9TH MEETING OF THE SOFIA COMPETITION FORUM
11 November 2016

Report

The 9th meeting of the Sofia Competition Forum took place on 11 November 2016 in Sofia. There were participants from all SCF beneficiaries (Albania, Bosnia and Herzegovina, Croatia, Georgia, Kosovo, Macedonia, Montenegro, Serbia), UNCTAD, OECD, Italy, Russia, Japan, Turkey, Ukraine, the economic consultancies Oxera and Compass Lexecon, as well as the law firm Freshfields Bruckhaus Deringer.

Opening remarks

Welcoming addresses were delivered by Ms Julia Nenkova, Chairperson of the Bulgarian Commission on Protection of Competition; Mr Juan Luis Crucelegui, Chief of Capacity Building and Advisory Services Section at the Competition and Consumer Policies Branch of UNCTAD and Mr Rumen Kamenov, Deputy Director of "UN and Cooperation for development" Directorate of the Bulgarian Ministry of Foreign Affairs.

Ms Julia Nenkova expressed her sincere welcome to all members of the SCF and thanked UNCTAD and the Balkan Competition authorities for their joined efforts, which resulted in establishing a successful platform for technical assistance, exchange of experience and consultations in the field of competition law and policy. Another thanks were for the Ministry of Foreign Affairs, which had supported the initiative financially.

Ms Nenkova confirmed that despite that the forum was initially designed as a regional initiative, it is also open to competition authorities from other countries.

Ms Nenkova expressed her genuine commitment to preserving the continuity of the Sofia Competition Forum. She gave appreciation to the accomplishments of the fruitful partnership. She also stated her eagerness for further development of the activities of the forum.

In this context, the general topic of the Forum *Pricing abuses of dominance in energy and telecommunications* was outlined as really important as it was relevant for all competition authorities. One of the purposes of the discussion was to shed some light on the interaction between competition legislation and sector regulations. According to Ms Nenkova, pricing abuses of dominance in energy and telecommunications provided for a lot of issues that could be discussed.

Ms Nenkova pointed out that the Comparative Study in the field of Procedural Fairness and the SCF Newsletter would be both presented at the meeting.

Mr Juan Luis Crucelegui thanked Ms Nenkova, Mr Kyumyurdzhiev and Mr Rumen Kamenov and all distinguished colleagues for their contribution to the forum.

He expressed his deepest gratitude to everyone in the Bulgarian CPC and the Ministry of Foreign Affairs for the generous support in the realization of the conference. He also mentioned that the partnership between the Bulgarian CPC and UNCTAD was very effective since its creation. He outlined the accomplished level of cooperation, exchange of expertise of competition related issues, and sharing of publications on competition issues. He admitted that there were a number of challenges that the forum faces, but he also mentioned the progress accomplished on the issues.

Mr Crucelegui invited SCF members on the upcoming workshop which will be held in Tirana, on 5th – 7th December 2016. Information about the adoption of the UN Guidelines on consumer protection policies was introduced. He also inferred that the work on consumer protection issues should complement the achievements in the field of competition issues. In accordance, a proposal for expansion of the forum with those topics was made by the name of UNCTAD. He proposed inviting officials by the Consumer protection authorities for the upcoming editions of the forum. In that way, it would be possible to take into account the consumer welfare and the protection of the consumer rights, as it would be helpful to discuss issues of mutual interest.

Mr Crucelegui mentioned that the general topic of the forum – Abuse of dominant position in energy and telecommunication is very important in the context of liberalization of these markets and the growing necessity to prohibit and punish bad practices, which would result in more efficient marketplace.

He expressed his gratitude to the participants, who had agreed to share their experience and proposed a topic for the meeting of the forum that would be held in June – the issue of collaborative economy with the participation of the Consumer Protection Agencies or experts. In his opinion, this was an issue which had impact on all markets and consumer welfare, and had consequences on both consumer protection and competition issues.

Mr Rumen Kamenov thanked the Chairperson and the Vice chairperson of the Bulgarian CPC and Mr Crucelegui for organizing the event. In Mr Kamenov's words the forum had affirmed itself as a useful regional initiative for cooperation and exchange of information between the countries who had taken part in it. By the name of Ministry of Foreign Affairs, Mr Kamenov expressed awareness of the fact that enabling free competition was crucial for developing a healthy economy and improving the well-being of consumers. Because of that, the Ministry of Foreign Affairs highly appreciated the initiative of the forum and supported it financially.

