

Duplicate!

Round seal: Supreme Administrative Court, Republic of Bulgaria

COURT RULING

No: 170

Sofia, 8 January 2008

IN THE NAME OF THE PEOPLE

The Supreme Administrative Court of the Republic of Bulgaria – consisting of five members – second college, at its court session held on the fifteenth of November two thousand and seven, consisting of:

CHAIRMAN:	ANDREY IKONOMOV
MEMBERS:	DIANA DOBREVA
	TANYA RADKOVA
	IVAN RADENKOV
	ILİYANA DOYCHEVA

with Secretary Milka Angelova and with the participation of the Prosecutor Viktor Malinov, heard the report of the Chairman ANDREY IKONOMOV under administrative case No: 7667/2007.

The proceedings are under Art. 208 and subsequent of the Administrative Procedure Code /APC/, in connection with Art. 43, Par. 1 of the Competition Protection Act /CPA/. They are initiated on the grounds of cassation claims of Danlex EOOD, Sofia and Hydroloc EOOD, Sofia against Court Ruling No: 5833/8 June 2007, enacted under administrative case No: 3085/2006 under the register of the Supreme Administrative Court /SAC/.

The cassation claims are submitted within the time limit and are procedurally admissible.

By the appealed court ruling a committee of the SAC has rejected the appeals of Danlex EOOD and Hydroloc EOOD against Decision No: 30/16 February 2006 of the Competition Protection Commission /CPC/, enacted under Letter No: KZK-201/2005.

The cassators are not satisfied with the decision and appeal against it.

Danlex EOOD submits arguments for considerable violation of the court procedure rules on behalf of the three-member court committee which have accepted and reviewed a claim of one non-exclusive and illegitimate representative of the manufacturer “Rapiscan”; for lack of substantiation of the decision due to failure to discuss all evidence collected under the case and for its enactment in violation of the material law. Cancellation of the ruling of SAC and enactment of another ruling is demanded concerning the essence of the dispute which shall satisfy their initial claim and revoke the decision of CPC in the part which has accepted the violence under Art. 31, Par. 1, in connection with Art. 30 of the Competition Protection Act /CPA/ and the imposition of a property sanction. They request adjudgment of the legal costs.

Hydroloc EOOD believes that the ruling of SAC contradicts the material law. According to the company the data collected under the case indicate in an undisputable manner violation on

behalf of Danlex EOOD, not only of Art. 31, Par. 1 of CPA, but also violations under Art. 31, Par. 2, Art. 32, Par. 2 and Art. 34, Par. 1 of CPA. The manager of Danlex EOOD – Nadia Bojilova as a natural person has also performed the above violations in connection with Art. 2, Par. 1, Subpar. 4 of CPA on the grounds of which they ask a penalty to be imposed on her.

The defendant – CPC, through their legal representative, consider the cassation appeals ungrounded.

The prosecutor also considers the cassation claims ungrounded.

SAC, consisting of five members, in order to pass judgment, adopted the factual circumstance ascertained by the three members of SAC to which the following facts having reference to the correct resolution of the case must be added:

It was undoubtedly ascertained by the collected evidence under the case that in letters No: 70-00-75/30 May 2005 to the Ministry of Regional Development and Public Works /MRDPW/ and No: 26-00-592/30 May 2005 of the Ministry of Finance /MF/, Danlex EOOD has provided statements which CPC and the three-member committee of SAC considered false information and misrepresentation of facts, damaging the reputation and trust in its competitor Hydroloc EOOD, as well as in the goods, offered by the latter, which were production of Rapiscan company. This was qualified as violation under Art. 31, Par. 1 of CPA and sanctioned respectively. The statements were described in details in the decision of CPC and were adopted as actually presented in the ruling of the three-member committee of SAC.

