CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

OECD Global Forum on Competition

CONTRIBUTION FROM SLOVENIA

This contribution was submitted by Slovenia as a background material for the first meeting of the Global Forum on Competition to be held on 17 and 18 October 2001.

JT00113337

Document complet disponible sur OLIS dans son format d’origine
Complete document available on OLIS in its original format
CONTENTS

1 INTRODUCTION ..............................................................................................................................................4

2 LEGISLATION ................................................................................................................................................6

3 RESTRICTION OF COMPETITION BY AGREEMENTS ..................................................................................7
  3.1 Prohibition of restrictive agreements ......................................................................................................7
  3.2 Exceptionally permitted restrictive agreements .....................................................................................7
  3.3 Negative clearance .....................................................................................................................................7
  3.4 Restrictions of minor importance ..........................................................................................................8
  3.5 Appraisal of restrictive agreements in 2000 .............................................................................................8
  3.6 Summary of selected cases ....................................................................................................................8

4 ABUSE OF DOMINANT POSITION .............................................................................................................9
  4.1 Prohibition of abuse of dominant position ............................................................................................9
  4.2 Negative clearance ................................................................................................................................10
  4.3 Appraisal of abuses of dominant position in 2000 .............................................................................10
  4.4 Summary of the case AMB d.o.o. – Telekom Slovenije d.d. .................................................................10

5 CONCENTRATION OF UNDERTAKINGS ................................................................................................11
  5.1 Concentration under the terms of the Act ...............................................................................................11
  5.2 The obligation to notify a concentration ...............................................................................................11
  5.3 Failure to notify ......................................................................................................................................12
  5.4 The competencies of the CPO in the process of appraisal of concentrations .........................................12
  5.5 Appraisal procedure .............................................................................................................................12
  5.6 Appraisal of concentrations in year 2000 ...............................................................................................12
  5.7 Problems faced by CPO in appraising concentrations .........................................................................13
  5.8 Concentration in 2000 by industrial sectors ........................................................................................13
      5.8.1 Retail stores ....................................................................................................................................13
      5.8.2 Publishing and media ...................................................................................................................14
      5.8.3 Chemical and rubber tire industry ................................................................................................14

6 INTERNATIONAL ACTIVITIES ..................................................................................................................15
  6.1 Activities for accession to the EU ..........................................................................................................15
  6.2 International conferences ......................................................................................................................15
  6.3 Specialisation and training of officials ...................................................................................................16

7 DUMPING AND SUBSIDISED IMPORTS .................................................................................................16
1. INTRODUCTION

The year 2000 was the first full year in which the Prevention of the Restriction of Competition Act was in use. The advantage of this Act in comparison with the previously valid legislation lies in its higher transparency, clear definitions of competencies, the introduction of procedural rules and in the adoption of penalty provisions, which enable the Competition Protection Office (CPO) to obtain information during the process.

The normative framework, which is completed by statutory regulations adopted in 2000, is the basis for the effective protection of competition. It could not, however, exist without qualified and independent bodies and without the important role of courts of justice. The necessity to assure adequate human and financial resources is of equal importance.

Qualified staff are needed for correct assessment of individual forms of restriction. Training CPO officers has been pursued through multilateral and bilateral forms of co-operation, coupled with special training within the CPO.

In addition to transparent legislation and qualified institutions there must also be awareness of the meaning of efficient competition and of the adverse effects of restraining competition to achieve efficient protection of competition. The preventive function of the CPO is therefore also very important.

Improving the competition culture is one of the issues that the CPO gave special attention in 2000. This was reflected mainly in a constant openness for communication and in responding to deviations in a timely and correct manner, but also through different forms of providing information and educating participants in the market.

The trend to increasing the level of competition culture was also well-accepted by participants in the market, where the media played a very important role by providing correct information and showing high understanding of regulatory issues, thus promoting the importance of protecting competition and consequently raising the level of the competition culture.

Handling notifications of concentration represented the greater part of the operational work in 2000. In the second half of the year, the impact became evident of the adopted decree defining the contents and elements required for the notification form for the concentration of undertakings. A database has been assembled to assist faster decision making and general overview of the market.

The creation of the database has enabled simultaneous monitoring and analysis of specific industrial sectors, especially telecommunications. This kind of monitoring is necessary mainly because of CPO’s active role in the formulation of legislation, the prime reason of which is introducing competition into specific sectors such as telecommunications, traffic, energy and media.

Dealing with restrictions of competition statistically represented a minor part of CPO’s operation in 2000, mainly because of the prescribed time framework, which determines the disposal time for decision taking about notified concentration. However, in the second half of 2000, there was a tendency toward more time being devoted to the assessment of restrictive agreements.