It was also commendable that the forum is very useful since it made the training of a number of experts from the beneficiary countries possible. It had also enabled experts to exchange lessons learned, along with sharing some of the best national and international practices in the field. The Bulgarian Ministry of Foreign Affairs highly valued the project because it strengthened the capacity of national institutions in the region to harmonize their competition legislation and policy in line with the European law and standards.

Mr Kamenov pointed out the positive role of the SCF in contributing towards the transfer of knowledge between the Bulgarian CPC and the relevant competition authorities in the countries from the region.

Mr Kamenov also asserted that the general theme of the forum would be very helpful, since it was especially relevant to participants and generates high public interest and legitimate scrutiny from Bulgarian citizens. Energy and telecommunications were challenging fields with consequences cascading across the whole economy, which is why they needed particular attention. Clearly, there was a necessity to create environment for conducive and fully free competition that ensure the best prices for consumers and prevent unfair practices. The liberalization would be conducive to improving sustainable efficiency in the interest of consumers.

Mr Kamenov informed that Ministry of Foreign Affairs is committed to continuing the financial support in the future for that praised initiative.

Plenary session: Pricing abuses of dominance in energy and telecommunications

The first plenary session of the meeting started with an opening statement by **Ms Elizabeth Gachuiri**, **Economic Affairs Officer, UNCTAD**, who was also a moderator of the session. She emphasized the significance of the energy and telecommunications sectors as important features of economic development. Ms Gachuiri noted that since the price was an essential aspect of any business transaction, the issue of pricing and abuse of companies' dominant position related to pricing would also be discussed in the meeting.

Mr Pedro Caro de Sousa, OECD Competition Division, started the discussion by asking about the link between energy and telecommunication market and whether both industries had similar characteristics. He clarified that energy and telecommunications were network industries and did not share common features as regards production level. Whereas for the energy sector there was a certain degree of competition at the production level, the telecom markets lacked production level since they were usually decentralised. As a result, the consumers were frequently the providers of the inputs as well. To exemplify his point, Mr Caro de Sousa referred to the Internet to explain that people who are accessing the online network could also be providing its content.

The speaker outlined some basic similarities between the energy and telecommunications as network industries, such as the factors of economies of scale and bottleneck issues. Both industries in Europe used to be state-owned regulated monopolies. Following the liberalisation process in recent years those sectors are becoming increasingly competitive. Mr Pedro Caro de Sousa added that it was very important how one regulated and deregulated a market to genuinely understand the role of competition there. He recalled the main goals and objectives of the deregulations in Europe – the creation of the European market. Mr Caro de Sousa explained that geographical markets had remained national and new entrants were generally national firms with cross-border foothold that were operating in competition with national incumbents in different national markets.

Concerning the differences, Mr Caro de Sousa observed that, whereas in the telecom industry wireline phone services competed directly with mobile phone services, for the energy there were no direct competitors to the monopolist's transmission and distribution system. The speaker differentiated between storage of energy and storage for communications. While the latter could be stored to a certain extent and conveyed later, the former market was characterised by an elastic demand and therefore a large amount of electricity could not be stored and distributed.

Afterwards, the speaker commented on the interaction between competition law and sector regulation in network industries. Traditionally, both the electricity and telecom sector used to be controlled and managed by the State. As a result of the liberalisation process, as Mr Caro de Sousa noted, these industries had become regulated sectors across the world to open up the market to competition. Accordingly, regulation was often used as a tool to achieve a market opening in telecommunication, electricity and gas.

Mr Caro de Sousa then went on to address the relationship between competition authority and regulatory bodies. He introduced two approaches to dealing with this matter – EU and US approach. As regards EU, competition rules apply where companies have autonomy under sector-specific legislation and EU competition law has parallel and cumulative application. In contrast, according to the US method, competition enforcers generally should not intervene in regulated sectors. As regards cooperation, Mr Caro de Sousa referred to three models for interaction between sectoral regulators and competition agencies: 1) memorandum of understanding (MoU) – an arrangement between sectoral regulators and the competition authority for coordinated work; 2) integrated agencies model where the competition authority is empowered to enforce both sector-specific regulation and competition law; and 3) concurrent jurisdiction as is the case in the UK – sectoral regulators have specific competition competencies.