It is also undisputable that under a Treaty between the governments of the Republic of Bulgaria (RB) and the Republic of Turkey (RT) on opening of a new border checkpoint and Resolution (RCM) No: 647/3 December 1998 of the Council of Ministers of RB construction of Border Checkpoint Lesovo – Hamzabeyli has started. By resolutions of 18 March 2005 and of 1 April 2005 of the Interdepartmental Commission on the border control, the facilities and the technical equipment of the border checkpoint is assigned to MRDPW and the entire procurement pertaining to the deliveries is assigned to the chief executor of construction and mounting works – Inos – 1 OOD. After hearing the opinion of the beneficiaries under the delivery of the technical equipment for the checkpoint – Customs Agency (CA) and National Border Police Service (NBPS), MRDPW has requested and obtained a positive statement of the Public Procurement Agency (PPA) the delivery to be performed under the conditions of Art. 13, Par. 1, Subpar. 3 of the Public Procurement Act, i.e., without conducting the public procurement procedure envisaged by the law and its personal assignment. The technical specifications and the names of the manufacturers of the relevant equipment were provided to the beneficiaries and the other authorities engaged with the border checkpoint. MRDPW has signed contract No: 68/9 June 2005 for the delivery and mounting of the latter for the border checkpoint by Inos-1 OOD (folder 1.1, sheet 205 and subsequent). As seen from Appendix No: 2, item 1 to the documentation, prepared by the Customs Authorities (par. 1.1, par. 11), the stationary x-ray apparatus necessary for the border checkpoint for checking of pallets must be fit for sizes of the checked pallets from W=145cm and H=200cm at the minimum. The only indicated producer of such x-ray apparatuses is American Science and Engineering – the USA and Smiths Heimann-Germany and representatives (suppliers) of these companies are Lomini OOD and Danlex EOOD respectively. Despite the said Appendix No: 2 was not signed or sealed by the Customs Authorities the fact of its execution by CA is confirmed in item 3 of Letter No: 883/13 December 2005 of Bezkontaktni multipleksorni sistemi (BMV) EOOD to CPC (Folder 1.1, sheet 219). On 28 June 2005 a contract was entered into between Public Investment Projects (PIB) EOOD and MRDPW for gratuitous

financing of the entire project by PIB on the grounds of RMC No: 273/14 April 2005. MRDPW did not elect a subcontractor for the project in its part for delivery and mounting of the technical equipment by assigning that opportunity to Inos-1 OOD on the grounds of Art. 2, Par. 2 of Contract No: 68/9 June 2005. Inos-1 OOD assigned the delivery of the technical equipment to BMV EOOD. The contract between the two companies under No: 36/7 June 2005 is not enclosed to the file, but information about it is contained in Letter with outgoing No: 1111/30 November 2005 of BMV EOOD to CPC (folder 1.1, sheet 177). On its part, BMV EOOD assigned to Hydroloc OOD by Contract No: 61/14 June 2005 (folder 2, sheet 2), to perform the delivery, transport and mounting of the specialized equipment for the border checkpoint according to the enclosed specification. This contract also contains data about the existence of Contract No: 36/7 June 2005. In Art. 1, Subpar. 1.1 of Contract No: 61/14 June 2005 the delivery of “Specialized x-ray apparatus for checking of pallets with tunnel dimensions: 1.5x2.25m, Rapiscan model 532H – Specially modified” is arranged, for which it is seen by the note to that article “the delivery deadline is 31 October 2005 due to the fact that it is produced under a special order of the BENEFICIARY (i.e., the Customs Agency).” The x-ray apparatus is described in the same manner in item 1.1 of Appendix No: 1 (folder 2, sheet 4) and item 1.1 of Appendix 2 to the contract (folder 2, sheet 10). Moreover – item 1.1 of Appendix 1 (folder 2, sheet 4) expressly provides that “this x-ray apparatus is produced specially according to the technical requirements so that modification of the original specification of 532H is possible.” As seen from the indicated in column “Certificate by an internationally recognized certification body for radiation safety... (the final line is illegible)” of Appendix No: 1 (folder 2, sheet 8) the presence of such a document is mandatory and from column “Spare parts, accessories and consumables” of the same Appendix – “...the service documentation must be provided in English and Bulgarian languages.” Before CPC and SAC a “Certificate by an internationally recognized body for radiation safety” is not submitted for the delivered x-ray apparatus. Service documentation in Bulgarian language is also missing as evidenced in sheet 2, line 13 from bottom to top by the conclusion of the expert questioned before the three-member committee of SAC. According to the service documentation in English language enclosed to the border checkpoint x-ray apparatus it is defined as model “Rapiscan 532HH”. Having in mind the unavailability of any other x-ray apparatus for checking of pallets with the indicated large sizes, delivered to Lesovo checkpoint, it is assumed that the statements made by the cassator Danlex EOOD in the letters addressed to MF and MRDPW, indicated above, refer to that x-ray apparatus. Due to that reason the evidence referring to x-ray model 532H and model 532HH shall be considered only.