Looking back at 2000 reassures us that the proper directions were followed (the full enforcement of law, training CPO’s officers, timely and correct manner of cases assessment, preventive function and the contribution to an improved level of competition culture) and that they present adequate starting-points for the future.
The directions, which can be discerned from the overview of CPO’s work in 2000, lead us into a more thorough assessment of classic restrictions of competition, co-operation in liberalisation processes within industries and in improving the level of the competition culture. We are not only committed to do so because of the existence of the rules of legislation in force, commitments from negotiating positions and the national programme for adoption of the Acquis of the European Union, but primarily because of our shared responsibility for progress and joining the common European market, which is not imaginable without efficient competition.

The year 2000 brought an improvement in both normative and operational points of view. The aims turned out to be achievable, progress is visible, although it is clear that for the effective protection of competition it will be necessary to assure adequate human and financial resources, together with efficient judicial protection and, above all, an efficient system of penalties for violators. From that perspective, it could be said that 2000 was not entirely positive, but identifying achievements and unresolved problems defines tasks and challenges for 2001 and coming years.

Andrej Plahutnik, director
2. LEGISLATION

The foundation of the legal framework of competition rules lies in the Article 74 of Constitution of the Republic in Slovenia. The third paragraph of the above mentioned Article prohibits all practices that restrict competition in a manner contrary to the law.

The Prevention of the Restriction of Competition Act\(^1\) was adopted on 30 June, 1999 by the National Assembly of the Republic of Slovenia. This act succeeded the provisions of the Protection of Competition Act\(^2\), which regulated the area of restriction of competition. As a modern act, fully aligned with material and procedural legislation of EU, it regulates all three areas of restriction of competition by undertakings: restrictive agreements, abuse of a dominant position and concentrations.

The new act contains a special chapter on the procedure of decision-making by the CPO, providing for the subsidiary use of the Administrative Procedure Act\(^3\). Final decisions of the CPO may be reviewed by the Administrative Court in an administrative dispute and appeal may be made to the Supreme Court. This differs from the arrangement under the Protection of Competition Act, under which the affected undertaking could bring an action in civil procedure.

The legislator has also included a chapter on restrictions of the market by authoritative legal instruments and actions but excluding the assessment of the legality of such instruments and actions from the jurisdiction of the CPO.

The Act envisages the enactment of a decree on block exemptions and a special application form for notification of concentrations.

The Decree on application form to notify a concentration\(^4\) defines the content and elements required for the notification form for the concentration of undertakings, which the notifying party must submit to the CPO in accordance with Article 12.

The Decree on Block Exemptions\(^5\) defines groups of restrictive agreements, which when fulfilling positive and negative conditions under Article 5 and Article 9, are not contrary to the law and therefore permitted. On the basis of this decree, the Instructions on the Method and Conditions for Defining the Relevant Market\(^6\) have been enacted, forming the basis for the determination of the market power of undertakings in procedures before the CPO.

Still valid provisions of the Protection of Competition Act which regulate dumped and subsidised import, together with the Decree on Dumped and Subsidised Import\(^7\) determine the competencies of the CPO in antidumping procedures and procedures against subsidised import. These provisions extend the

---


\(^3\) Administrative Procedure Act, Official Gazette of the Republic of Slovenia, No. 80/1999.

\(^4\) Decree Defining the Contents and Elements Required for the Notification Form for the Concentration of Undertakings, Official Gazette of the Republic of Slovenia, No. 4/2000.


\(^7\) Decree on Dumped and Subsidised Import, Official Gazette of the Republic of Slovenia, no. 38/1999.
competencies of the CPO from the protection of competition toward measures of a pure commercial character.

3. **RESTRICTION OF COMPETITION BY AGREEMENTS**

**Prohibition of restrictive agreements**

According to the Act restrictive agreements are in principle prohibited, but under certain conditions may be exceptionally permitted. Restrictive agreements within the meaning of Article 5(1) are null and void. Restrictive agreements are deemed to be agreements between undertakings regarding business conditions in the market which have as their object or effect the prevention or distortion of competition in the Republic of Slovenia. Prohibited restrictive agreements are defined by virtue of a general clause having the primary character. The prohibition refers to horizontal as well as to vertical agreements, thus to agreements between undertakings operating at the same level of production or distribution, and to agreements between undertakings at different levels of production or distribution. According to Article 3, the provisions in respect of the agreements between undertakings shall also apply to decisions by an association of undertakings, and to concerted practices. Article 5(2) contains a list of typical examples of restrictive agreements.