Next, Mr Caro de Sousa covered the main types of abuses that seemed to affect both electricity and telecom industries: refusal to deal, margin squeeze, predatory pricing, excessive pricing and price discrimination. The main problem in this context was when the same practices were framed under different abuses. Mr Caro de Sousa acknowledged the need to set up antitrust doctrines in an economically neutral way so as to avoid companies structuring practices with similar effects in such a manner as to evade competition enforcement.

After examining the various forms of abuses related to network access and incumbency, Mr Caro de Sousa commented on the relevance of state action as enshrined in Art. 106 (1) TFEU and explained the circumstances where state's infringement of competition law might occur. The doctrine was developed in several EU cases related to telecommunications such as ERT v DEP, GSM Italy and GSM Spain, and Connect Austria. In those cases, as pointed out, the market structure facilitated the abuse of competition law by the incumbents. As a final point, Mr Caro de Sousa mentioned the Greek Lignites case. The main issue at hand was whether it was necessary to demonstrate that the company engaged in an abuse of dominant position or that it created unequal conditions of competition between companies in order to establish an infringement of competition law. Mr Caro de Sousa

acknowledged the importance of the ECJ's judgement which provided a broad scope of Article 106 (1) TFEU in conjunction with article 102 TFEU.

Mr Kentaro Doi, Coordination Division, Economic Affairs Bureau, Japan Fair Trade Commission talked about pricing conducts in Energy and Telecommunications sectors. He started off by focusing on the liberalisation process in Energy and Telecommunications. Mr Doi referred to a map showing the monopoly position of ten Electric Power Companies (EPCOs) in Japan before the liberalisation in the electricity market. He presented the process in electricity market from power generation to transmission and retail, noting that before the liberalisation of the market only EPCOs were responsible for the retail supply of electricity to all customers. As Mr Doi explained, the area of liberalisations in electricity retail market had been progressively expanding for the last 15 years. In April 2016 the electricity retail market was opened to full competition.

The speaker pointed out that Japan's 2011 earthquake brought about tight demand and supply of electricity. As a result, the government carried out a review of the electricity market with one of the issues identified was little competition in the market and strong price control by EPCOs. Mr Doi mentioned the three-step reform of the electricity market in Japan, focusing on the second step: Full liberalisation of the retail electricity sector by 2016. Currently, it was important for new entrants to procure electricity from EPCOs power generation sectors since EPCO's still hold a large percent of the retail market.

Concerning the Gas market, Mr Doi referred to an excerpt from the report of the Electricity system subcommittee [2013] of the Ministry of Economy, trade and industry, revealing plans for the reform and liberalisation of the gas retail market in Japan. The speaker informed that since 1995 the area of the gas retail market had undergone a gradual expansion and there were plans for the liberalisation of the whole gas market by 2017. As revealed, the General Gas Utilities (GGUs) had large market share in the manufacture and transport processes. Therefore, Mr Doi concluded that it was important for new entrants to procure gas from the General Gas Utilities (GGUs) and transport it through the GGU's pipelines.

As regards Telecommunications, it was mentioned the privatisation of the Japanese telecom sector in 1985 as a policy reform to liberalise the market. Mr Doi showed a flowchart displaying two telecom markets – wired-line market and mobile market. He explained that after the liberalisation, dozens of new companies had entered the market and competed with telecom carriers which had a relatively large share in both markets. It was concluded that the carriers had still strong power in the market.

Mr Kentaro Doi then talked about bundled services in Japan which number had grown after the liberalisation of the electricity market. For example, he suggested that if EPCOs applied electricity with telecommunication services, consumers would save 6 euro per month. It was mentioned that the bundled services would become widespread after the forthcoming liberalisation in the gas retail market in 2017.

Another area of discussion was the relationship between liberalisation process and JFTC's guidelines. Mr Doi stated that after liberalisation, incumbent companies such

as EPCOs (electricity market) and GGUs (gas market) had a significant influence on the market and their conduct should be closely monitored in order to avoid barriers to entry that could prevent newcomers competing at the wholesale level. According to the JFTC's guidelines on the assessment of companies' bad conducts in the sector, bad conduct meant when incumbent carriers had a relatively large market share (telecommunications sector).

