have shares in excess of 10 %, but the CR_3 index for 2009 was lower than 40. Indeed, in 2010, CR_3 exceeded 40, but the market could still qualify as relatively competitive (see CPC decision no. 1125/2012, pp. 49–50).

[55] CPC decision no. 1125/2012, p. 71.

[56] CR_4 for 2009 amounted to of 27 %.

[57] CPC decision no. 1125/2012, p. 124 and CPC decision no. 958/2012.

6.1.3.2 Outcome of the Market Studies

The First Bread Supply Chain Inquiry

The CPC found that the first-degree market (wheat production) is extremely fragmented and could only benefit from consolidation—either contractually based or corporate.[58] Regulatory intervention through simplified export rules and procedures was advised, but it was noted that the public authorities should put more effort in tax & financial controls rather than on pricing intrusion. Most importantly, stimulation of commodity exchanges was highlighted as a priority, as this was conceived as the best option for countering the excessive bargaining power of wheat merchants.[59]

Competition in the milling sector was considered sufficiently healthy since most operators were SMEs. It was noted that the state could contribute by introducing uniform technical and quality standards and stimulate their adoption by appropriate tax measures.[60]

In the end-product market, the CPC again noted that the presence of many competitors and lack of dominant undertakings signify healthy market structure. However, there were signs of emergence of anticompetitive agreements among market players, aiming to fix prices and restrict access of competitors to specific regions. It was advised that a standard for "common bread" is necessary in order to serve as a basis of comparison between products.[61]

Milk Supply Chain Inquiry

The CPC established that the sector of raw milk production is highly fragmented. Most of the animal farms are small or medium-sized enterprises. The majority had an average number of 40–50 cows. The fragmented nature of livestock breeding leads to a dependency of farmers on buyers and milk processors.[62]

According to the CPC, this asymmetry has the potential to lead to unfair distribution of value added along the entire supply chain, from milk producers to end users, as a result of which a significant part of the generated income stays on the level of dairy processing.[63] In view of the above, the CPC stated that it supports the recommendations and conclusions drawn by the European Commission—i.e., that no special legislation is required and such problems should be overcome by means of the mechanisms and measures existing in the framework of the rules on the Common Agricultural Policy and national and EU competition laws.

[58] CPC decision no. 50/2005, p. 53.

[59] CPC decision no. 50/2005, p. 54.

[60] CPC decision no. 50/2005, p. 109.

[61] CPC decision no. 50/2005, p. 149.

[62] In 2009, for example, there were about 2,500 milk-producing farms that supplied 20 milk processing companies (CPC decision no. 1641/2010, p. 78).

[63] CPC decision no. 1641/2010, p. 79.

Cooking Oil Supply Chain Inquiry

The CPC claimed that the lack of transparency and price instability are results of bargaining inequalities. Significant fragmentation in sunflower seed production places farmers at a disadvantage when negotiation with merchants and processing companies. Absence of commodity exchanges also contributes to distortion of price information along the supply chain. In order to remedy the situation, the authority proposed adoption of three priorities:

1. promotion of sustainable contractual relations based on free market prices,
2. enhancing of pricing transparency along the supply chain for the purpose of promoting competition and combating pricing instabilities,
3. promotion of consolidation among undertakings on national level (e.g., through cooperation on farming level).[64]

Second Bread Supply Chain Inquiry

The CPC noted that price instability problems are observed in recent years not only in the bread supply but also with respect to all farm products and foods. The authority urged the government to address the situation by introducing specific measures for the promotion of effective competition on all levels of the grocery supply chain, proposing focusing on

- the development of legitimate mechanisms for increasing price transparency, such as publicly accessible price-monitoring platform collecting and processing data on national historical aggregated prices;
- support for standard compliant products, especially for farmers (e.g. bio-farming subsidies);
- the promotion of written agreements with the aim to increase legal stability of commercial relations and limit grey sector supplies.[65]

As a remedy against future sharp variations, the CPC suggested improving the balance of bargaining power along the wheat-flour-bread supply chain by:

- stimulating SMEs by providing easier access to funding and reducing administrative burdens,
- stimulating production and supply of high-quality wheat,
- promoting adaptation of farmers to the changing market environment by stimulating consolidation through various cooperative forms and branch associations.[66]

[64] CPC decision no. 686/2012, p. 55.
[65] CPC decision no. 1125/2012, p. 124.
[66] CPC decision no. 1125/2012, p. 125.

6.2 Competition Law Enforcement

6.2.1 Competition Law Enforcement Against Anticompetitive Horizontal and Vertical Agreements

6.2.1.1 Collusion Among Suppliers of Grocery Products

Horizontal agreements between suppliers for the purposes of control over quantities have been penalised by the CPC on several occasions. The best example of such case is the *Poultry Cartel*[67] investigation, which started after a series of press publications on the "abrupt" increase of poultry meat prices in July–August of 2007. The CPC dawn raided the office of the Bulgarian Poultry Union and amassed sufficient documentary evidence to allege that its members have consorted for the purpose of limiting production and raising prices.

The authority established that on several Union meetings it was decided that egg producers should sell all excess supply (in compliance with a negotiated delivery schedule) to one designated processing factory, which should serve as a buffer by grinding surplus eggs into egg powder. On other sessions dedicated to poultry meat, the Union adopted several recommendations encouraging all members to reduce their production by 30–40 %, and a special committee was set up to "supervise market trends". In order for the "recommendations" to reach all market players, the Union regularly published them in its magazine "Poultry Breeding". Parallel to that, the Union disseminated letters directly to its members with information on the adopted recommendations.

The CPC held that the mechanisms of taking "surplus" quantities out of the market have maintained artificially prices at levels higher than the ones that would have resulted from standard market dynamics. Collection of periodic reports on individual output quantities and dissemination of that data to Union members in a non-aggregate form was also condemned as a prohibited exchange of sensitive information.

