

Recent Developments in Slovak Competition Law – Legislation and Case Law Review¹

by

Zuzana Šabová*, Katarína Fodorová**, Daniela Lukáčová***

CONTENTS

- I. Introduction
- II. Legislative changes
 - 1. Latest amendment of the Act on the Protection of Competition (2012)
 - 2. New draft amendment to the Act on the Protection of Competition (2013)
- III. Selected decisions and other activities of the Slovak Antimonopoly Office
 - 1. Control of concentrations
 - 2. Antitrust cases
 - 3. Competition advocacy
 - 3.1. Inter-ministry comment procedures
 - 3.2. Market studies
- IV. Significant judgments of Slovak courts in competition matters
- V. Conclusions

¹ All views expressed by authors in this paper are strictly personal and do not represent the opinion of the Antimonopoly Office of Slovak Republic; zuzana.sabova@antimon.gov.sk.

* Zuzana Šabová, Antimonopoly Office of Slovak Republic, PhD. Student at Comenius University, Bratislava. All views expressed in this paper are strictly personal and do not represent the opinion of the Antimonopoly Office of Slovak Republic; zuzana.sabova@antimon.gov.sk.

** Katarína Fodorová, Antimonopoly Office of Slovak Republic; katarina.fodorova@antimon.gov.sk.

*** Daniela Lukáčová, Antimonopoly Office of the Slovak Republic; daniela.lukacova@antimon.gov.sk.

I. Introduction

Slovak competition law is set by the Act No. 136/2001 Coll. on the Protection of Competition, as amended (hereafter, Competition Act). Covered therein is the prohibition of competition restricting agreements and the prohibition of the abuse of dominance as well as concentration control. The wording of the prohibitions is identical to Articles 101 and 102 TFEU. Control of concentrations is largely modelled after the EU system also including the substantive test, Significant Impediment of Effective Competition, which is used in Slovakia since 2012 with some procedural divergences. Enforcement is administrative in nature and only undertakings are subject to investigations and fines. The relevant enforcement body is the Antimonopoly Office of the Slovak Republic².

The EU enforcement model remains the main source of inspiration for national legislation, for the decision-making practice and competition policy of the national competition authority – the Antimonopoly Office (which tends to rely on the concepts and doctrines established at EU level) as well as for the soft laws adopted by the Office on its own initiative (Leniency programme, Guidelines on Commitments, Guidelines on Settlement etc.).

In recent years, the main issue has been the interplay between the Office's decision-making practice and judicial review carried out by the Regional Court in Bratislava, acting as the first-instance court, and the Supreme Court of Slovakia, as the appellate body. The Office lost several big cases in 2009–2011 before the first-instance court that related to issues such as: bid-rigging in the construction sector; restrictive agreement in the banking sector and; several abuse cases in telecoms³. Some of these cases are still pending before the Supreme Court based on appeals lodged by the authority. The differences in opinion between the Courts and the Office related mainly to the evidential threshold and other procedural aspects. Unlike the authority, the courts tend to rely more on criminal investigations or general administrative principles than on EU case-law and doctrines as their reference point.

The need for coherent application of EU competition law has led to two *amicus curiae* interventions by the European Commission pursuant Article 15(3) Regulation 1/2003⁴. The first took place in 2011 and concerned the notion of

² Decisions of the Office and the relevant national judgements are published on the Office's web site www.antimon.gov.sk.

³ The Office's stance on the judgments can be found in the document „Problems arising from the decision-making practice of the courts in competition law in Slovakia“. The Office published the document on its webpage; an English version is available at <http://www.antimon.gov.sk/849/c-2011.axd>.

⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.

‘undertaking’, in particular the transfer of liability for a breach of competition law from the offender onto a new entity (economic successor) after the perpetrator ceased to exist (economic continuity test). The more recent 2012 case related to the imposition of a fine for an offence consisting of a violation of the so called ‘general clause’ – general ban on the abuse of dominance⁵. Mentioned should also be the fact that a Slovak court submitted recently for the first time a reference for a preliminary ruling under Article 267 TFEU. The issue at stake was the notion of a cartel and liability for participating in such conduct.

This experience has shown that it is worth building an open and continuous dialogue with the national judiciary and the Office has indeed been paying a lot of attention to competition advocacy. Recently, a number of conferences and workshops were organised and discussions launched about particular features of competition law and its current problems including the margin squeeze doctrine, inspection powers or fining mechanisms⁶. Thanks to initiatives on both sides, progress can be expected.

The policy of the Slovak Antimonopoly Office shows a clear shift from a traditionally formal to a more economic approach. This is visible in cases concerning vertical agreements (such as a case concerning alleged RPM in distribution of luxury cosmetics in 2011) as well as recent abuse cases (exclusionary behaviour in the waste management sector, excessive fees for certain activities in the electricity sector). A positive attitude towards this trend, which corresponds to EU practice, can also be observed on the part of Slovak courts as illustrated by the latest judgment of the Regional Court in Bratislava concerning margin squeeze in telecoms. In order to ensure a coherent and expert approach in this field, a chief economist unit was formally established in 2012.