In conclusion, Mr Doi reviewed three types of conduct in JFTC's Guidelines relating to pricing. First of all, in regards to unlawful practice concerning rate setting in wholesale supply, he explained that if EPCOs power generation sectors set unreasonably high prices, new entrants would be prevented from competing with their retail sectors. Likewise, competition law might also be violated in cases where EPCOs retail sectors set unreasonably lower retail price compared to their retail supply cost in order to restrict their customers from switching to newcomers. Also, where EPCOs set discount prices on its own electricity or its bundled services which were unreasonably lower than their supply cost, it would be difficult for new entrants to compete with the EPCOs retail sector. After providing similar examples of unlawful conducts in the gas sector, Mr Kentaro Doi underlined some practices concerning unreasonable cost setting in interconnection to telecommunications facilities; practices to users who switched to competitors; and practices concerning bundled services.

Ms Nadine Watson, Senior Vice President of Compass Lexecon pointed out that margin squeeze was falling to the category of exclusionary abuses of dominance. She explained that a margin squeeze was when a vertically integrated firm holding a dominant position in the upstream market prevented its non-vertically integrated downstream competitors from achieving a viable margin. She clarified that a viable margin was the one that ensured that the retail price the rival was charging minus the wholesale price it was paying to the dominant company was enough to cover the other downstream costs of the rival. There were two different strategies to conduct a margin squeeze: predation – when the dominant company charged downstream price that was too low or refusal to deal done by increasing the wholesale price. Ms Watson explained that from an economic perspective there was no difference how you analyse a margin squeeze, a predation or a refusal to deal. There were three potential motivations for a dominant company to abuse of its position through a margin squeeze – to create a monopoly on the downstream market by raising rivals' costs, to maintain its dominance in the upstream market, to prevent a new entry in the downstream market from being successful and from integrating backwards and becoming another vertically integrated company. Ms Watson explained that the motivation and the negative margin were not enough to prove that there was an abuse. It was also important to analyse the ability and the incentives of the dominant company. Two of the key aspects in the ability of a dominant company to exclude its competitors from the market were the existence of barriers to entry and re-entry and the asymmetries of information between the dominant company and the rivals. There were alternative explanations such as that the regulator set the prices or when the dominant company lowered the prices it was meeting competition. More convincing was the dynamic pricing which was very important in telecommunications and the IT sectors. These were markets with network externalities and switching costs. When a new company

entered the market it was willing to lower its prices below cost in order to gain economies of scale, recognition. So the assessment of the possible exclusion had to be taken over a period of time and not in a single moment. The profitability of the ex ante investments was one of the reasons why dominant companies could lower prices initially to get sufficient number of customers to make their investments profitable. Ms Watson pointed out that the margin squeeze cases were very complex because most often occurred in markets that were dynamic and therefore economies of scale and switching costs were very important and investments played a big role. Although there might be very clear evidence of a margin squeeze in a single moment in time if you took into account future revenues and future costs perhaps revenues were enough to cover costs. Ms Watson said that most of the margin squeeze cases in Europe had been in regulated industries mostly telecoms where there were former monopolies. Ms Watson explained that when we look whether the margin was too small we look at the dominant player because competition wanted to defend the efficient players which could cover the cost of the dominant. The complex issues that had to be resolved in margin squeeze test were: what cost to use – avoidable cost or incremental cost; what efficiency standard to use – as efficient competitor or reasonably competitive; what products to include and do we analyse them separately or jointly; what time period to take into account.

Ms Watson gave a practical example with the Telefonica case which dealt with residential access to internet by ADSL. Telefonica was the only operator in Spain with a national network and hence with unbundled access to the homes. It offered three wholesale broadband products to its rivals. The European Commission decided that it would analyse these products separately with a focus on the national broadband. The investment ladder theory says that the new entrant first tries to gain access into a new market with the least investment and therefore will go to the national interconnection. Once it gets some customers it will invest more in its own network and it will ask for regional access and when it has enough customers it will ask for access to the local loop. So the European Commission decided that it needed to ensure that the prices Telefonica charged for the national access are sufficient to cover costs. One of the key issues in the Telefonica case was whether the margin squeeze was analysed on a period by period basis or through a discounted flow approach which took into account future revenues and future costs which was more consistent with the economic theory given that this was a network industry. The Commission did both analyses. The way to make both analyses similar was to allocate the initial sunk costs that Telefonica has to spend on customers and on developing the network over the lifetime of the subscribers. The Commission used the subscriber lifetime of Telefonica to decide how long it would have to distribute the costs. One major issue that had to be addressed when assessing a margin squeeze was what was the relevant time period over which the abuse was going to be analysed. In order to give fair time for the incumbent to materialize its investments but yet not such a long time that it would be able to reap anticompetitive benefits the Commission decided on a 5-year period. According to Ms Watson it was good to analyse the potential effects on the market and in this case the Commission showed that average prices in Spain were very high.