For the sake of completeness, it should be noted that the NCA has not reviewed any cases of small suppliers (such as farmers) jointly retaliating against large grocery food retailers to punish the latter for selling low-priced imported agricultural products cheaply. At the same time, there has been a lot of publicity around complaints from local farmers and food processing companies against low-price imports. However, any joint action of suppliers related to the adoption of uniform prices or other trading conditions towards one or more specific retailers would constitute a prohibited agreement that could be prosecuted and sanctioned in accordance with Art. 15 PCA.

6.2.1.2 Collusion Among Grocery Retailers

So far, there have been only two investigations where the CPC evaluated the conduct of retailers in Bulgaria from an antitrust perspective. Since the first case

[67] CPC decision no. 601/2008.

was related to alleged abusive unilateral conduct (see Sect. 6.2.2 below), only the so-called Retail Cartel[68] case is discussed hereinbelow.

In 2009, the NCA launched an investigation against several "modern trade" chains[69] in response to complaints by local suppliers of imposition of unfair terms in supply agreements and abusive practices. Following a preliminary investigation of more than a year, in February 2011, the CPC issued a statement of objections alleging coordination of marketing strategies and price fixing for products in promotion. The authority focused its analysis on the following types of provisions present in the supply agreements:

- most-favoured-customer (MFC) clauses, pursuant to which a supplier is obliged to extend to the retailer any reduction in the supply price that has been offered to another retailer;
- clauses obliging suppliers to report to the retailer a lower net supply price granted to another retailer;
- product promotion exclusivity (PPE) clauses, which prevent suppliers to launch simultaneous promotional price decreases of one and the same product with different retailers;
- clauses on access charges (and, in particular, on their amount), pursuant to which suppliers are obliged to make payments for product listing and shelf space.

Each of the defendants had some but not all of the above provisions in its supply agreements, and none of the above clauses were present in the supply agreements of all defendants. Nevertheless, the CPC formulated the following specific objections:

1. The application of PPE clauses allowed defendants to exchange (through suppliers) information about their future marketing and promotional plans leading to coordination of marketing policy.
2. The parallel existence of MFC and PPE clauses in the supply agreements resulted in horizontal coordination of prices of goods in promotion.
3. The combined application of MFC with clauses relating to calculation of supply prices, and in particular clauses regulating the level and amount of access fees, resulted in coordinated price fixing—pushing procurement prices down.

While some of the allegations may seem a variation of the "hub-and-spoke" theory, the CPC did not offer proof or allege any actual communication or exchange of information through suppliers. According to the authority, the "intentional" implementation of the suspect clauses in supply agreements had "network effects" that allegedly increased transparency on the supply market, thus allowing retailers

[68] CPC decision no. 833/2012 on case no. 404/2009.

[69] Defendants in the case were Metro Cash & Carry Bulgaria EOOD, Billa Bulgaria EOOD, Kaufland Bulgaria EOOD, Kaufland Bulgaria EOOD & Co KD, Piccadilly AD, Maxima Bulgaria EOOD, and Hit Hypermarket EOOD.

to obtain current information about the supply costs and planned promotional activities of competitors. Market data did not support the price fixing allegation either since procurement prices were not identical.

The theory applied by the CPC was vulnerable to criticism on many grounds, e.g., because some of the types of clauses were block exempt and their use as evidence of a horizontal cartel raises policy concerns about legal certainty in competition law enforcement. However, instead of dealing with those concerns under the framework of the applicable block exemption regulations (e.g., by withdrawing the benefit of the block exemption), the CPC brought cartel charges.

The case was closed without a final decision on the merits. Eventually, all six defendants offered to abolish[70] the suspect clauses from their supply agreements, which the CPC found sufficient to alleviate its concerns. It should be noted, however, that the PCA does not allow adoption of commitments in cases of "serious violations". In its own Guidelines on Commitment Decisions from 2010, the CPC had stated that it would treat all price-fixing cartels and other hard-core horizontal restraints as "serious". The authority did not provide any meaningful explanation to reconcile the apparent contradiction between the law and its acceptance of the proposed commitments. It merely stated that the alleged horizontal coordination did not constitute a hard-core violation of competition law and the adoption of commitments was fit to redress competition concerns. Thus, without any further elaboration on this point, the position of the CPC undermined its own cartel allegations.

The "Retail cartel" case of 2012 is the only example of investigation on collusion among retailers. In addition, it should be noted that in the summer of 2012 the Minister of Agriculture announced that he has secured the agreement of several commercial chains to "freeze" prices of certain staple foods. Indeed, most large retailers started to distribute leaflets and even run radio ads about "frozen" prices. The opposition challenged the campaign, arguing that the government is succumbing to populist demands and actually stimulating cartel practices. The CPC issued a press release that it intends to investigate the topic, suspecting potential price fixing collusion between the retailers. The government tried to defend its position, arguing that this is not a cartel but a promotion. There is no data of opening of official CPC proceedings, and the entire campaign died out completely by the middle of autumn 2013.

6.2.1.3 Anticompetitive Horizontal Agreements at the Local Level

So far, the CPC has not reviewed complaints of horizontal collusion between retailers in a small locality. Judging from case history related to other sectors of the economy (e.g., taxi services,[71] bakery,[72] bus transport[73]), the limited territorial

[70] Some of them had already done so in 2009; thus, the only commitments offered were "not to implement such clauses in the future".

[71] CPC decision no. 39/2012.

[72] CPC decision no. 622/2008.

[73] CPC decision no. 205/2005.

scope of a suspect infringement would not prevent an investigation or mitigate the risk of imposition of sanctions.