At the beginning of 2013, the Office publicly presented also its strategy for the next term⁷. This document suggests that the Office’s general objective is

⁵ The Supreme Court ruled in 2011 for the first time that the Office cannot impose a fine when the offence consists of a violation of a ‘general clause’ (opinion given in a ruling related to a case concerning funeral services assessed under national law only). This view was later followed by other panels of judges in different cases (telecoms, fuel) some of which concerning also the application of Article 102 TFEU. However, this judicial view is not uniform as shown by the latest telecoms judgment, where the Regional Court in Bratislava left this question open. For detailed comments see K. Kalesná, ‘Zneužívanie dominantné hopostavenia v teórii a aplikačnej praxi’ [Abuse of dominant position in theory and case law] (2012) 4 *PrávnyObzor*; Z. Šabová, ‘Zásada nullum crimen sine lege a ukládanie sankcií v súťažnompráve’ [The principle of nullum crimen sine lege and imposition of fines in competition law] (2013) 2 *PrávnyObzor*; O. Blažo, ‘Nullum crimen, nulla poena sine lege a generálne klauzuly v prípadoch zneužívania dominantné hposavenia’ [Nullum crimen, nulla poena sine lege and general clauses in cases of the abuse of dominant position] (2013) 4 *Justičná revue*.

⁶ 2012 Annual Report of the Antimonopoly Office, available also in English on its website.

⁷ The document ‘Antimonopoly Office of the Slovak Republic, its mission and policy orientation for the next period’ is available at <http://www.antimon.gov.sk/files/31/2012/Ciele%20PMÚ%20SR.pdf>.

to build a modern competition authority with a policy focused on consumer benefits. To achieve this, the authority has been gradually introducing a variety of special measures and changes to Slovak legislation and policy-making as well as to the Office's own organizational structure. Prioritization seems to be the main challenge of its enforcement activities; an effort that corresponds to the EU model as well as to the overwhelming trend throughout the EU.

Although prioritizing is not a notion completely new to the Office's practice (such references can be found in cases dating from 2009⁸), it is the first time for it to be publicly announced as a matter of policy. The principles of prioritization were published⁹ in March 2013 in the form of a soft law, there is no direct legislative provision supporting them in the Competition Act yet. Nevertheless, since infringement procedures can only be opened in Slovakia on an *ex officio* basis, it is fair to say that prioritization is legitimate also under the current wording of the Competition Act. Since these principles have been used in practice for a very short period of time only, it is not yet possible to draw substantial conclusions in this regard.

As regards the prioritization principles, it is obvious that the Office will focus its resources on the most serious types of infringements such as cartels (namely bid-rigging), exclusionary abuses and the implementation of prohibited mergers. These types of conduct are generally considered as the most harmful to competition. It is thus not surprising that also the Slovak competition authority aims to concentrate its resources on prosecuting them. More importantly, the document sets and explains detailed rules on how the authority intends to apply the prioritization policy in its everyday work. Aside from this, it is declared that administrative proceeding are but one of the many means to alleviate competition concerns and problems stressing also the usefulness of advocacy activities and sector inquiries.

Concerning sectorial orientation, the Office will focus its activities in the next term on the financial sector, food industry and the heat sector. While the first two largely mirror EU efforts, the final selection reflects the repeated complaints submitted in this field in Slovakia in recent years as well as the fact that the heat sector is perceived as a sensitive area from the end-user perspective and marked by systemic deficiencies resulting from structural problems and insufficient regulation.

The shaping of the prioritization policy and the wording of its particular principles will certainly be subject to expert discussion and possible refinements may arise from practical experiences. Nonetheless, the essential need for

⁸ e.g. the Office did not investigate a given period of abuse due to regulatory intervention. The Office concluded that since the identified problem was solved by the regulator, parallel proceedings would no longer be of priority.

⁹ Available at <http://www.antimon.gov.sk/409/4939/prioritisation-policy-of-amo-sr.axd>.

prioritization remains indisputable. The Office makes visible efforts to become a modern and flexible enforcement agency and a full-fledged member of the ECN. However, with its limited budget of about 2,1 million EURO for 2013 and a small number of staff (34 non-administrative staff working on competition matters in 2012), which represents a decrease in resources compared to 2012¹⁰; prioritization of its activities in all areas of competencies appears to be inevitable.

II. Legislative changes

1. Most recent amendment of the Act on the Protection of Competition (2012)

Slovak competition law has undergone several amendments since its introduction in 1991 – most recently in January 2012 by the provisions of Act No. 387/2011 Coll. Introduced thereby were primarily changes to its merger control rules creating new assessment criteria whether a concentration shall be subject to pre-emptive control by the Office. The amendment eliminated obligatory notifications in cases where the target company meets certain worldwide turnover criteria but does not notably participate in the competitive exchange within Slovakia itself. For the national notification obligation to arise, the target company must now attain a given turnover inside the Slovak Republic. The main goal of this shift is to enable the Office to focus its capacity on concentrations most important to the national economy.

At the same time, a two-phase assessment process was introduced. The Antimonopoly Office currently has twenty-five working days from the date of the notification to analyze concentrations or ninety working days for more complicated cases.

The amendment adjusted also the circumstances and the lapsing of the time limit: for the Office to find that a notification had been incomplete in its section referring to affected markets; when it asks a party to the proceedings to submit further information and documents, which may substantially affect the decision on the concentration; or if the decision is annulled by the court or by the Office itself; and when the original notification becomes non-complete due to a change of market conditions or provided data which has occurred in the mean time.

The amendment introduced also the Significant Impediment of Effective Competition test (SIEC test) as the assessment criteria for concentrations and eliminated the use of the earlier Dominance test. This change harmonises Slovak legislation with EU competition law and is consistent with the more economic approach to competition law proceedings.

¹⁰ In 2012, the Office's budget was of EUR app. 2,4 million.

The amendment shortened also the period in which the Office can issue a decision on the exemption from the suspension of a concentration. The Office is to issue a decision on the granting or non-granting of such an exemption within twenty-five working days following the delivery of the request (as opposed of the previous thirty days).