In conclusion Ms Watson said that margin squeeze was not a different type of case and had to be analysed the same as constructive refusal to supply or predation and the very

first step was to see whether the firm had obligation to supply and if there was such obligation then the margin squeeze test should be applied. There were many complex issues that need to be assessed and most important was to take into account that these were dynamic markets where there were economies of scale and if possible it was good to analyse the potential effects.

Prof. Dr. Thomas Lübbig, Partner at Freshfields Bruckhaus Deringer LLP started with the general focus of EU law enforcement under Article 102 TFEU by mentioning the cases concerning rebates Post Danmark I and II, Intel as well as innovative cases such as the investigation against Google which according to him is de facto back-door regulation as a replacement of proper legislation to have some handle on developments in digital markets.

Historically the focus of EU competition law enforcement in the energy sector has been on discriminatory practices in the granting of access to network infrastructures and on division of markets along national borders. With progress of unbundling and the increased establishment of (national) regulatory control with a high density, EU competition law enforcement has diminished in intensity in the Western European markets. Prof. Lübbig pointed out exotic law enforcement in cases such as German traction current case (rail track energy) as well as the Greek lignite case. More recent focus is on cases in South Eastern Europe such as BEH Electricity in Bulgaria and the Opcom case (electricity exchange) in Romania. Prof. Lübbig also mentioned the pending investigation regarding gas distribution by Gazprom in Central and South Eastern Europe. According to Prof. Lübbig the next challenges are perhaps to use new competition law enforcement as corollary to achieving European Energy Union.

Ms Elena Zaeva, Head of the Department for Regulation of Telecommunications and Information Technology at the Federal Antimonopoly Service of the Russian Federation presented information about the "Suppression of monopoly high prices on the telecom markets". Ms Zaeva outlined the legislation on competition in the Russian Federation, along with the relevant competent authorities. She informed that suppression of monopolistic activities was regulated in Article 10 of Federal Law on Protection of Competition. She informed that according to the text of the article both determination and support of monopolistically high or monopolistically low prices were forbidden. As explained during the presentation, prices were supported monopolistically high when the price exceeded the amount of expenses and profits necessary for production and sale of such goods. Along with that, price should exceed the price which was formed under competitive conditions at comparable goods market (by the composition of sellers, buyers and regulatory environment).

Ms Zaeva outlined the distinctions of the telecommunication markets and she also presented the exact assessment of the change in value of that market in Russia.

In the last part of the presentation, Ms Zaeva introduced to the audience a case in the field of telecommunications involving the Russian company Sibir Telecom. In the case operators had mutually set overstated roaming fee that had groundlessly increased the expenses of roaming. That practice had led to excess profit from rendering roaming

service for subscribers. This was a typical example when the price for roaming service was set monopolistically high.

As a conclusion, Ms Zaeva outlined the main purposes and advantages of the methodology the Russian Federal Antimonopoly Service had used.