The internal governance of grocery franchises has not been subject to review by the NCA in Bulgaria.

6.2.1.4 Resale Price Maintenance and Recommended Resale Prices

Existing CPC case history indicates that any attempt of a supplier to influence the pricing behaviour of its clients would be regarded as a straightforward competition restraint.[74] Setting minimum prices is considered a hard-core restriction that is *per se* illegal. Maximum prices are not regarded as automatically anticompetitive, and their actual effect on the market should always be evaluated. Generally, price caps are considered restrictive if they distort or eliminate price competition on the relevant market.[75] However, effects on a neighbouring (upstream or downstream) market would also be considered in case of price correlation—e.g., because the analysed products (sunflower seed) serve as principal inputs for production on the downstream market (sunflower cooking oil).[76] Price recommendations are also in principle permissible, as long as additional factors (such as penalties for non-compliance or incentives for compliance) do not alter their voluntary nature.[77]

The best example so far where the CPC has reviewed the legality of price recommendations with respect to distribution of FMCG comes from the *Danone*[78] case decided under the old PCA 1998. The focus of that investigation was certain resale price maintenance practices in the distribution of dairy products manufactured by Danone-Serdika AD (Danone). During the first months of 2000, Danone released on the market yoghurt bearing a retail price tag. Danone also entered into agreements requiring its distributors, inter alia, (1) to sell Danone branded yoghurt at prices not higher than the retail prices recommended by Danone and (2) not to sell Danone branded yoghurt at prices lower than base procurement prices, as per the effective price list of Danone. The distribution agreements also established performance- and volume-based rebate incentive schemes. The CPC defined a relevant market of production and distribution of natural (non-flavoured) yoghurt. During the period under review, Danone was a dominant undertaking on that market with a market share of just over 35 %.

The CPC held that the agreements executed between Danone and its distributors contained minimum resale price-fixing arrangements in breach of Art. 9 PCA 1998 (the equivalent of the present Art. 15 PCA and Art. 101 TFEU). In its analysis of the

[74] CPC decision no. 1292/2012.

[75] CPC decision no. 576/2008.

[76] CPC decision no. 1150/2007.

[77] The best example where price recommendations were treated by the CPC as prohibited price fixing is provided by the 2010 investigation against the National Chamber of Construction Companies, which was penalised for publishing and maintaining price benchmarks that were considered anticompetitive because of the existence of disciplinary powers and mechanisms against noncompliant members (see CPC decision no. 496/2010).

[78] CPC decision no. 139/2000.

effect of RPM on competition, the CPC drew a distinction between (1) maximum price fixing and recommended prices, on one hand, and (2) the establishment of minimum or fixed prices, on the other hand. The CPC considered that the practice of establishing maximum resale price levels and/or provision of recommended prices would normally not raise competition concerns, *unless such practices disguise other forms of price fixing*. In contrast, the minimum and absolute price fixing was classified among the most serious restraints on trade with a number of anti-competitive effects.[79] In this respect, the CPC highlighted the inhibiting effect on intra-brand competition stemming from the inability of distributors to compete on price levels.

In this particular case, the CPC ruled that the resale price maintenance arrangement contained in Danone's distribution agreements could not possibly have any pro-competitive effects. This conclusion was based partially on the premise that the rebate incentive scheme applied by Danone (a dominant undertaking) was an aggravating factor inhibiting inter-brand competition.[80]

In addition, it should be noted that at the end of April 2013 the authority issued three separate statements of objections alleging prohibited vertical restraints in the form of RPM and territorial allocation against several manufacturers of sunflower oil and their distributors. According to the official press release,[81] during its sector inquiry on the vegetable oil supply chain (see Sects. 6.1.3.1 and 6.1.3.2 above), the CPC discovered price recommendation clauses in the distribution agreements applied by certain manufacturers, which were regarded as suspect. The available data indicate that originally the CPC intended to bring cartel charges for horizontal collusion, but since it was unable to find such evidence, proceedings were split in three and transformed into allegation of prohibited vertical restraints. Thus, without much evidence about additional incentives or monitoring mechanisms, relying only on the text of the respective clauses, the CPC brought formal charges against each group of supplier-distributors for direct or indirect fixing of resale prices and allocation of markets in the form of limitation of the territorial scope of operations of distributors. The case is currently pending at the stage of defence submission, and a decision may be expected early this summer.

[79] In *Danone*, the CPC fell short of establishing a per se rule with regard to minimum resale price maintenance. Rather, it suggested that there may be instances where setting minimum or fixed prices would be permissible, provided that such vertical restraints stimulated inter-brand competition. This proposition, however, does not seem to have been further developed in the practice of the CPC, which has since *Danone* applied a uniform per se rule with respect to price fixing (see CPC decision no. 1292/2012).

[80] In *Danone*, the CPC suggested that a more stringent test for review should be applied to price recommendations issued by a dominant undertaking. In its subsequent practice, the CPC has taken this proposition further to suggest that analysis under Art. 15 PCA would always require a higher level of scrutiny with regard to vertical agreements involving a dominant undertaking (see, in particular, CPC decision no. 174/2006).

[81] CPC press release from 24 April 2013, available at www.cpc.bg.

6.2.2 Abuses of Dominance

Article 21 PCA prohibits any abuse by one or more undertakings of a dominant position and provides an exemplary list of abusive practices. In its case law, the CPC has dealt, among others, with various types of abusive conduct, such as abusive or predatory pricing, margin squeeze, discriminatory treatment, refusal to deal, tying, and bundling.