Sanctions for conclusion of a prohibited agreement are of a penal and civil nature. According to Article 52 of the Act, a monetary fine shall be imposed on the undertaking for conclusion of such an agreement and, in addition, according to Article 5(1) such an agreement shall be null and void.

**Exceptionally permitted restrictive agreements**

Article 5(3) of the Act explicitly permits certain agreements falling under the prohibition within the meaning of Article 5(1), if these agreements (i) contribute to improving production or distribution of goods, or to promoting technical and economic progress, (ii) while allowing consumers a fair share of the resulting benefit (positive conditions). However, such agreements, decisions or concerted practices may not (iii) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and (iv) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

This provision is applied through individual and block exemptions. In the case of individual exemption, the CPO may assess, upon application by one or more participating undertakings, the compatibility of an agreement with the provisions of Article 5(3). If it falls within Article 5(3), the CPO will grant an individual exemption by decision, in which it shall specify the date of the entry into force of an exemption, its duration and the conditions for an individual exemption, as well as the possible obligations imposed on the undertakings. Block exemptions are dealt with in Article 9, which authorises the Government to specify by decree the categories of agreements referred to in Article 5(1) meeting the conditions from the Article 5(3). Agreements fulfilling the conditions determined in the decree on block exemptions shall not be notified in order to be granted a decision on an individual exemption.

**Negative clearance**

According to Article 8 of the Act, the CPO may confirm, upon application by an undertaking, several undertakings, or an association of undertakings, that on the basis of the facts in its possession, Article 5(1) has not been violated in respect of the relevant agreement. The negative clearance offers
undertakings a degree of legal certainty, since it assures them that their agreement can be carried out without any fine being imposed.

Restrictions of minor importance

The Act recognises the existence of agreements which, albeit falling under the prohibition of Article 5(1), have only a negligible effect on competition, by reason of the low market shares of the undertakings on the relevant market. These agreements defined in Article 6 as agreements of minor importance, are therefore exempted from the prohibition of Article 5(1). This provision shall not apply where the competition in respect of the relevant product is restricted due to market circumstances, or when the undertakings enter into one of the agreements listed in Article 6(5).

Appraisal of restrictive agreements in 2000

In 2000, the CPO initiated 2 proceedings with regard to prohibited restrictive agreements. Both were initiated ex officio. In the first case the CPO issued a decision by which the existence of a prohibited vertical restriction was established. In this case, the CPO filed a proposal to a judge of misdemeanours for the imposition of a monetary fine. In the second case the procedure had not been concluded by the end of 2000.

The CPO was, in addition, assessing 6 requests for individual exemption, 5 of which were requested before the Decree on Block Exemptions entered into force. Individual exemption was granted in 5 cases, while in 1 case the procedure had not been concluded by the end of 2000. The CPO received 3 requests for negative clearance. In 2 cases the negative clearance was granted, and in 1 case rejected, since the CPO established that the notified agreement formed a prohibited vertical restrictive agreement.

Summary of selected cases

AS MERX d.o.o – Gasilska oprema d.o.o

The subject matter of the proceeding in this case was the appraisal of two standard-form contracts concerning the maintenance of fire extinguishers, between Gasilska oprema as the importer of fire-fighting equipment on the one hand and the maintenance services on the other. One of the contract provisions restricted maintenance services in the expansion of their service to other competitive products of another importer without the prior written consent of Gasilska oprema, except for products they were already maintaining at the time of the conclusion of the contract. AS MERX requested CPO to determine that Gasilska oprema had abused its dominant position in the market of fire extinguisher maintenance and that the contested provision of the contract forms the prohibited restrictive provision. The CPO found out that Gasilska oprema had not abused its dominant position, since it had never turned down any other importer of fire-fighting equipment nor had any undertaking asked for a consent. Nevertheless, as the CPO found, the contested provision represents a restrictive provision, falling under the Article 5(1) prohibition, since such a restriction is not a *conditio sine qua non* for assuring the quality of fire extinguisher maintenance. Maintenance services are namely supervised by the Inspectorate of the Republic of Slovenia for Protection against Natural and Other Disasters (Inspektorat RS za varstvo pred naravnimi in drugimi nesrečami), and, in addition, authorisation for maintenance of fire extinguishers may be withdrawn by the same body. Since the CPO determined that the provisions of the agreement fell within the scope of Article 5(1), it refused the request to issue a negative clearance made by FFE.
**GIZ Suma 2000**