Following these legislative changes, the Office's Decree on the particulars of the notification procedure was also amended in the part that relates to affected markets. It is now more precise in stipulating which markets are considered as 'affected' by a concentration.

Beside the merger-focused part of the reform, the 2012 amendment brought about a number of minor changes concerning procedural aspects of competition enforcement such as the fact that a warrant submitted by a party to the proceedings no longer requires a certified signature.

In addition, changes were introduced in the area of sanctioning. Undertakings are now no longer obliged to pay a penalty for failing to pay the imposed fine on time. The reason for this change was that the Office had found that such penalty payment did not satisfy a precautionary purpose but represented only a secondary sanction which could be excessively high compared to the sanction imposed.

The amendment affected also the enforcement of Slovak competition law decisions. The Office used to be obliged to finish execution within five years. The period within which its decisions can be ordered to be executed is now set to five years from the expiration of the time limit set for the fulfilment of the imposed obligation. This amendment puts Slovak competition law in line with its general legislation on administrative proceedings.

2. The new draft amendment to the Act on the Protection of Competition (2013)

The Antimonopoly Office prepared in 2012 a new draft amendment to the Competition Act, which was submitted for public consultation and is currently being prepared for legislative submission. The main aims of the draft are to further approximate Slovak legislation with EU law and to further improve its national merger control system.

In the antitrust field, the draft omits the regulation of the essential facility as it did not correspond to EU case-law and has proven problematic in practice.

Regarding merger control, the Office intends to further speed up its assessment process. The counting of the time limit for issuing a decision is drafted to begin on the day following the day of the delivery of the notification rather than the day of the delivery of a complete notification as is currently the case. Following the EU model, the amendment is to introduce the role

of a trustee and provides further details in this regard. A trustee would assist the Office in supervising the fulfilment of merger remedies or would directly fulfil the remedies on their behalf.

The draft clarifies the competences of the Office with respect to procedural rules. Following practical experiences and judicial review, it also provides for a refinement and clarifications of the obligations of undertakings during inspections.

In light of the increasing importance of ‘due process’, the draft tackles the need to regulate access to the file as an important part of the right of defence. This is an especially sensitive issue that requires precise rules particularly so when the file contains confidential information or business secrets. Again, the adopted approach draws inspiration from the European Commission’s practice and EU jurisprudence. In addition, the amendment provides precise rules on access to the file in leniency cases. After the amendment enters into force, leniency applications will not be part of the file until the Call before Issuing a Decision (national equivalent of the Statement of Objections) is sent to the scrutinised undertakings. Only after would a party to the proceedings be allowed to make a transcript of the relevant documents but even then, it will not be allowed to copy them.

With the aim to encourage leniency applicants and boost the use of the Leniency programme, another important draft change relates to claims for private damages. Similarly to Hungarian legislation, a leniency applicant will in the future not be further liable in private lawsuits, provided the sustained damage can be reimbursed by other cartel members.

However, the leniency programme can only be efficient if the Office is able to uncover cartels *ex officio* also. In order to achieve this, the draft introduces a completely new tool – the so-called ‘informant’ – as already used in some EU countries such as the United Kingdom and Hungary. Accordingly, the first person to provide significant evidence about a horizontal restrictive agreement may in the future be entitled to a reward of 1% of the imposed sanction (not exceeding EUR 100,000) under conditions specified by law. Given the quite low number of leniency cases completed so far in Slovakia, this new tool could lead to an increase in the number of cartel cases in general as well as induce leniency applicants to approach the Office in particular.

From a practical point of view, the draft proposes a change relating to communication between the parties to the proceedings and the Office. Delivery of some documents by the Office will be possible by electronic means, if the undertaking so requests.

Furthermore, the draft introduces a shift in the internal organisation of the Antimonopoly Office. The Deputy Chairperson will no longer be a member of the Council of the Office but will be responsible for first-instance proceedings

instead. The amendment stipulates the conditions of the performance of the Deputy Chairperson's office, in particular appointment and dismissal conditions.

A number of related soft laws will be changed once the amendment of the Competition Act is introduced. The Office has prepared a new draft Decree on the *De minimis* rule as well as on Settlement and on the Leniency programme. According to current legislation, the *De minimis* rule is governed directly by the Competition Act. Based on the amendment, only its basic framework will be stipulated in the Act, its details will be covered by a Decree. The same will happen with respect to Leniency and the Settlement procedure. The *De minimis* rule will be further approximated with EU law. In terms of Settlement, there was so far no legal basis in Slovakia for the operation of such procedure. Fine reductions were awarded in practice on the basis of a general rule allowing the lowering of fines for cooperation during the investigation and proceedings¹¹. The basic principles of the new Slovak Settlement procedures are identical to those used by the Commission. Unlike in the EU however, the Slovak procedure will be applicable to all competition law infringements including restrictive agreements, abuse, infringements relating to merger control and other forms of unlawful restrictions of competition¹².

In addition, the existing Decree on the particulars of the notification procedure will be annulled and a new one prepared. The Decree on the calculation of turnover will also be annulled – some of its provisions will be incorporated into the Competition Act, other aspects will be regulated in a new soft law act.

III. Selected decisions and other activities of the Antimonopoly Office of the Slovak Republic

1. Control of concentration

Holcim and VSH (construction industry)

In this concentration, the undertaking HOLCIM Auslandbeteiligungs GmbH, Federal Republic of Germany (hereafter, Holcim) gained direct exclusive control over the undertaking Východo – slovenskéstavebnéhmoty,

¹¹ For further details see O. Blažo, 'Úsviturovnania na Slovensku' ['Dawn of settlement in Slovakia'] (2011) 2 Antitrust – Revue of Competition law.