Under item 4 of Letter No: CPC-201/17 October 2005 (folder 1.1, sheet 51), CPC requested from Hydroloc EOOD “information whether Rapiscan Systems Ltd produces (and since when) the apparatus subject of the dispute; evidence of successful tests for compliance with the standards and certificates for market release” of the apparatuses subject of the dispute. A response (folder 1.1, sheet 53) is received by CPC on 25 October 2005, where Hydroloc EOOD states that since Danlex EOOD has not indicated the model of x-ray apparatus for which the quoted letters state that it is „an experimental sample” they must prove before CPC their statement. Two documents composed by Rapiscan systems are submitted: 1. Certificate of conformity (folder 1.1, sheet 56-57) of x-ray systems from the series 5xx, produced in Crowley, UK, with European Directives, enlisted in details, and 2. Certificate of origin and quality (folder 1.1, sheet 57-58) of Rapiscan, series 500 EPX x-ray systems and 528/566 x-ray apparatuses, as well as Certificate of Quality Q5472” (folder 1.1, sheet 58-59), issued by the internationally licensed company SGS, authorized

by UKAS- United Kingdom Accreditation Service, of: 1. Production, installation and service of x-ray equipment for baggage check; 2. Design, production, installation and service of integrated conveyor systems for baggage processing, and 3. Delivery, installation and service of metal detectors. Certificate of “market release”, requested by CPC is not submitted by Hydroloc EOOD. “Technical specification of Rapiscan 532H and 532HH is drawn up on a letter-head of the company Rapiscan systems Ltd. (folder 1.1, sheet 40).

Item 3 of Letter No: CPC-201/3 November 2005 (folder 1.1, sheet 60), CPC has requested from Hydroloc EOOD data whether up to the present moment Rapiscan Systems Ltd have produced “... another modified apparatus apart from that for Lesovo border checkpoint, with tunnel length over 2 m” and the relevant proof of that. It is evident that a technical mistake has been made in the letter by requesting information about the tunnel length, while the discussion in that particular case is about its height.

Item 4 of the same letter also requests a Catalogue of the products of Rapiscan Systems Ltd. The reply to that request represents Petition No: CPC-201/11 November 2005 in item 3 where Attorney Vladimirov – representative of Hydroloc EOOD states that “there are over 10 machines with tunnel height 2 m produced and sold in various countries...” without submitting evidence about any of these machines and their sale. Probably the source of information in this issue is a letter of 30 September 2005 of the Engineering and Quality Directors of Rapiscan Systems Ltd (folder 1.1, sheet 49, 50) stating that “...there are at least 10 machines with tunnel width corresponding to 532H or 534 on the market”, but there is no connection between the information contained herein and the information requested by CPC. By the same petition of Attorney Vladimirov a Catalogue of the company Rapiscan Systems Ltd is submitted, containing 49 pages. Among the models described therein an x-ray apparatus designated as “532HH” is not available. An apparatus with tunnel height over 2m is also missing. The apparatus with largest sizes of the tunnel for freight check among those described in the catalogue is the model Rapiscan 546 with tunnel width 180cm and height 179cm (folder 1.1, sheet 72).

As seen from item 3 of Letter of the Nuclear Regulatory Agency (NRA) No: 05-00-70/5 December 2005, submitted to CPC on 7 December 2005 (folder 1.1, sheet 170) Hydroloc EOOD received Permit No: 196/17 September 2005 for import of stationary x-ray apparatus, model 532H, with end user the Customs Agency, Lesovo – Hamzabeyli border checkpoint.