With respect to exploitative abuses, the CPC has the burden to prove that prices imposed by the dominant undertaking are not cost oriented. However, if such prices are (1) determined without the application of clear and transparent cost-oriented criteria, (2) not subject to negotiation, and (3) forced upon customers because they do not have any alternative source of supply, an in-depth economic analysis would not be necessary and prices will be automatically deemed unjustified or excessive.[82] The burden of proof shifts to the dominant undertaking to justify the level of prices it charges and to prove that such prices are determined on the basis of the cost of the product or service or that such prices are comparable to the prices on neighbouring geographic or product markets.

Discriminatory pricing exists where a dominant undertaking applies dissimilar prices to similar transactions, and discriminatory application of trading conditions exists where a dominant undertaking treats differently its customers, as a result of which customers are placed at competitive disadvantage.[83] However, price differentiation among customers would not be regarded as discriminatory if it is based on objective criteria and such criteria are equally applied to all customers of the dominant undertaking. For example, in an investigation of the discount scheme applied by a dominant distributor of audio-musical products, the CPC held that transparent and uniformly applied volume rebates do not amount to price discrimination.[84]

6.2.2.1 Abuse of Dominance by Retailers

As noted in the introduction to this national report (see Sect. 6.1.1.3 above), the Bulgarian grocery retail market is characterised by low concentration, and none of the market players commands a share higher than 10 %. In these circumstances, unilateral conduct should not be a reason for concern. Nevertheless, there is one notable occasion in the past when the CPC tried to enforce the rules on dominance, arguing that nationwide "cash-and-carry" trade forms a special and independent market, on which one single undertaking—Metro Cash & Carry Bulgaria EOOD (Metro)—operates and enjoys the advantages of unrestricted market power.

[82] CPC decision no. 147/2004.
[83] CPC decision no. 628/2007.
[84] CPC decision no. 268/2008.

The investigation (*Vemira vs Metro*[85]) was initiated on complaint[86] from a small confectionary producer (a sole proprietor with five employees), claiming that the access fee collected by Metro is not objectively calculated since it does not take into consideration actual use of shelf space, as a result of which companies with identical shelf access pay different fees. Petitioner also complained that the fee was not refundable upon termination and demanded review of other clauses in the supply agreement, including the turnover bonus, advertising bonus (for posting of items in Metro post), price guarantee, and the most-favoured-client clause.

Petitioner entered into contractual relations with Metro in 1998 but commenced deliveries in 1999 when the first two Metro stores started operations. During the investigated period (1999–2002), the relative share of sales to Metro from all petitioner's sales indicated a declining trend—starting at 62 % in 1999 and dropping to just 15 % in 2001.

The disputing parties signed a supply agreement, which was subject to annual review and renewal. Before commencement of business operations, petitioner had to pay a one-time "access fee" of fixed value (BGN 3,500—approx. EUR 1,750). Payment of this fee allowed the supplier to deliver up to ten items to the two Metro stores. In 2002, following the opening of three new stores, Metro demanded payment of additional BGN 5,425 (approx. EUR 2,770). Petitioner did not want to pay any additional amounts but did not declare relations with Metro officially terminated. After petitioner's refusal to pay the new stores' access fee, Metro did not send any orders for its products.

First Case Ruling

In its legal analysis,[87] the CPC notes that "cash & carry" wholesale is a distinct form of distribution service compared to the one offered by large-scale retailers. The latter supply end customers and do not offer certain "comforts" for small retailers, associated with wholesale—e.g. bulk packages, greater assortment, tax invoices. It was also stressed that access to "cash & carry" stores is restricted to registered customers, and there are minimal purchase quantity requirements, which make them less suitable for end customers. Because of this, the CPC concludes that "cash & carry" wholesale distribution is a separate service market with national scope, on which Metro had dominant position (as the only other wholesaler operating under the same model had only one store in Sofia).

[85] CPC decision no. 187/2003 on case no. 26/2003; reversed on appeal – decision no. 6584/2004, Supreme Administrative Court, 5th Chamber; reversal confirmed on cassation – decision no. 6595/2005, Supreme Administrative Court, 2nd Grand Chamber; proceedings reopened on case no. 170/2005, ending with CPC decision no. 293/2005; reversed on appeal – decision no. 7404/2006, Supreme Administrative Court, 5th Chamber; reversal confirmed on cassation – decision no. 11909/2006, Supreme Administrative Court, 2nd Grand Chamber; proceedings reopened on case no. 309/2006 ending with CPC decision no. 257/2007, which was not appealed.

[86] Procedure was governed by PCA 1998, which did not provide for two stages separated by a statement of objections—this system was introduced in Bulgarian only in 2008 with the third PCA.

[87] In sharp contrast with its own practice on merger control cases in the retail sector.

With respect to the legality of the access fee, the CPC noted that it was clearly described in the supply agreement as a one-time "access" payment, associated with commencement of business operations, and not refundable upon termination. Because of this, the authority concluded that there was no unfair treatment on the part of Metro and the petitioner, being a merchant, should have been aware of the nature of the fee.

The CPC, however, found that the method for determination of the amount of the fee was not transparent. Metro claimed that the access fee was determined on account of various factors, including, in particular, estimated turnover, additional services used by the supplier, advertising budget, etc. The CPC dismissed Metro's explanations, noting that they sharply contradict the description of the fee as "remuneration for merchandising know-how". The authority stated that if the fee were based on the value of delivered intangible "property", it should have been the same for all suppliers, or at least variations should have been within a close range. However, in the investigated case, the fee varied from BGN 1,000 to BGN 10,000 (EUR 500–5,000). Because of this significant difference, the CPC concluded that Metro did not define clear criteria for the determination of the access fee amount and reserved itself considerable space for discretion. A consequence of the lack of transparency was the determination of unreasonably high access fees. Since Metro failed to provide conclusive evidence on the method of calculation, the CPC was not convinced that it was objectively justified and held that the amount was purely discretionary.