¹² State administration authorities during the performance of state administration, local self-administration authorities during the performance of self-administration and transferred performance of state administration, and special interest bodies during the transferred performance of state administration must not provide evident support giving advantage to certain undertakings or otherwise restrict competition.

a. s., TurňanadBodvou (hereafter, VSH). It was the first concentration approved with remedies after the Office published in 2006 its Directive on Conditions and Obligations (national equivalent to EU merger remedies)¹³. The concept of trustee and a ban to implement a concentration before the fulfilment of remedies were used here for the first time during the remedies imposition procedure.

Holcim was a member of a group of companies controlled by Holcim Ltd. and operated in the Slovak Republic through its subsidiary Holcim (Slovensko) a. s., Rohožník. It was active in the production and sale of bulk and packed cement, truck-mixed concrete, aggregates and transport services.

VSH was a Slovak company that engaged, most importantly, in the production and sale of bulk and packed grey cement. It was also active in the production and sale of truck-mixed concrete, aggregates and transport services.

The Office analysed the impact of the concentration on several relevant markets and found that the operation would negatively influence effective competition on the relevant market for the production and sale of grey cement in Slovakia. Barriers to effective competition were also identified on the relevant market for the production and sale of truck-mixed concrete within the respective territories in the Slovak Republic.

Upon the request of the Office, Holcim proposed conditions and related obligations leading to the sale of the Vlkanová Terminal, a sales force of Holcim, within a scope necessary to achieve viability and competitiveness of the sold business. The Antimonopoly Office tested whether the proposed conditions were sufficient and effective enough to prevent Holcim from acquiring or strengthening a dominant position as a result of the concentration, which would create major barriers to effective competition on the respective relevant markets.

On the basis of market enquiries and other information received in the administrative proceedings, the Office found that competition problems would not arise if the Vlkanová Terminal was sold to an independent transferee (not related to the parties to the operation and their economic groups). However, such entity would have to have experience, incentive and opportunity to maintain and develop the respective business and be able to exert effective competitive pressure on Holcim after the implementation of the concentration on the relevant market for the production and sale of grey cement. The sale of the Vlkanová Terminal to a suitable transferee was subject to approval by the competition authority.

¹³ Available at <http://www.antimon.gov.sk/574/directives-and-guidelines.axd>.

In view of the limited number of suitable transferees, the Office applied in its decision a particular provision of the Competition Act whereby the parties to a concentration must not exercise the rights and obligations resulting from the concentration until the fulfilment of the imposed conditions. The decision¹⁴ with conditions and obligations entered into force on May 15, 2011.

AGROFERT HOLDING, a. s. and EURO BAKERIES HOLDING a. s. (bakery sector)

The Office assessed here a concentration consisting of the acquisition of direct sole control by the undertaking AGROFERT HOLDING, a. s., Praha, Czech Republic (hereafter, 'AGROFERT'), over the business of the undertaking EURO BAKERIES HOLDING a. s. Praha, Czech Republic. The Office conducted its assessment according to the former substantive test – the Dominance test – and focused on the potential creation or strengthening of a dominant position with a significant negative impact on competition.

In its horizontal assessment, the Office focused on the analysis of the relevant market for the production and distribution of fresh bread in Slovakia, relevant market for the production and distribution of fresh common bakery products in Slovakia and the relevant market for the production and distribution of other sweet and savoury bakery products in Slovakia.

According to the Office's findings in the first-instance proceedings, this concentration would have created a dominant position for the undertaking AGROFERT resulting in significant barriers to effective competition in all mentioned markets.

In its vertical assessment, the Office examined the impact of the transaction on the market for flour distribution but did not identify any competition concerns. In the light of the conclusions regarding horizontal aspects of the operation, the Office prohibited the concentration in first-instance proceedings. AGROFERT appealed the decision at first but ultimately withdrew its notification in the course of second-instance proceedings. The Council of the Office changed therefore the original decision and terminated the proceeding¹⁵.

Caterpillar/MWM (use of referral system)

In 2010, the Slovak Antimonopoly Office received a notification of a concentration between Caterpillar Inc., United States of America (hereafter, 'Caterpillar') and MWM Holding GmbH, Germany (hereafter, MWM). The European Commission soon informed Member States that the German

¹⁴ Available at http://www.antimon.gov.sk/files/29/2011/018_bez%20OT.rtf.

¹⁵ Decision available at <http://www.antimon.gov.sk/files/38/2013/RozhAgrofertWeb.rtf>.

competition authority, the Bundeskartellamt, submitted a request for referral under Article 22 of Regulation No. 139/2004 and that other EU countries could join the request of the German competition authority.

The proposed concentration led to horizontal overlaps, especially in the area of gas power plants driven by piston engine (hereafter, 'REGS') for decentralized energy supply. The geographical relevant market was determined to be the area of the EEC.

The Slovak competition authority joined the request of the Bundeskartellamt and asked for the European Commission to assess the case. The Commission informed the Office that such referral was admissible because it fulfilled the requirements set forth in Article 22(2) and Article 22(3) of the Regulation: the request had been delivered within the prescribed time period, the concentration influenced trade between Member States; and was likely to significantly influence competition in the territory of the Member State or Member States requesting referral. The Commission thus decided to examine the concentration. Subsequently, the Slovak competition authority stopped its own proceedings¹⁶. This was the first time for the Office to successfully apply Article 22 Regulation 139/2004. It was also the first time for waivers to be used.