As seen from Chapter IV, item “a”2 of the conclusion of Expert Shopova, graphic image of the model upon the corpus of the x-ray apparatus supplied by Hydroloc EOOD is missing. The “conformity marking” according to Art. 4b, Subpar. 2 and Art. 21 of the Act on Technical Requirements towards Products and the Conformity Marking Decree are also missing. On the inner part of the cover of the x-ray apparatus technical documentation in English language consisting of 9 pages was enclosed, defining the apparatus as model 532HH. The apparatus is not revised by the Regional Inspectorate for Public Health Protection and Control or by the National Centre for Radiobiology and Radiation Protection for the “equivalent dose” values according to Art. 56, Par. 3, Subpar. 1 of the Act on the Safe Use of Nuclear Energy, which cannot lead to the conclusion that the latter does not need a license or permission for performing activity with an ionizing radiation source under the meaning of Art. 56 of the same Act.

According to letter No: 05-00-64/11 November 2005 of the Nuclear Radiation Agency (folder 1.1, sheet 153) and the enclosed copies of licenses (folder 1.1, sheet 154-166) of Hydroloc EOOD, License No: B-179, reg. No: 291 was issued on 14 July 2003, valid until 13 July 2004 for import of x-ray apparatuses and systems for baggage check. This company has not been issued

the same license for technical service, mounting, dismantling, measurements and repair activities, as License P 342, reg. No: 1117 is, issued in the name of Sophilco OOD on 5 July 2004 and valid until 4 July 2009. Having in mind the unavailability of a license for repair activities contract No: 5/1 August 2004 was entered into between Hydroloc EOOD and Sophilco OOD (folder 2, sheet 11) for mounting, maintenance and repair of x-ray systems for baggage and freight check within/outside the warranty period, manufactured by Rapiscan.

In April 2003, following procurement, Sofia Airport JSC purchased 2 x-ray apparatuses Rapiscan 528 from Rapiscan Systems Ltd. The latter were delivered and installed by the manufacturer's representatives and Hydroloc EOOD on 24 April 2003 and have been in regular use since 27 April 2003. On 24 June 2003 representatives of Directorate General "Civil Aviation Administration" performed an inspection of the operation of the installed x-ray apparatuses and drew up a Protocol with a Table of conformity to the requirements of the technical assignment of the competition (folder 1.1, sheet 122-123). Unavailability of 6 main technical specifications was ascertained; 3 technical specifications were not confirmed and conformity to 5 secondary requirements was absent. The conclusion from the inspection was that the delivered systems Rapiscan 528 are not fit for airport use and a statement was made that they would be returned to the supplier for the purpose of their replacement with other systems compliant with the technical assignment and the requirements towards the inspections for safety of the registered baggage (see Letter No: 40-02-373/30 June 2003, folder 1.1, sheet 124 of Directorate General "Civil Aviation Administration"). The obtained results imposed repair of the x-ray apparatuses mounted by Rapiscan Company as seen from letter of 30 January 2004 of the product specialist from the same company Yan Armitage (folder 1.1, sheet 135-136) shows that the x-ray generators were replaced as well as the detection boxes of the apparatuses and a new software was installed on them. After the modifications the software was configured in a manner meeting the requirements of the technical assignment as regards to the indices contained in the letter. Two self-ascertaining lists for office x-ray systems issued by the US Federal Aviation Administration were enclosed to the case, where the models of x-ray apparatuses mounted at Sofia Airport were not indicated as suitable for use. The indicated specifications of the installed x-ray apparatuses contributed to the lowest possible mark (4) of the x-ray control of the registered baggage – items 5.2 and 5.2.1 of Audit in Aviation Security at Sofia Airport, performed from 04 till 12 February 2005 by inspectors, in compliance with the requirements of Doc. 30 of ECCA (folder 1.4, the end).

For optimization of the operation of the unit for maintenance of x-ray apparatuses, the Executive Director of Sofia Airport EAD issued Order No: 47/18 February 2004 for opening of a new workplace for the position of "engineer of technical support of security systems" – see Letter No: 160-2811/27 February 2004 (folder 1.1, sheet 131).

Under these factual circumstances the current five-member committee of the Supreme Administrative Court makes the following conclusions as regards to the submitted cassation appeals:

A. Under the appeal of Danlex EOOD:

It appears reasonable. The imposed sanction is for a violation performed by the company under Art. 31, Par. 1 of CPA, expressed in statements made before MRDPW and MF, consisting of false data and information, damaging the reputation and the trust in its competitor Hydroloc EOOD, as well as the goods offered by the latter, manufactured by Rapiscan Company. It is notable that the provision of true facts even if they lead to the same result, does not constitute a violation under Art. 31, Par. 1 of CPA.