With respect to the price guarantee obligation, the CPC noted that observance of fixed prices for a short period of time is not tantamount to abuse of market power, as long as this could not affect adversely competition. In this case, it was important that Metro commended operations in 1999, and there were no sales history data. Thus, it was completely reasonable that the company would seek some levels of procurement prices to be guaranteed so that it could plan future orders and funding of operations. In addition, the CPC concluded that a price guarantee of 9 months, such as the one under the supply agreement, was acceptable in the circumstances. Although petitioner claimed that the clause was active for a longer period (up to conclusion of the agreement for 2001), there was no evidence induced that there was an actual request for increase in procurement prices. The supply agreement provided for a specific mechanism for price amendment, which required a written notification of a minimum term to be served to Metro before the contemplated effective date. In the absence of actual price increase notifications, the CPC dismissed all claims that Metro exercised pressure on petitioner to keep prices low.

With respect to the MFC clause, the CPC noted that although there is no explicit prohibition to sell products to third parties at better conditions, such an obligation would nevertheless result in restriction of the commercial freedom of petitioner. If the supplier was obliged to notify Metro about each transaction on more favourable terms (and further obliged to implement those terms immediately), that would represent an exploitative abuse because Metro would be using its market power to impose conditions and receive benefits that were not available in the case of effective competition.

For implementing prohibited clauses, the CPC imposed a fine on Metro in the amount of BGN 80,000 (approx. EUR 40,000). On appeal, the Supreme Administrative Court (SAC) quashed the administrative decision, noting that the relevant market was not correctly identified. The court advised that the CPC should have analysed the substitutability of all similar distribution services, offered by other merchants in the country, before assuming that "cash & carry" was a separate market. Cassation appeal confirmed this position, and the case was remanded to the CPC for de novo review.

Second Review (CPC Case No. 170/2005)

Trying to follow SAC's instructions, the CPC devoted a significant part of its analysis on interchangeability between retail and "cash & carry" distribution services. The authority again found that "cash & carry" wholesale is not substitutable with retail distribution. It was also stressed that Metro has started operations in Bulgaria in 1999 and just for a year managed to register a database of more than 600,000 clients. According to the CPC, this made the company a preferred partner for food manufacturers because it offers fast access to a large group of potential customers. For small manufacturers, in particular, which offer less advertised products, Metro provided an opportunity to participate in promotional campaigns in parallel with famous brands. Thus, according to the CPC, the "cash & carry" distribution concept, represented in Bulgaria solely by Metro, is very important for suppliers as it offered an unparalleled opportunity to enlarge their business.

Analysing the activities of confectionary producers and the various distribution channels available to them, the CPC concluded that the relevant market should be defined as the market for "cash & carry" distribution. Since Metro held a de facto monopoly position on that market (because there was no other national operator that offers the same service), its behaviour was abusive for reasons discussed in the first decision. Following this line of reasoning, the CPC re-imposed on Metro a fine of BGN 80,000 (EUR 40,000).

On appeal, the SAC again quashed the CPC decision, noting that the relevant market was not correctly identified. The court again advised the CPC that it should analyse substitutability of similar distribution services, but the focus should not be limited to differences between retail and "cash & carry", and the analysis should cover also all forms of wholesale operations. Cassation appeal confirmed this position, and the case was remanded again to the CPC for de novo review.

Third Review (CPC Case No. 309/2006)

In its third take on this case, the CPC defined the relevant market as "services for distribution of chocolate and sugar confectionery". The authority noted that the assortment structure of Metro's "Pastry and Sweets" department (comprising tea, coffee, cocoa, bread, pastry, etc.) indicates that chocolate sweets are not among its priorities. Accordingly, the share of sweets within the total turnover of Metro was less than 5 %. Thus, despite the lack of credible national statistics data, relying on information from major sweets producers (such as Kraft Foods, Nestle, and others) about the relative share of Metro sales from all their sales in Bulgaria, the CPC

concluded that the actual market share of Metro on the relevant market during the period 1999–2002 should be less than 5 %.

Following this analysis, the CPC ruled that the position of Metro on the relevant market could not be defined as dominant. Accordingly, its behaviour was not subject to review since in the light of the insignificant market share in distribution, no practice could be deemed to have any negative effect.

6.2.2.2 Abuse of Dominance by Suppliers

Under the current PCA, reselling below cost and de-listing of suppliers could represent a violation only if the company is dominant. A good example where sales below cost for a significant period of time were condemned as a violation comes from the *Simid*[88] case, decided by the CPC in 2005.

The investigation on the pricing practices of Cooperative "Simid 1000" (Simid) was started pursuant to a complaint from one independent bakery, backed by the Bread and Pastry Producers Association, in 2004. It was alleged in particular that Simid sold bread at prices below production costs, thus aiming to drive its competitors out of the market.

At the time of the investigation, the cooperative owned two of the principal industrial scale bakeries in Sofia and was one of the strongest players on the markets for flour and bread in Bulgaria. Simid had established its own distribution network, which allowed for easy access to raw materials and retail channels. The cooperative owned or controlled a total of 22 vertically integrated companies, active on all stages of production on the supply chain wheat-flour-bread.

The CPC concluded that the economic characteristics of Simid, considered together with its market share in Sofia region of about 40 %, prove that it had a dominant position on the *regional market* for common bread.

Following a detailed analysis of price levels in the principal bakery and pastry classes and the associated production and distribution costs, the CPC established that during the period January–November 2003, Simid had applied unreasonably low prices. As a result of this, the cooperative had forced the other market players to sell below costs and suffer losses, or lose clients. This behaviour was also a clear signal to potential competitors not to enter the market.