2. Antitrust cases

Procter & Gamble and HENKEL (Agreement restricting competition, leniency programme, settlement procedure)

Based on a leniency application lodged by Procter & Gamble, International Operations and Procter & Gamble, spol.s r. o., the Antimonopoly Office opened an investigation of a cartel agreement among detergent producers. Given the time frame of the infringement, national laws were applied regarding the pre-accession period, both national and EU competition rules were used in parallel for the period after the Slovak Republic's entry into the EU.

According to the Office's findings¹⁷, between mid-1999 and the end of 2004, particular undertakings belonging to the Procter & Gamble and Henkel groups negotiated an agreement on the limitation of the scope and frequency of promotional activities for the sale of high-efficiency detergents in the Central European region. They also agreed, in terms of standardization of packaging of high-efficiency detergents, for prices to remain at the level of former packaging even after the introduction of a new standard packaging.

¹⁶ Available at <http://www.antimon.gov.sk/files/29/2011/005.rtf>.

¹⁷ For further details see Annual Report of the Antimonopoly Office of the Slovak Republic, 2011.

Participants exchanged also commercially sensitive information. The Office decided that the parties concluded and implemented an agreement on indirect fixing of prices for goods on the relevant market for household detergents in Slovakia.

Both leniency applicants from the Procter & Gamble group fulfilled the immunity conditions. The Office imposed a fine of EUR 291 060 on Henkel Central Eastern Europe and a fine of EUR 194 040 on HENKEL SLOVENSKO, spol. sr.o.. Regarding these two undertakings, the fact that they admitted their participation in the cartel, cooperated in the investigation and provided the Office with supplementary evidence was taken into account as a mitigating circumstance. As a result, the basic amount of their fines was decreased by 30%. The decision was not appealed.

This case represents the first successful use of the Leniency Programme in the Slovak competition authority's decision-making practice. Two others proceedings initiated upon a request for the non-imposition of fines were also opened but while one of them is currently pending before the Slovakian Supreme Court, the other was closed for procedural reasons.

The Slovak Leniency Programme is modelled after the EU. Its basic conditions are stipulated in the Competition Act and expanded upon in soft law. Leniency has been part of Slovak legislation since 2001 but it was not used in practice until the first case opened in 2007. The 3 aforementioned cases are thus Slovakia's only experiences with leniency. Still, the stance that courts will take in the future regarding pending cartels will surely influence the motivation of undertakings to approach the Office with leniency submissions. Meanwhile, the authority strives to promote the programme and to eliminate possible concerns for potential applicants. For that purpose, it induced a change into Slovak criminal and public procurement law whereby a successful leniency applicant receives immunity from sanctions not just from national competition law but the other two legal systems also¹⁸. Moreover, the currently underway draft amendment of the Competition Act (presented above) is to introduce a further refinement of the Leniency programme (reward for informants) which will benefit applicants and, simultaneously, may also boost the number of leniency submissions.

Despite the fact that there is currently no legal basis for settlement in the Competition Act, the Office applied it successfully in this case to the Henkel group on the basis of soft law only. In order to increase legal certainty for

¹⁸ Z. Šabová, 'Aktuálne otázky aplikácie Leniency programov v súťažnompráve' ['Current trends in leniency programmes in competition law'] (2011) 8-9 *Justičná revue*; K. Fodorová, 'Zánik trestnosti trestné hočiny v nadväznostinavy užítie leniency programu v Slovenskej republike [Interplay between the decriminalisation of cartels and the leniency programme] (2010) 2 *Antitrust – Revue of Competition Law*.

undertakings and transparency of public activities, the above draft amendment introduces essential rules on settlement into the Competition Act to be complemented by an additional Decree of the Office stipulating its further details.

3. Competition advocacy

Beside its decision-making activities, the Antimonopoly Office promotes and develops the Slovak competitive environment also through competition advocacy initiatives. It is generally recognized that such activities have a preventive effect on law compliance and contribute to the development and general societal consent to competition policy and competition culture. Competition advocacy comprises a wide range of activities: the competition authority submitting its own comments to draft legislation or other documents within the inter-ministry comment procedure; publishing various initiative documents; as well as engaging in expert discussions with stakeholders etc.

3.1. Inter-ministry comment procedures

Through comments to draft legal acts and other documents, the Office seeks to eliminate potential barriers to the effective application of competition rules that are likely to cause a failure of the market and the competitive environment. The Slovak competition authority is quite active in this area and pays a lot of attention to these activities (comments submitted to 36 documents in 2011; 33 in 2012). In the recent period, the authority's comments concerned primarily the health sector, the draft Act on Advocacy and the draft Act on Public Procurement. Such comments can be of fundamental nature or have the nature of a recommendation.

3.2. Market studies

With the gradual shift from a formal to a more economic, effect-based approach to competition law enforcement, the importance of in-depth knowledge of particular sectors increases. Market studies can help competition authorities to become more familiar with specific features of given industries and markets. They help detect the causes of market deformations and to identify potential anticompetitive restrictions. They are particularly important in newly liberalised sectors that are gradually being opened to competition.

Railway transport services

In 2011, the Office finalised a sector inquiry in the area of railway transport – its results were later discussed with concerned undertakings and regulatory bodies¹⁹. The objective of this inquiry was to evaluate the rail-transport services sector from a competition point of view and to identify key problems that prevent or prevented the development of market competition.

The report focuses on rail-freight transport. The railway sector was recently liberalized – railway infrastructure (including railway lines) is administered by the state-owned company ŽSR, infrastructure access prices are regulated and private companies can operate alongside state carriers. According to the 2011 findings, competition on the rail-freight transport market did not develop despite liberalization. It was established that the incumbent carrier, the state-controlled company CARGO, held a higher than 90% market share while private carriers achieved very low market shares and grew at a low rate in spite of the fact that they have been operating since 2004.