The argument for considerable violation of the administrative and court rules, expressed in the circumstance that CPC and the three-member committee of SAC assumed Hydroloc EOOD for a legitimate representative of Rapiscan Systems Ltd in case of unavailability of such data is unreasonable. Proofs were submitted under the administrative case for representation of Rapiscan Systems Ltd by Hydroloc EOOD. They were not disputed before the administrative body, as seen from the minutes of the meeting of CPC held on 16 February 2006 (folder 1.2, sheet 119). The question was raised only before the three-member committee of SAC where it was discussed and a substantiated and lawful response was received.

The argument for lack of violation under Art. 31, Par. 1 of CPA is also reasonable. The statements expressed in the above quoted letters of Danlex EOOD to MRDPW and MF do not contain false data and do not misrepresent information due to the following reasons:

- a) the statement that Hydroloc EOOD does not possess a license or a permit is true. As indicated above the License B-189, reg. No: 291 issued by the Nuclear Regulatory Agency in the name of Hydroloc was valid until 13 July 2004. The issue was not reviewed by SAC in the appealed ruling, but the conclusion of CPC for inadmissibility "...a serious participant on the market such as Danlex not to be aware of the legal amendments in force..." is unreasonable. As indicated above, on mounting the x-ray apparatus model 532HH no measurements were conducted by the authorized bodies due to which it cannot be preliminarily assumed that the procedure under Art. 56 of the Act on the Safe Use of Nuclear Energy is inapplicable. Due to that reason the submitted information is not "distorted"
- b) the information regarding the lack of "...service and technical team for installation, education and maintenance of x-ray apparatuses..." must be assessed in the same manner. The statement as submitted to both ministers entirely corresponds to the truth. It would have been different if it referred to "inability of Hydroloc" to ensure repair and maintenance of such apparatuses" for example. In such case, in the availability of a contract with such a subject, concluded with Sophilco OOD it is evident that the statement would be false. The unavailability of the relevant license for that which is a fact that could be verified, leads to the correct conclusion about the lack of service and technical team on behalf of Hydroloc due to which the statement is not incorrect. The existence of the contract itself is qualified by Hydroloc EOOD as commercial secret and Danlex are not obliged and cannot be knowledgeable about its existence. Danlex could have misrepresented facts only if they were knowledgeable of this fact and such data are missing. The conclusion of CPC (page 17, par. 2 from the top) about the possibility of Hydroloc EOOD independently to ensure delivery, mounting, operation, warranty and post-warranty service..." is also ungrounded.
- c) The conclusion of SAC that the general reading of the letter to MF "...leads to the persuasion that Hydroloc EOOD will be the contractor under an assignment without a tender or a competition namely because of the fact that it does not meet the necessary criteria...". The three-member committee has not indicated on the basis of what proof it has come to that conclusion, provided that it is not present in the decision of CPC. Similar insinuations in the two quoted letters of Danlex EOOD are not present. They only indicate that "...a delivery assignment was made without competition or selection... The delivery of x-ray apparatus with the specification at the amount of around 1 million BGN was assigned to Hydroloc EOOD in gross violation of the legal, qualification and technical