The CPC noted that a distinction should be made between (1) sales below variable cost of production and (2) sales above variable cost but below total production cost. In the first case, the anticompetitive purpose of the practice could be presumed to exist since a sale below variable cost could not have any rational market explanation. In the second case, predatory pricing would be found to exist only if the pricing policy of the dominant undertaking was part of a plan to drive competitors out of the market. Most importantly, dumping pricing must be applied for such a period of time so that it has negative effect on competition.

[88] CPC decision no. 88/2005, reversed on appeal – decision no. 6894/2006, Supreme Administrative Court, 5th Chamber.

In applying the above rules, the CPC found that during a period of 11 months in 2003, Simid sold bread in Sofia at prices lower than its average variable cost. Although this alone would have been sufficient for the authority to find that the cooperative was abusing its dominant position, it was also noted that during the same period Simid was selling bread on other regional markets at higher average market price (transport costs accounted for). The CPC claimed that the malicious behaviour of Simid had specific anticompetitive results—its main competitor was forced to cease deliveries to several of the largest retail chains as a result of the low prices offered by the cooperative. Ruling that Simid's behaviour represented abuse of dominant position, the CPC imposed a fine of BGN 250,000 (the highest possible fine at that time was BGN 300,000).

On appeal, the Supreme Administrative Court quashed the CPC decision on the ground that the relevant product market *was national in scope* and Simid was not a dominant undertaking on such a broader market. The court did not address any of the substantive issues of the test for predatory pricing set by the CPC. A point that remained somewhat unclear was what duration of sales below prime cost would be sufficient evidence of abusive behaviour. From the *Simid* decision, it appears that the key issue with regard to the time of application of predatory prices is not the absolute duration of the dumping practice but rather whether such a period was sufficient to cause adverse effects on competition and competitors. In its dicta, however, the CPC noted that even a short period of time during which predatory prices were applied might suffice to establish abusive behaviour.

6.2.3 Abuse of Buying Power, Abuse of Dependency

6.2.3.1 Legal Provisions Regarding Abuses of Buying Power

The PCA in its current version does not prohibit abuse of dependency outside the scope of dominance. However, as explained in Sect. 6.1.2.4 above, since September 2012 several draft bills for PCA amendment were discussed by the Bulgarian legislators with the stated purpose of countering unfair B2B practices in the retail supply chain resulting from inequality of bargaining power.

6.2.3.2 Definition of Buyer Power

Neither the law nor the CPC case practice provides a specific definition for the term "buyer power". The latest bill for PCA amendment introduces the concept of "superior bargaining position" (SBP) as a new regulatory category, which shifts the focus of the analysis from the market structure to the specific contractual relationship. The definition states that an undertaking would be deemed to have SBP where its commercial partners are dependent on it due to the characteristics of the relevant market, the specific relations between the undertakings concerned, the type of their activities, and the difference in their scale of business.

6.2.3.3 Is Abuse of Buyer Power a *Per Se* Offence?

According to the rules regulating unilateral conduct by dominant undertakings, practices that may be deemed to restrict competition by object are prohibited *per se*, while in all other cases economic effect analysis is required.

Assuming that the PCA amendment is adopted in the present form, it would prohibit "any act or omission of undertaking with SBP, which contradicts good faith commercial practices and harms or may harm the interests of the weaker party by means of unreasonable refusal for supply or purchase of goods or services, implementation of unreasonable or discriminatory terms and conditions, or unreasonable termination of commercial relations". Considering that the exemplary enumeration at the end of the draft provision refers in all its items to "unreasonable" practices, it can be concluded that economic effect analysis would be required in all cases and only behaviour, which does not have objective justification, could be deemed abusive.

6.2.3.4 What Constitutes an Abuse of Buyer Power?

Under the present version of the PCA, abuse of "buyer power" may be found only on the part of dominant undertakings. The governing national rule (Art. 21 PCA) reproduces Art. 102 TFEU. Within the scope of the statutory prohibition would fall various practices related to imposition of exploitative prices, such as dumping prices pursuing predatory effects, discriminatory pricing and treatment in general, or bundling. However, a violation would exist only where such practices are implemented by a dominant company.[89]Non-dominant undertakings are not required to abide by the same increased standard of diligence, and application of unfair terms and practices on their part (as evidenced by the *Metro* case saga described in Sect. 6.2.2.1 above) would not constitute a violation.

As noted above, the draft PCA amendment introduces a new regulatory category, which expands the list of potential abuses to any behaviour in violation of good faith commercial practices, which does not have objective justification.

6.2.3.5 Case Law on Abuse of Buying Power

The CPC did not have many changes to review allegations of abuse on the part of dominant buyers. In its limited practice, the authority has ruled that arbitrary determination of access fees and the application of most-favoured-customer clauses constitute abuse on the part of a "dominant" distributor.[90] Furthermore, exercising pressure on suppliers to reduce procurement prices for the benefit of retailer's own margin of profit and without passing the benefit to consumers would also constitute an abuse.[91]

[89] Under Bulgarian law, "dominance" is defined as a position of market strength enjoyed by an undertaking, which with a view of its market share, financial resources, access to markets, level of technological development, and business relation to other undertakings is independent from its competitors, suppliers, and customers and may hinder competition on the relevant market (Art. 20 PCA).

[90] CPC decision no. 187/2003.

[91] CPC decision no. 833/2012.

6.3 Merger Control

There are no special thresholds for review of mergers in the grocery retail sector. Concentrations of commercial activities[92] in Bulgaria are subject to the mandatory prior control of the CPC. Under Bulgarian law, a notification must be filed where (1) the joint turnover of all undertakings concerned in Bulgaria for the year preceding the year of the concentration exceeds BGN 25 million (EUR 12.78 million) and (2) (a) the turnover of each one of at least two of the undertakings concerned in Bulgaria for the year preceding the year of the concentration exceeds BGN 3 million (EUR 1.53 million), or (b) the turnover of the target in Bulgaria for the year preceding the year of the concentration exceeds BGN 3 million (EUR 1.53 million).