According to the Office's findings, the main hindrances to the development of competition on the rail-freight transport market included excessive or unreasonably high entry barriers; access to modern electric locomotives and locomotive diesel fuelling systems was found to be particularly problematic. Regulation of the access fee for rail transport routes caused difficulties as well – the access fee is an important cost item for carriers, one that significantly affected the transport price. Since 1 January 2011, this fee was regulated in such a manner that it ranked among the highest in Europe lowering the overall competitiveness of rail-freight transport in comparison with road-freight transport. It also caused a fall in the competitiveness of the Slovak Republic in transit transport and an overall decrease in the volume of rail transport, which had a negative effect on new carriers.

Problems were identified also in certain aspects of the influence exercised on this sector by the Slovak state, especially the method by which subsidies and other financial support are being provided to state undertakings. The development of competition was also said to be potentially complicated by lacking interoperability (i.e. technical compatibility of the Slovak railway network with its neighbours) and low quality of railway infrastructure. Finally, the development of competition was also endangered by the conduct of state-owned companies – carriers trying to keep their market dominance by way of different practices such as access denial to infrastructure needed by private carriers as well as by various pricing practices.

¹⁹ Available at <http://www.antimon.gov.sk/files/23/2011/Problémy%20v%20sektore%20železničnej%20dopravy%20zo%20súťažného%20hľadiska.pdf>.

Gas sector

In 2010, the Office finalized a Sector report on the functioning of the gas market in the Slovak Republic²⁰ which was preceded by consultations with interested stake holders including representatives of the Office for Network Industries (i.e. the relevant regulatory body) and the Ministry of Economy and Construction. The competition authority focused its report on a comprehensive description of the market and its levels as well as the players acting thereon. Evaluated was the situation of gas supply to final consumers from the competition law point of view including the identification of factors affecting its further development. Competitors arrived in the area of gas supply in the Slovak Republic in 2009 – 2010 saw a continued growth in their market share to the detriment of the incumbent supplier SPP, a. s.. The Office established that it was necessary to focus its inquiry on the following areas: predictability and transparency of legislative measures and the analysis of their market impact; availability of comprehensive information on the market to all its participants; adoption of further measures to increase the liquidity and flexibility in the area of gas trading; revision and correct setting of regulatory measures according to real market needs; determination of specific plans for the interconnection of networks between the Slovak Republic and its neighbours. The final report was submitted as an informative material to the Slovak Government in November 2010.

IV. Significant judgments of the Slovak courts in competition matters*Case C-68/12 Slovenská Sporiteľňa (Preliminary ruling, Art. 267 TFEU)*

In February 2012, the Supreme Court of Slovakia submitted a reference for a preliminary ruling to the Court of Justice of the European Union (C-68/12 *Slovenská Sporiteľňa*) related to a cartel case decided by the Antimonopoly Office in 2009. The authority investigated the conduct of three major banks, Slovenská Sporiteľňa, a.s. (hereafter, SLSP), Všeobecná úverová banka, a.s. (hereafter, VUB) and Československá obchodná banka, a.s. (hereafter, CSOB). It concluded that their agreement to terminate existing current account contracts and not to conclude new ones for the company Akcenta CZ, a.s. (hereafter, Akcenta) was aimed to illegally exclude the latter from the market of non-cash foreign exchange transactions, where it acted as their competitor. The Office imposed on SLSP, CSOB and VUB fines of app. 3.2, 3.2 and

²⁰ Available at <http://www.antimon.gov.sk/files/26/2011/VS%20PMÚ%20SR%202010.pdf>.

3.8 million EUR, respectively. Given that effect on trade between Member States was present in this case, Article 101(1) TFEU was applied in parallel to national competition rules.

Akcenta is a Czech non-bank financial institution providing cashless foreign exchange services. It held a licence of the Czech National Bank, but it did not have such licence from the National Bank of Slovakia. Akcenta was able to provide foreign exchange services by way of electronic means and to offer a better rate to those customers, who had an account in the same bank as the company. In order to carry out such services, Akcenta needed to have current accounts in multiple banks.

During the investigation, the Office gathered evidence of electronic communication and bank employees meetings where they agreed to simultaneously terminate Akcenta's current accounts and to refrain from opening them in the future. According to the Office's findings, the communication has also shown that the banks considered Akcenta as their competitor on the market of cashless foreign exchange services. In the course of the proceedings, the banks argued that Akcenta acted in the Slovak market illegally without a licence of the National Bank of Slovakia and that the said communication only had the aim to warn each other about the illegality of Akcenta conduct and its possible negative effects.

In September 2010, the Regional Court in Bratislava examined the decision of the Office in three independent proceedings and ultimately annulled it. The three resulting judgments contain divergences as to their legal opinion concerning the same offence. They also raised questions about coherent application of EU rules at the national level since the stance of the Slovak court concerning some elements of the offence differed from the attitude taken by EU case-law²¹.

The Office lodged an appeal to the Supreme Court. Due to the partitioning of the case by the Regional Court, three independent proceedings took place before the Supreme Court also. In the case of CSOB, the appellant court upheld the judgment of the Regional Court. Hence, the Office's decision with respect to this bank was dismissed. Concerning SLSP, the Supreme Court decided to stay the proceedings and submitted four questions concerning the interpretation of Article 101 TFEU to the Court of Justice of the European Union. Subsequently, the Supreme Court interrupted the VUB proceedings also.