requirements...”. These statements also correspond to the truth. It is evident and undisputable that the procurement was assigned to the relevant company without a competition or selection by the competent authority. Despite the statement of the Public Procurement Agency on admissibility of the performance of the relevant procurement under Art. 13, Par. 1, Subpar. 3 of the Public Procurement Act, the principles of performance of public procurements are obviously violated. In this way Art. 2, Par. 1 of the Public Procurement Act (as amended as of the time of assignment of the delivery of an x-ray apparatus for Lesovo – Hamzabeyli border checkpoint) provides for publicity, transparency, free and loyal competition and equality of all applicants. Although the grounds under Art. 13, Par. 1, Subpar. 3 of the Act regarding its violation were available, the so indicated principles which should not be excluded in case of direct assignment of the procurements must also be observed. In this case it is undisputable that the procurement was performed without a competition and/or selection. It is also important that MRDPW has assigned it to Inos-1 and the latter, on its part, has assigned it to BMV OOD and the latter – to Hydroloc EOOD. This assignment and reassignment from one company to another without explanation of the reasons thereof, undoubtedly makes the product more expensive for the end user. It has been performed on the basis of bilateral negotiations between the assignor and the contractor for each reassignment without this process being public and transparent and without seeking for the opportunity to obtain the most beneficial proposal under the conditions of free and fair competition, due to the fact that such proofs were not collected. The conclusion made by CPC that “...the assessment of the observation of the requirements for conducting tenders and competitions, as well as of the qualification and technical requirements fall within the competence of the authority which has announced the tender and the competition whose actions are subject to legal control according to the Public Procurement Act and not within the competence of a certain business company...” (page 17 of the decision) is incorrect and contradicts the principles of the democratic society, including of Art. 120, par. 2 of the Constitution of the Republic of Bulgaria. The assessment for observation of one legal requirement or another is an expressed form of the freedom of thought and the right of opinion – basic rights of the citizens of the Republic of Bulgaria in accordance with Art. 37, Par. 1 and Art. 39, Par. 1 of the Constitution. It is another question what the practical value of this assessment is, but the opposite would mean that the people are not able to exercise their rights. Apart from that, the public control is one of the main forms of democracy. The forms and methods of its accomplishment may not be restricted (except in the cases stipulated by the law) due to which the present committee considers that Danlex EOOD approaching bodies such as the Minister of Finance and the Minister of the Regional Development and Public Works about actions which CPC and SAC have considered as performed in violation of the law, in fact has exercised its right to participate in the social and economic life of the country and to notify the authorities empowered to adopt measures if the signal is correct. The letters are addressed to state authorities directly related to the requirements for observation of strict fiscal discipline, which leads to the conclusion that intention for damaging the reputation and trust towards the competitor Hydroloc EOOD and the goods offered by the company and produced by Rapiscan, is not present.

- d) The statements referring to the x-ray apparatus installed at Lesovo border checkpoint for pallet checking are true and supported by the collected evidence. As seen in the letter of Danlex EOOD of 24 August 2005 it is stated that, "...it does not exist in the program of the manufacturer Rapiscan, that it is an experimental sample which would have not legitimately passed the procedures and the tests for conformity to the standards as well as specification for market release." As seen from the catalogue of Rapiscan Systems Ltd it actually does not have regular production of x-ray apparatuses model 532HH. No evidence under the case were submitted even for the production of any apparatuses with tunnel height over 200cm. The only statement in this direction is made by Attorney L. Vladimirov and is included in his petition of 11 November 2005 (folder 1.1, sheet 62) however, it is not supported by evidence despite the proof requested by CPC from Hydroloc EOOD in a letter dated 3 November 2005, item 3 (folder 1.1, sheet 60). The fact that an x-ray apparatus with tunnel height over 200cm is not available was probably known to the Customs Agency, which, while preparing Appendix No: 2 to the List of the necessary specialized technical equipment for customs control at Lesovo border checkpoint (folder 1.1, sheet 11), has not identified Rapiscan Systems Ltd as a company manufacturing similar equipment. The same was applicable to Hydroloc EOOD, which described the x-ray apparatus in question in the contract with BMV EOOD not as model 532HH but as "Stationary x-ray apparatus for checking of pallets "Rapiscan 532H – specially modified" and have envisaged a longer term for its manufacture exactly due to that reason. "Experimental" sample means that the article is not in regular production. This is expressly indicated in item 1.1 of Appendix 1 to the quoted contract between BMV EOOD and Hydroloc EOOD where it is stated that "that x-ray apparatus is produced especially under the assigned technical requirements so that modifications of the original specification of 532H are possible" (folder 2, sheet 4). As a final argument it could be stated the fact ascertained by the expert appointed by SAC who, after an inspection at Lesovo border checkpoint, has not found the necessary conformity marking which should be placed by the manufacturer on the x-ray apparatus in accordance with Art. 21, Par. 1 of the Act on Technical Requirements towards Products, Art. 3 of the Ordinance for assessment of the conformity for electromagnetic compatibility and Art. 2 and 3 of the Decree on conformity marking. The only document ascertaining the technical qualities of the installed x-ray apparatus, presented as model 532HH, is the "Rapiscan 532H & 532HH Technical specification, enclosed in folder 1, sheets 40-43. However, it is provided by the manufacturer who is undoubtedly interested in the outcome of the dispute and therefore should be approached with reserve. As indicated above, despite the proofs requested by CPC as to whether the company has manufactured and sold x-ray apparatuses with tunnel height over 2m, no such proofs were submitted. Factual technical indices for model 532HH in this specification, in contrast to the indisputable proofs as regards to model 532H do not exist, except the indicated different tunnel height. It is questionable whether under the same radiation sources envisaged for the lower tunnel height of model 532H and the increased height of model 532HH an unscanned area remains. CPC has not received an answer to this question. As indicated by the expert on page 4, par. 1 from the bottom in his conclusion, "...the correspondence of the technical indices of the x-ray apparatus is established by means of functional technical tests which are priority of an accredited laboratory – authorized to carry out such tests and to issue the