Mr Sumit Sharma, Senior Consultant at Oxera pointed out that the traditional fixed telecom sector had evolved considerably. Technological improvements mean that copper, fibre, coax cable, 4G, LTE, the upcoming 5G networks could at that time often provide competing services. At the same time similar services could be provided by over-the-top providers, for example voice and SMS were facing competition from Skype and Whatsapp, TV services from others like Netflix and Amazon. Consumers were showing clear preference for bundles of services combining voice, broadband and TV content from a single provider. In response to this preference telecom and pay TV operators had adopted expansive strategies into each other's markets by bundling. It was getting increasingly complex to test for margin squeeze because the different retail services were offered by different operators and they were often using different wholesale inputs based on different technologies. This related to oligopolistic competition and product differentiation and means that different services providers might not offer exactly the same services bundle to compete in the market. So it was not always obvious what replicability means. There was blurring line between the regulatory and competition approaches. According to Mr Sharma in telecoms this was because incumbents were bundling regulated services in which they traditionally had dominance or SMP with other services in which they didn't necessarily have dominance. Mr Sharma discussed testing for margin squeeze in the context of Ofcom VULA case. VULA was virtual unbundled local access which was the type of access provided by BT over its fibre network. Mr Sharma said that the best practice was to use the long run average incremental costs of an equally efficient operator and to test across a portfolio of products. The portfolio approach provided pricing flexibility to the incumbent to recover more or less margins from different products just like the rivals were free to do so. In relation to the profitability approach one way to provide pricing flexibility, especially for new products and emerging markets, was by taking a longer term approach to the analysis of profitability. Besides multi-period analysis over the customer lifetime in some cases for more established steady state products and markets looking at profits in a specific period of time might also be acceptable and it was easier to do. Mr Sharma presented the approach of Ofcom in a recent competition case. The case was conducted at a time when BT recently acquired the English Premier League football rights and launched its BT Sport channels. Ofcom applied the test to the entire portfolio of superfast broadband sales (standalone broadband sales and bundles of broadband including pay TV) as this was the relevant market Ofcom decided rivals were likely to compete over. Otherwise there was a danger to conclude that there had been an abuse on an overly narrow view of the market. Depending on the particular market circumstances different approaches might be appropriate. If bundling with TV and exclusive sports was going to affect competition in the broadband market it should be taken into account when designing the margin squeeze test. Ofcom spread the net costs of BT Sport across all broadband subscribers and required the recovery of costs over 5-year period which reflected the

customer lifetime of a broadband customer in the UK. Ofcom looked at this as an investment in content and the net costs of BT Sport could be seen as costs that other operators would incur if they included a similar service with broadband bundles. In this case BT had exclusive rights to certain football games so the test was trying to include costs which would allow other competitors to replicate a similar offer which might be with other football games or other content. In any margin squeeze test estimation of the time period for cost recovery was very important as it could significantly affect the outcomes of the test. Mr Sharma also talked about comments of the European Commission on the case that Ofcom's approach lacked the necessary flexibility and could unduly limit BT's commercial activity in markets where it did not have significant market power. BT could be looked as an entrant in the pay TV market so it was a way of introducing more competition. According to Mr Sharma the end result of the competition enforcement should be consumers and citizens. He also pointed out that under European best practice the failure to recover costs in a margin squeeze test did not automatically result in an abuse of dominance finding nor was a reflective of competition concern in the market. This principle had been established by the European Court of Justice in the case TeliaSonera and very recent example was observed in the case of Ofcom's margin squeeze analysis in the wholesale calls market. In this case the margin squeeze test showed that BT earned a negative margin over a 1-year period but the market analysis could not find that this had affected competition in the market. In conclusion, Mr Sharma said that the product, time frame and wide market context had to be taken into account. It might also be appropriate to take into account mitigating circumstances – to explain why in certain conditions failure to recover costs did not constitute competition problem.

Mr Gianluca Sepe, EU Affairs Unit, Italian Competition Authority, outlined a different question, which had not been previously discussed. Mr Sepe brought to the attention an enforcement policy perspective – the highlight of the discussion wasn't the question how to assess the cases in the field, but rather which cases should be chosen for assessment from the competition agencies.

Mr Sepe pointed out that the most specific feature about cases in the field of energy and telecommunications was the availability of a regulation. According to him, the presence of a specific regulation made the whole difference. It also might cause tension. During the next part of the presentation, the exact remit of that tension was observed and discussed. Regulation usually is considered necessary when preventing vertical monopolists from abusing their monopoly power by charging the extortionate prices to the customers. This type of regulation was initially different from the perspective of competition law – competition authorities wouldn't regard themselves as controller of prices as it wasn't what a competition agency stood for. According to Mr Sepe, what had practically happened were parallel paradigmatic shifts, both on the regulatory side and the competition side. On the regulatory side, as it had already been mentioned, due to the wave of liberalization and privatization in the 90's, the telecommunication and energy markets had been opened to competition. But whilst some of the companies retained proprietary rights on some parts of the networks, regulation had been introduced to make sure that entry had been possible, that consumers had been protected and the fair competition could have operated on the

market. So, in Mr Sepe's words, regulation became competition oriented. Both, the telecom and the energy packages adopted by the European Commission, borrowed a lot not only from the ideas, but even from the vocabulary of competition law with the reference to relevant markets, to dominance and etc.