Three of the questions submitted to the CJEU related to the issue whether it is relevant for the application of Article 101 TFEU that the competitor affected by a cartel acted on an illegal basis (without a licence) during the time

²¹ M. Nosa, 'Vec AKCENTA CZ, alebo dokazovanie kartelu' ['Case AKCENTA CZ, or to prove a cartel'] (2011) 1 Antitrust – Revue of Competition law.

when the cartel agreement was concluded, or if it is possible to take this fact into account pursuant to Article 101(3) TFEU. The last question concerned liability of an undertaking for the conduct of its employees who attended cartel meetings and participated in related e-mail communication.

The CJEU delivered its judgment on 7 February 2013. Concerning the alleged illegality of Akcenta's activities, the CJEU ruled that Article 101 TFEU must be interpreted as meaning that the fact that an undertaking that is adversely affected by an agreement whose object is the restriction of competition was allegedly operating illegally on the relevant market at the time when the agreement was concluded is of no relevance to the question whether the agreement constitutes an infringement of Article 101 TFEU. According to the Court, competition rules are intended to protect not only the said competitor but also the structure of the market and, consequently, competition as such. It is for public authorities, rather than for private undertakings, to ensure compliance with statutory requirements, the CJEU added.

As regards the question on liability, the CJEU referred to established case-law and observed that for Article 101(1) TFEU to apply, it is not necessary to demonstrate personal conduct on the part of a representative authorised under the undertaking's constitution or personal assent, in the form of a mandate, of that representative to the conduct of an employee of the undertaking who has participated in an anti-competitive meeting. According to settled case-law, the burden of proof is on the undertakings to put forward evidence to establish that their participation at a given meeting did not have an anti-competitive purpose.

The fourth question concerned the applicability of the exception under Article 101(3) TFEU. SLSP claimed that the conditions of Article 101(3) were satisfied since by preventing a competitor from acting illegally on the market, the agreement protects healthy competition and thus seeks to promote economic progress as required by Article 101(3) TFEU. The CJEU noted here that SLSP had only put forward one out of the four conditions required in Article 101(3) TFEU and that, in the case at hand, it did not appear that the other three conditions were met. In particular, the Court mentioned the third condition whereby an agreement must not impose restrictions which are not indispensable to the attainment of the objectives stipulated by the first condition. Therefore, the exception under Article 101(3) TFEU did not apply according to the CJEU.

The SLSP case is the first for the Slovak judiciary to turn to the CJEU with questions concerning EU competition law. Unlike the attitude of the panel of judges that dealt with the CSOB case, this clearly shows the effort of the Supreme Court to apply EU law appropriately and in a coherent manner. However, the CJEU reply is quite short and mainly refers to settled EU case-

law. As regards the substance of the answers, the alleged illegality of Akcenta's operation seems crucial to all of the three judicial proceedings, while the question of liability surfaced only in the case of SLSP. In fact, concerning both issues, the CJEU ruled in favour of the Slovak competition authority. After the CJEU delivered its ruling, the Supreme Court upheld the Office's decisions concerning SLSP and VUB banks. However, the earlier review of CSOB remains intact despite the fact that the findings of the Supreme Court are completely different to those delivered by the same court after the CJEU was consulted in the two related case.

Case ENVI-PAK (abuse of dominance, waste management sector, fines, amicus curiae intervention)

This case is an example of the Office's effort to shift from the traditionally formal to a more economic, effect-based approach in competition law assessment. The Office analysed here the behaviour of ENVI-PAK, a.s. (hereafter, ENVI-PAK) in the matter of granting sublicenses for the trademark 'Green Dot'. EU and national rules on the abuse of dominance were applied in parallel (Article 102 TFEU and its national counterpart).

Relevant market definition proved an interesting issue as far as the substance of the case is concerned. The Office defined the market of granting approval to use the trademark 'Green Dot' to third persons by means of individual licenses. For the first time in its practice, the Office defined a relevant market related to intellectual property rights (hereafter, IPR). ENVI-PAK's dominant position was established due to the fact that it was the only entity entitled to provide this trademark to third parties in the entire territory of the Slovak Republic. At the same time, there was no substitute to this trademark. Defining a relevant market on the basis of IPR is not often done; it is more common to define the relevant market as a market for goods or services that are the subject of the scrutinised IPR. Still, the former approach is not excluded. A market definition based on technology is admitted even in the DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses²². It provides that there is no general obligation for the IPR holder to license the IPR, not even where the holder acquires a dominant position in the technology or product market concerned.

The investigation and following administrative proceeding was based on complaints concerning the trade mark 'Green Dot' sublicensed by ENVI-PAK. Two relevant markets were defined where ENVI-PAK operated. The first was the market for the granting of approval to use the trade mark "Green Dot" to

²² See point 238 of the Discussion paper.

third parties by means of individual licences. ENVI-PAK was found to hold a dominant position on this market and it was this very dominance which was being abused. Impact of this abuse appeared on a second relevant market – market for the provision of packaging waste collection, recovery and recycling services through authorized organizations.

ENVI-PAK abused its dominant position by setting the payment system for the trade mark ‘Green Dot’ in such way that its service clients (those using packaging waste collection, recovery and recycling services) had the possibility to use ‘Green Dot’ for free. At the same time, ANVI-PAK’s licence clients (those interested in obtaining an approval to use the trade mark ‘Green Dot’ only) had to pay a fee for the licence as well as a fee for packaging without the ‘Green Dot’. The amount of the fee was not determined with respect to related costs. Instead it was so shaped that the final price which the potential licensee would have to pay was always higher than the price to be charged if it had also become ENVI-PAK’s service client. As a result, it was not economic to use other authorized services providers. Since an alternative did not exist, potential licensees were forced to accept conditions set by ENVI-PAK.