relevant certificates in this connection, in compliance with the European Directives for radiation safety...” The same expert ascertains that there isn’t such an accredited laboratory in Bulgaria which is able to perform the tests. A document certifying the compliance of the various technical parameters of model 532HH, issued by an accredited European laboratory has not been submitted by Hydroloc EOOD or Rapiscan Systems Ltd.

- e) With a view to the evidence the statements of Danlex EOOD announced in their letter to the Ministry of Finance of 24 August 2005 as regards to the two x-ray apparatuses purchased by Sofia Airport Ltd do not appear to be false. According to those statements, the company “...pays a lot until present – on the one part for the intensive service maintenance with own personnel and on the other part – through critical notes about inconsistent technical parameters indicated in the reports...”. CPC and the three-member committee of SAC have built their conclusions about availability of false statements, purposefully made on the basis of the proofs provided by Sofia Airport EAD which theoretically is interested in protecting its choice, irrespective of the quality of the purchased apparatuses, by virtue of which it appears to be an interested party. However, there are other proofs provided by other independent sources which were not taken into consideration but in which SAC has complete faith. They are the proofs evidencing the correctness of the statements. In the first place the Letter of the Executive Director of Sofia Airport to the Chief Director of Directorate General “Civil Aviation Administration”, ref. No: 160-2811/27 February 2004 (folder 1.1, sheet 131) that in connection with the problems with x-ray apparatuses installed at the airport he has modified the staff schedule and has opened one workplace – Engineer in technical support of security systems. This fact taken alone and the funds expended on the engineer occupying the new workplace substantiate the correctness of the statement of Danlex EOOD in its first part. Moreover, the proofs for incompatible technical parameters of the supplied x-ray apparatuses are more detailed. In the first place this is seen from the content of the Protocol of ascertainment of the inspection conducted on 24 June 2003 (folder 1.1, sheet 122) and the subsequent correspondence between the chief director of GDCAA and the director of Sofia Airport (folder 1.1, sheet 124-138), the content of which was reproduced above. Similar are the facts ascertained by the Aviation Security Audit which has given the mark 4 (i.e., the lowest possible) under folder 5.2 – x-ray control of the registered baggage (folder 1.4, the last document).

Having in mind the aforesaid, the present committee considers that the cassation petition is substantiated.

B. Under the petition of Hydroloc EOOD

The present committee, with a view to the aforesaid as regards to the conduct of the competitor Danlex EOOD considers that the petition is not substantiated. Without repeating the arguments of CPC and the three-member committee of SAC which are also determined by the present one, it must be indicated that factual specific cassation arguments were not substantiated. The statement for violation of Art. 31, Par. 2 of CPA for example, is presented by “the defendant brings forward the quality of the goods and products offered by him and allows him to compare those making intolerable suggestions.” Outlining the quality of a certain article is the essence of its advertizing.