It should be noted that the jurisdictional threshold under the preceding PCA 1998 was much lower, requiring notification and review of every transaction involving change of control as long as the *joint* turnover of the undertakings concerned exceeded BGN 15 million (EUR 7.67 million). Because of the over-simplified nature of the test, in many cases turnover of the acquirer was sufficient by itself to trigger a merger control review. In fact, large retailers had to notify the CPC and wait for clearance for each acquisition, no matter how minor.[93] With the entry into force of the PCA on December 2008, this practice was discontinued and now only acquisition of assets with attributable national turnover in excess of BGN 3 million (EUR 1.53 million) is subject to review.

For the purpose of turnover calculation, the CPC takes into account the entire turnover of the undertakings concerned in Bulgaria.[94] When an undertaking belongs to a group of companies, the Bulgarian turnover of the group as a whole must be taken into account. Turnover figures are calculated on the basis of revenues from sales of products and services generated during the financial year preceding the concentration. When the concentration involves acquisition of control over part of one or more undertakings, regardless of whether or not such part constitutes an independent legal entity, only the turnover of the respective part, which is subject to acquisition, is taken into account. In cases of vertical integration between a supplier and its distributor, the CPC takes into account both the turnover of the supplier from sales to the distributor and the turnover of the distributor from sales of the supplier's products to third parties.

[92] Defined in Art. 24 PCA as a lasting change of control over an undertaking as a result of (i) the merger of two or more independent undertakings or (ii) the acquisition of control over an undertaking by person(s) who already control one or more other undertakings or (iii) the creation of a full-function joint venture company.

[93] For example, in 2008, only Maxima was involved in 5 merger control proceedings, related to acquisition of assets of various size, ranging from part of the existing network of the "Evropa" retail chain to large buildings and even individual neighbourhood stores.

[94] Previously in its case law under the 1998 PCA, for undertakings domiciled in Bulgaria the CPC was using their aggregate turnover—both from national sources and sales abroad.

6.3.1 Market Definition in the Grocery Retail Sector

6.3.1.1 Relevant Product Market

Pursuant to the statutory definition, the product scope of the relevant market should be defined, taking into consideration all goods or services that are viewed by consumers as interchangeable with respect to their characteristics, intended use, and price.[95] The CPC practice on acquisitions at the retail level of the grocery sector in Bulgaria indicates a stable approach towards market definition. Since 2007, and the first major cases involving mergers between retail chains,[96] the authority has repeatedly defined a relatively broad relevant market encompassing "retail with fast-moving consumer goods in supermarkets, hypermarkets, and convenience shops selling food and non-food items".[97] In its analyses, the CPC has concluded that all types of mixed assortment shops, irrespective of size, are substitutable. Most importantly, small-size convenience shops are regarded as competitors of large supermarkets. This conclusion was challenged on a couple of occasions and reaffirmed most recently in 2010 when on the basis of GfK data[98] the CPC concluded that delimitation between various store formats would require a significant change in the habits of Bulgarian consumers. Although it is generally accepted that consumers visit "modern trade" outlets less frequently than small local shops (so-called traditional retail), marketing surveys for Bulgaria indicate similar intensity of visits for super/hypermarkets (44.8 average visits per month) and convenience stores (46.7). In addition, despite the different degree of penetration of "modern trade" outlets in the capital and big cities in comparison to small towns, the average monthly frequency of shopping for all residential areas in Bulgaria is quite similar—between 16.8 and 17.2 average visits per month. Moreover, there is clear evidence that retail chains are attempting to reach consumers by launching small store formats in towns and city districts. This, according to the CPC, indicates a policy driven by consumer preferences, who do not want to change their habits despite the conveniences offered by larger sales area, broad product assortment and ample parking space.

It is important to note that cash & carry stores are regarded as a type of "hypermarket" and included in the retail market.[99] Acknowledging that such establishments generally offer FMCG to the business (e.g., in larger packages—crates and cases), the CPC claims that Bulgarian operations deviate significantly from the classical model. The argument in support of this conclusion is the fact that

[95] Sec. 1, para. 15 (a) of the Supplementary provisions to the PCA.

[96] The acquisition of the local "Piccadilly" chain by the Serbian Delta Maxy group in 2007 (CPC decision no. 784/2007), the acquisition of the local "Evropa" chain by Maxima (CPC decision no. 1057/2008), the acquisition of the local Plus franchise by LIDL in 2010 (CPC decision no. 1199/2010), the acquisition of Delta Maxy by Delhaize in 2011 (CPC decision no. 456/2011).

[97] E.g., CPC decision no. 416/2007 and CPC decision no. 794/2007.

[98] See CPC decision no. 1199/2010, p. 17.

[99] See CPC decision no. 416/2007, footnote 7 at page 8, and CPC decision no. 794/2007, footnote 2 on p. 7.

although access to cash & carry outlets in Bulgaria requires registration, many individuals acquire customer cards and purchase goods for personal consumption. Package sizes are also not regarded as a serious distinguishing factor since most products are actually sold in consumer-friendly units.

So far, activities of Internet stores have not been subject to review by the CPC in a merger control context. Nevertheless, considering the broad definition for FMCG retail, it is quite possible that e-merchants will be regarded as competitors of brick-and-mortar shops. Moreover, some retailers already offer home deliveries and accept orders online, which indicates that Internet sales are just another means for reaching consumers.