The Office concluded that by using its dominant position in the licence market, ENVI-PAK forced those using the ‘Green Dot’ to also use its services in the market of packaging waste collection, recovery and recycling services. A fine of € 18 394 was ultimately imposed on ENVI-PAK.

Upon appeal lodged by ENVI-PAK to the Regional Court in Bratislava, the court annulled the Office’s decision – the parallel application of national and EU competition law was confusing to the court. According to its view, the Office should be able to decide during the proceedings whether the base for application of EU law existed or not. It should consequently apply either EU or national law but not both at the same time. It has to be mentioned that this is the first time for the Slovak judiciary to voice such an opinion despite the fact that the courts had not challenged this issue on several occasions when it arose in the past. This approach is even more surprising since it occurred after the CJEU judgment in the *Toshiba* case (C-17/10), where the principles of parallel application were clarified.

Referring to previous judgments of the Slovak Supreme Court, the Regional Court stressed also that, when imposing a fine for an infringement of a general clause, the Office has to observe the principle of *nullum crimen sine lege*. In that light, it can only impose a fine if the conduct in question had already been subject to an earlier decision which the undertaking failed to comply with.

The Office challenged the judgment before the Supreme Court. Since the assessed conduct infringed Article 82 TEC (now Article 102 TFEU), the European Commission used the possibility to express its views on this

case as *amicus curiae*. The Commission's view was in line with the approach and argumentation of the Antimonopoly Office in its original proceedings. The Supreme Court ultimately changed the verdict of the Regional Court in Bratislava dismissing the lawsuit of ENVI-PAK. In other words, the Office's decision was upheld.

Abuse of a dominant position in the telecommunication sector, interplay between competition law and sector-specific regulation – judgment of the Regional Court in Bratislava

In 2009, the Office issued a decision imposing a fine of app. EUR 17,5 million on the undertaking Slovak Telekom, a.s. (hereafter, ST), former state monopoly, for committing an abuse of its dominant position. The incumbent controls the largest telecoms network of fixed telecommunication lines in Slovakia which covers its entire territory. According to the Office, the scrutinised behaviour consisted of a complex set of differentiated practices meant to exclude the incumbent's rivals from the provision of telephony and internet services through fixed lines. The Office applied in parallel both EU and national competition laws on the abuse of dominance.

Given that telecoms are subject to sector-specific regulation, the question of the Office's authority in this field was challenged both during the administrative proceedings as well as in judicial review. The incumbent objected, in particular, to the Office's competence to deal with alleged margin squeeze and tying practices. According to ST's argumentation, this behaviour was subject to sector-specific regulation in the form of individual regulatory decisions adopted by the Telecommunication Office of the Slovak Republic. The Antimonopoly Office concluded however, referring mainly to the Deutsche Telekom case (C-280/08), that sector-specific rules did not deprive it of its competence to apply both EU and national competition rules in this case.

At the time of the decision, the Slovak Competition Act contained, however, a specific provision stating that the Act was not applicable to competition restrictions falling under the competence of another authority ensuring the protection of competition pursuant to special legislation. It was this very provision which was the subject of a letter of formal notice sent by the European Commission to the Slovak Republic in 2008²³. From the Commission's point of view, the contested provision limited the ability of the Slovak Antimonopoly Office to effectively apply EU competition rules to anticompetitive behaviour which falls within the competences of a regulatory authority. This clause thereby excluded the application of the Competition Act to behaviour that would breach national regulatory laws. According to the

²³ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/200&format=HTML&aged=0&language=EN&guiLanguage=de>.

Commission, this was contrary to EU law that requires a parallel application of competition law and sector-specific regulation. Although the Antimonopoly Office responded to the formal notice with a statement that this provision has never stopped it from going against regulated sectors and that such attitude was consistently upheld by the courts, the Commission formally requested the Slovak Republic to amend the contested rule in 2009. In order to prevent future legal doubts as well as to prevent the opening of formal proceedings against Slovakia in this matter, the Office had this rule removed from the Competition Act in 2009.

In the appellate procedure, the Regional Court in Bratislava came to the conclusion that given the specific national rules on the interplay between competition law and sector specific regulation, the Office was not empowered to act pursuant national competition law. On the other hand, the court fully upheld the Office's competence to intervene pursuant to EU law. Currently, the case is pending before the Supreme Court.

V. Conclusion

Recent developments in competition law and policy in Slovakia show a clear tendency to adjust it to trends set at EU level. It is visible from recent amendments to the Competition Act that also procedural and fining mechanisms are to a great extent harmonised with the European model. A high degree of convergence with EU rules can also be observed in the field of soft law and policy documents. In so doing, the Office strives to ensure a coherent and effective application of competition rules in the internal market. The overview of national judgments shows certain divergences from, or lack of familiarity with, established concepts of EU competition law. Still, the latest rulings of the Supreme Court, which follow its recent interaction with the European Commission and CJEU, manifest an increased awareness of the importance of EU competition law. However, one cannot expect the use in every judicial proceeding of formal procedures such as a preliminary reference or *amicus curiae* interventions. Competition advocacy seems, therefore, to be a useful tool to achieve progress in this regard and the Office does pay a lot of attention to building an expert dialogue with the judiciary via workshops, conferences etc.

The latest reform of the internal organisation of the Slovak Antimonopoly Office aims at the same time to build a modern and flexible institution and a full-fledged member of the ECN. However, with its limited resources in terms of budget and staff, prioritization in all areas of competence appears to be inevitable.