Hydroloc EOOD does not indicate which of the outlined qualities of the production of Smiths Heimann GmbH leads to intolerable suggestions and what exactly they are. In both letters Danlex only states that "...the x-ray apparatuses are manufactured by the German producer Smiths Heimann GmbH which apparatuses won all procedures under PHARE program for equipment of the Customs Agency in the past 5 years. The quality of the x-ray apparatuses and the performance of the contracts were fully satisfactory for the Customs Agency and the other subjects involved in the contracts..." (a letter to MRDPW and MF of 30 May 2005) and "... We are ready to offer a high-quality x-ray apparatus possessing the required specifications, manufactured by the German company Smiths Heimann which for the past 5 years has supplied x-ray apparatuses for the Customs Agency for millions of euro, with flawless quality and performance." (a letter to MF of 24 August 2005). Neither of these statements has been proven incorrect, neither of them attributes "non-existent qualities of goods or services compared with the goods or services of the competitors", due to which CPC was right not to accept it as violation and not to impose a sanction and these conclusions are shared with SAC.

The argument for violation under Art. 32, Par. 2 of CPA is not substantiated either. It is also presented declaratively. In the practice of CPC and the court this text applies in case of false data and misrepresentation of facts in the advertisement of own articles; in contrast to that behavior as regards to the competitor, which is sanctioned under Art. 31 (1) of the law.

The argument for violation under article 34 (1) of CPA is also ungrounded. It is indisputable that attraction of any of the clients of Hydroloc EOOD and termination of already concluded contracts with them as a result of the behavior of Danlex EOOD is not present. Such a violation, directed towards attraction of clients generally is not punishable from the point of view of CPA.

The actions performed by the manager of Danlex EOOD – Nadia Ivanova Bojilova were incorrectly assessed. Development of the thesis of Hydroloc EOOD shall lead to imposition of sanctions not only to economic subjects – business companies, but in all cases of violation on their behalf penalties should be imposed to their management staff as well. It is indisputable that there isn't any document drawn up and signed by the business company. This in all cases is performed by the persons managing and representing that business company. Due to these qualities however, when they act as such they assume the responsibility on behalf of the business companies they represent not on their behalf as natural persons. According to the cassator differentiation of these activities is unallowable which involves completely incorrect interpretation of the law.

This petition, being unsubstantiated, must be left unsatisfied.

Due to the stated arguments and having in mind the substantiation of the petition of Danlex EOOD and the ungrounded petition of Hydroloc EOOD the ruling of the three-member committee of SAC must be revoked and another ruling must be enacted, pertaining to the essence of the dispute, which should respect the initial petition of Danlex EOOD and revoke the decision of CPA in that part which assumes performance of a violation by that company under art. 31 (1), in connection with art. 30 of CPA and a sanction was imposed at the amount of 50000 BGN.

The cassator Danlex EOOD in both court instances has requested adjudgment of the legal costs. With a view to the conclusions of the five-member committee of SAC, they appear reasonable. As seen from the submitted documents, before the first instance expenses were made at the amount of 650 BGN, of which 50 BGN for state fees; 300 BGN for attorney fees and 300 BGN for the expertise under the case; in the second instance they are 1525 – 25 BGN for state fees and 1500 for attorney fees, or 2175,00 BGN altogether. CPC must pay the expenses incurred.

Having in mind the aforesaid and on the grounds of Art. 221 (2) of the Administrative and Procedure Code, SAC, with its five-member committee

RESOLVED:

REVOCATION of Ruling No: 5833/8 June 2007 enacted under administrative case No: 3085/2006 under the register of the Supreme Administrative Court and in its stead enacts:

REVOCATION of a Decision of the Competition Protection Committee No: 30/16 February 2006 enacted under case No: KZK-201/2005, assuming that Danlex EOOD Sofia has performed violation under art. 31, par. 1 of the Competition Protection Act and has been imposed a sanction at the amount of 50 000.00 BGN.

SENTENCES the Competition Protection Commission to pay Danlex EOOD, 2B Topli Dol Str., Sofia 1680, the amount of 2175,00 (two thousand one hundred seventy five) BGN for costs on the case for both instances.

The court ruling is final.

True to the original.
Secretary (initials)

CHAIRMAN: Andrey Ikonomov (initials)

MEMBERS: Diana Dobрева (initials)
Tanya Radkova (initials)
Ivan Radenkov (initials)
Iliyana Doycheva (initials)

Seal: Supreme Administrative Council

Seal: Supreme Administrative Council
The ruling has become effective on 8 January 2008.
Secretary: (initials) 8 January 2008