At the same time, an even larger shift had happened in the competition regimen. Competition agencies after acquiring the power to adopt structural and behavioural remedies became capable of imposing positive duties of behaviour on the undertakings. Moreover, the Commission had an opportunity to impose performative changes of the relevant markets. In Mr Sepe's opinion, the regulation was seldom preceded by proper impact assessment. In his words, the application of competition law became in fact a regulatory exercise and under this respect, he submitted that competition and regulation could not be any longer distinguished from the point of view of legal theory as far as the instruments were concerned. In conclusion, they were two alternative forms of the economic regulation of the relevant markets.

According to Mr Sepe's statement, the narrative that was got from the European institutions and the European Court of Justice, along with the national courts, was generally a reassuring narrative of complementarity. Two decisions of the supreme administrative court were presented by Mr Sepe in support of the aforementioned thesis. The court had already said that the relation between the regulatory regimen and the competition law was a relation of pure complementarity, and not exclusion. In Italy, there was a dual-track regimen, while in fact any conduct must be compliant both with the regulatory regimen applicable to the relevant market and the competition imperatives. That would mean that competition law can be applied along with any regulation which might be adopted by the sector regulator.

Mr Sepe implied, that the main question that a competition authority should address was what added value competition enforcement could bring to those cases. Another important question was under what circumstances it would be worth it to devote resources to the investigation and the prosecution of generally very complicated investigations. The answer across the Atlantic was rather different. He mentioned that there were very visible transatlantic diversions. Some relevant cases coming from the practice were brought to the attention of the public as a support of that statement. According to Mr Sepe's analysis, the existence of a regulatory obligation to supply in legislative and jurisprudential framework of the EU actually facilitated competition agency in the process of proving because it eliminates the burden of proof as to the indispensability of the input. According to the court, there was a comprehensive and effective regulatory framework, which worked well and efficiently.

The lesson that could be derived from the analyses was that antitrust intervention indeed could add value where the regulatory system is imperfect, incomplete or where there were difficulties in enforcement. But according to Mr Sepe's opinion, once a comprehensive and competition oriented regulatory system had been set, the cases where antitrust intervention would be able to provide added value would be relatively limited.

Another point of interest during the presentation was the level of significance of the determination which authority should handle the cases – the competition authorities or

the sectoral regulators. After a short comparative analysis of the functional systems in the EU, Mr Sepe concluded that an additional element should be taken into consideration – the fact that, as the Court of justice acknowledged, the public interest underpinning competition law and regulatory intervention might not be perfectly consistent. An example of that hypothesis was explained. So far the jurisprudence had never endorsed a reasonably efficient competitor test within the standard competition toolbox.

Breakout session I: Exclusionary pricing abuses of dominance in energy and telecommunications

During the Breakout Session I, presentations were made by beneficiaries, Turkey, along with comments from resource persons and invited guests.

The group discussed exclusionary pricing abuses of dominance in energy and telecommunications. There were three presentations. The first one was given by the Montenegrin colleagues, who presented the general legislative and regulatory framework in Montenegro concerning energy and telecommunication. Then a series of cases on the "Sport club"'s rights in Bosnia and Herzegovina were discussed, and eventually a margin squeeze case and a number of investigations, presented by the Turkish competition authority.

Mr Gianluca Sepe from the Italian Competition Authority who moderated the session summarized the discussions. Quite significantly to mention, only in the Turkish case there was an example of regulatory intervention in that particular investigation, because it was a textbook market squeeze case, concerning the conduct of Turkish telecom and there were a subsidiary downstream, which through a series of advertising campaigns promoted access to the internet at a price which was lower than the price which other as efficient competitors could offer on the same market. It was still framed as a margin squeeze case whilst the Turkish authorities went on to establish that the conduct downstream was a predatory conduct in fact, because there was a loss. Also this gave the audience the possibility to discuss the relevance of the pricing behaviour of the firm in context because in this case the predatory conduct stood from a series of advertising campaigns which followed and overlapped each other with the result that the average price which was in fact charged by the dominant undertaking was actually lower than the cost they incurred to provide the service. And this was contrasted with another case that they investigated as well where the advertising campaigns were shorter in time, there was no commitment in terms of the duration of the contract and even if each one of them was considered individually, that might cause losses. Still in context there was no sufficient evidence for closure effect that would push the Turkish competition authority to forbid the conduct especially in light of the risk that this might curb potentially pro-competitive and pro-consumer behaviour. The other cases that were presented were with no regulatory intervention setting a duty to deal, whilst in the Turkish case a duty to deal on the dominant undertaking was placed by applicable regulation of the upstream market, the other two cases were cases where no duty to deal existed on the regulation. The first case, which was presented by the Montenegrin colleagues concerned a use of storage facilities for oil, and the Bosnian