6.3.1.2 Relevant Geographic Market

Pursuant to the statutory definition, the geographic scope of the relevant market should be defined with regard to a specific territory on which the corresponding interchangeable goods or services are offered and on which the conditions of competition are the same, while differing from those in neighbouring areas.[100] In its practice on mergers in the grocery retail sector, the CPC holds invariably that *the geographical scope* of the relevant market is limited to a specific territory where FMCG can be easily accessed by consumers (within approximately 20–30 minutes' drive from home). In other words, the market *is local or regional at most*.[101]

The NCA has noted that the retail of FMCG in Bulgaria indicates presence of a dynamic yet fragmented market, where "modern" retail chains compete with "traditional" small-scale merchants. The latter are much less organised[102] and still account for a larger share of the market, which makes it impossible to argue that all market players compete on a national scale. The CPC has concluded that even though large "modern trade" retailers have outlets in many regions (and some are fairly well nationally represented), in fact they compete with convenience and other shops on a local basis.[103]

[100] Sec. 1, para. 15 (b) of the Supplementary provisions to the PCA.

[101] See, e.g., CPC decision no. 794/2007 (referring to several relevant markets on "the territory of the cities of Sofia, Varna, Burgas, Veliko Tarnovo"), CPC decision no. 1244/2010 ("the territory of Sofia"); CPC decision no. 1545/2012 ("the territory of the city of Varna"); CPC decision no. 284/2013 ("the territory of the cities of Sofia and Varna").

[102] It should be noted that there is no representative association of small retailers on national level. The Bulgarian Retail Association is composed primarily of SMP retail merchants operating stores in malls and prime city locations. Some "traditional" retailers are members of the National Association of Small and Medium Businesses, which comprises primarily companies from the light industry sectors (food processing and textiles).

[103] CPC decision no. 284/2013, p. 11, referring to CPC decision no. 1244/2010 and CPC decision no. 1199/2010.

6.3.2 Merger Control and the Growth of Grocery Retail Networks

According to the most recent CPC merger control decisions,[104] there are numerous merchants in Bulgaria holding valid registrations for retail sale of foods and beverages. The majority is unspecialised grocery stores (some selling also alcohol and tobacco), and most are falling within the category of "convenience stores"—offering both food and non-food items. The constantly rising share of large chain stores indicates a trend towards consolidation and increasing role of super- and hypermarkets. However, the latter are located predominantly in the cities, and there is a significant regional disproportion in the development of their networks.

Differences in population density and revenues influence the asymmetry in penetration of "modern trade". Internal migration and natural increase of population in the cities are the principal reasons behind the expansion pattern followed by retail chains. Thus, most new super- and hypermarkets are opened in the capital and regional centres, where population density and purchasing power are higher. Competition is intensive and represented by many international players—Kaufland Bulgaria and Lidl (Schwarz Group), Billa Bulgaria and Peny (REWE Group), Piccadilly (Delhaize Group), Metro Cash & Carry Bulgaria (METRO Group), Carrefour Bulgaria (Carrefour Marinopoulos), Roda (Mercator Group), T-Market (Maxima Group)—as well as by local companies, such as Fantastico, Evropa, Coop, and CBA Bulgaria (some of them operating as cooperatives). A number of local companies also operate chains of convenience stores (under the brands "Pro Market", "Dar", "Verde", etc.), although they are concentrated mostly in the capital.

Despite the continuing penetration of "modern trade" outlets, traditional retail continues to play a leading role for Bulgarian consumers. The CPC notes that although the geographic scope of the retail market for FMCG is local, conditions of competition throughout the country are homogenous, and there are numerous different market players in each region. "Modern trade" still occupies a smaller share in comparison to traditional retail—the market has low concentration and fragmented structure. Because of this, none of the market players has sufficiently strong position, or market power, on any regional level in order to be deemed independent from their competitors, clients, and suppliers.[105]

6.3.3 Countervailing Buyer Power as a Mitigating Factor for the Concentration

As explained in Sect. 6.3.1 above, the grocery retail sector in Bulgaria has a low level of concentration. Mergers among suppliers are not very common, and considering the high fragmentation of most product markets there has not been a single

[104] See CPC decision no. 284/2013 and CPC decision no. 456/2011.

[105] CPC decision no. 284/2013, p. 18.

case where "mitigating" factors were needed in order to justify consolidation of businesses on the production or processing level of the grocery supply chain.

Likewise, since most supply markets in Bulgaria are extremely fragmented, countervailing buyer power argumentation cannot be used in defence of mergers in the retail sector.

6.3.4 Merger Remedies

So far, there are no cases where the combined market share of the merging retailers could raise suspicions of establishment of a dominant position. In fact, the most recent cases indicate that the retail market is still characterised by a low level of concentration.

6.4 Conclusion and Perspectives

According to recent surveys among national branch associations of suppliers, pressure exercised by the stronger party in a contractual relationship—reflected in unfair terms and practices—undoubtedly influences the redistribution of value added along the grocery supply chain. Most suppliers regard large retail chains with national coverage as parties with more bargaining power. Acknowledging the advantages of these chains as a distribution channel, they agree that retail merchants should receive a fair share in the revenues. However, all suppliers strongly believe that unreasonable and burdensome conditions, especially those related to transfer of commercial risk, should not be imposed on them without a proper justification.

On the other hand, "modern trade" representatives claim that the market structure in Bulgaria does not permit retailers to impose any unfair terms on suppliers. On the contrary, in many cases (especially the so-called must-have products), retailers are obliged to accept without negotiation supply conditions determined unilaterally by manufacturers.

In summary, while retailers resist introduction of new rules, there seems to be a general agreement between Bulgarian suppliers that "soft" approaches (i.e., internal institutional regulations and private enforcement mechanisms) are not efficient to counter abuse of bargaining power, while existing legislation, practices, and capacity of public authorities are not sufficient and do not result in the required level of prevention and control. The question, therefore, is whether the contemplated PCA amendment would provide the best possible remedy for the deficiencies present in the grocery retail supply chain.