colleagues illustrated a case where the essential facility was the ability to access the rights of transmission of some sporting events.

The main difficulty for competition agencies was to identify an antitrust duty to deal. It was only possible to envisage in very specific circumstances in European law. So this is a difficulty that agencies have to tackle in cases of constructive refusal to deal or in cases of outride refusal to give access to allegedly essential infrastructure.

In all of the cases it is difficult to identify pricing from non-pricing abuses, as it is always the case of constructive refusal to deal – there are pricing practices that really border non-pricing practices and it's quite interesting and it's important to identify a common theoretical framework to assess abusive conduct and to bring all the cases under the same common path.

Breakout session II: Exploitative pricing abuses of dominance in energy and telecommunications

Mr Sebastian Schmid, Case Handler, Austrian Competition Authority was a moderator of the second breakout session.

The breakout group included presentations by speakers from beneficiary countries Croatia, Macedonia, Bosna and Herzegovina and Georgia.

Mr Schmid commented that, in his opinion, the presentations showed a variety of implications in competition law in the area of telecommunications and energy.

The main topic of the presentation of Croatia was Compressed Natural Gas. The Croatian Competition Authority investigated a compliant stating that the undertaking GPZ-Opskrba abused its dominant position in the market of distribution of compressed natural gas by charging excessive prices. After conducting detailed price and market analyses, the authority eventually established that the undertaking in question did not abused its position by applying unreasonable and excessive pricing and accordingly the case was dismissed.

The presentation of Macedonia dealt with the relationship between competition and regulation and in particular pricing abuses of dominance in telecommunications. In the presented case, the Macedonian telecom regulator imposed different prices for wholesale services (call termination) for two different mobile networks in 2010. Two years later, the regulatory body set the same prices; however, the Macedonia Telekom did not comply and continued to charge its subscribers different prices for wholesale services. Accordingly, the Macedonian competition authority was able to demonstrate an infringement of competition law and imposed a fine of 30 000 euro on the undertaking.

Bosna and Herzegovina delivered a presentation about abuses in the market of television audience measurement. A television audience measurement company was able to increase its prices by 5 to 25% per year by charging different prices for different broadcasters for the same services on the grounds of tight public budget. The Competition Council established an infringement of competition law.

Another topic of discussion was the relationship between sector regulators and competition agency in Georgia. The Competition agency usually had only ex-post powers and no competence to regulate areas of municipal services such as: telecommunications, energy, water supply and finances. Those economic sectors are subject to supervision by the sector regulatory bodies. The relevant regulators have extensive powers which include tariffs regulation of companies, control of investment and ex-ante control, meaning they can intervene before an action is taken. However, Article 30 of the Georgian law on competition provides for the possibility of setting up a form of cooperation of the competition agency with the authorities regulating the sphere of economics subject to regulation.

Plenary session (cont.)

The main conclusions of the report "Comparative overview of the SCF competition regimes in the field of Procedural Fairness" were presented by members of the project team. The report cover different issues such as notification of the proceedings, access to file, right to reply to statement of objections, right to reply to an oral hearing, rights of complainants, rights of third parties, procedural issues in commitment decisions, procedural rights in interim measures proceedings, decision-making on competition cases and judicial review. After the presentation of the main conclusions the report was endorsed by the SCF members.

At the end of the meeting the second issue of the SCF Newsletter was presented. It contains 27 News articles from all SCF members. Besides there is information about the previous two meetings of the Sofia Competition Forum. The "Competition authorities at a glance" in the second issue are the Bulgarian Commission on Protection of Competition and the Croatian Competition Agency. In addition there are 3 success stories, 4 articles with expert's comments and 1 special report on procedural fairness.