The subject matter of the procedure was the assessment of a contract establishing Economic Interest Group Suma 2000. Members of this association are trading companies dealing with daily consumer goods. One of the objects of the contract was to create uniform business conditions in the buying market and the introduction of joint purchasing, which resulted in restricting the competition inside as well as outside this association. The members of the Group were also planning to introduce joint development. In its request for obtaining an individual exemption Suma 2000 pointed out that the establishment of Economic Interest Group represents only a transitional phase toward the formation of a holding company. After close examination of the contract and the market situation in the daily consumer goods market, the CPO established that the conditions of Article 5(3) are fulfilled and that an individual exemption can be granted. In the view of the CPO, rationalisation of operations, and the concentration of purchased quantities will improve the distribution of goods. As a result, better operating conditions achieved by the members of the association at suppliers, will be passed indirectly on to the consumers, which will result in lower retail prices. At the same time, the individual members, in spite of their involvement in the association, will keep their own sales, development and investment policy. Taking into account the position of the members of the Economic Interest Group on the relevant product market, they are unable to eliminate competition in respect of a substantial part of the products in question. CPO has therefore exempted the contract for the period of 3 years.

**Lek d.d. – Sanofi-Synthelabo**

Lek had notified to the CPO a contract on a joint venture concerning the establishment of a joint undertaking for the purpose of production, registration, promotion and sale of the products set forth in the contract, within the territory of Republic of Slovenia and some other ex-Yugoslavian markets. Lek notified the contract within the procedure on appraisal of concentrations. The CPO established that because of the nature of the contract, it should be considered as a restrictive agreement and that therefore a request for individual exemption should be filed. The purpose of the contract was the establishment of an undertaking between potential competitors, having as its object the performance of mainly commercial functions (co-operative joint venture). The CPO determined that the conditions for individual exemptions are met, and it therefore granted an exemption for a period of 15 years (also in accordance with established practice of the EU Commission).

**Alpe Air d.d.o – Laus Air  d.d.o**

The CPO had assessed on request a contract on business and technical co-operation between two air carriers, operating on relevant markets of passengers and cargo transportation. Within the procedure the CPO established that their joint market share on each relevant product market is less then 5 %. The object and the effect of the contract was purely in achieving the technical improvements, namely technical co-operation. As a result, a decision on negative clearance was granted.

4. **ABUSE OF DOMINANT POSITION**

**Prohibition of abuse of dominant position**

According to Article 10 of the Act the abuse of a dominant position in the market is prohibited. As is apparent from the wording of this Article, a dominant (or even monopoly) position in itself is not prohibited. An undertaking enjoys a dominant position in the market when it can act to an appreciable extent independently of its competitors, customers and the final consumers of its goods or services. According to Article 10(3) an undertaking is deemed to have a dominant position in the market if its share...
of purchasing or selling goods or services in the Republic of Slovenia exceeds a 40 per cent threshold. The Act takes into account the possibility that two or more undertakings enjoy joint dominance in the market. This is the case when no significant competition exists between them, and when their aggregate share of purchasing or selling goods or services in the Republic of Slovenia exceeds a 60 per cent threshold. The threshold criteria serve only as the basis for an overall competition analysis with a view to determining the (economic) power of the undertaking or undertakings concerned. The market share represents an important, but not exclusive criterion for determining the dominant position in the market. According to Article 10(2) other factors should be taken into consideration, too, such as the degree of competition in the market, financing possibilities, possibilities for purchase and sale, and entry barriers to the market. The competition rules prohibit the abuse of a dominant position and confer on a dominant undertaking an obligation to restrain from any practices which restrict or prevent competition in the market without justifiable reason. The Act does not define the notion of abuse but only enumerates certain abusive practices. The list of those practices is not exhaustive.

Exemptions from the Article 5(1) prohibition with regard to restrictive agreements may be granted, as previously mentioned. However, they cannot be granted in the case of abuse of a dominant position. The prohibition is therefore of an absolute nature.

Negative clearance

According to Article 10(6) an undertaking may request from the CPO a negative clearance confirming that it has not violated the competition rules applying to the prohibition of abuse of a dominant position.

Appraisal of abuses of dominant position in 2000

In 2000, the CPO dealt with 9 cases of abuse of dominant position. 3 of the cases were initiated in 2000, while the others had been initiated previously. The procedures initiated before the Prevention of Restriction of Competition Act entered into force are dealt with in accordance with the provisions of the Protection of Competition Act.

Summary of the case AMB d.o.o. – Telekom Slovenije d.d.

In 2000, the CPO issued a partial decision in case 3073-5/99, ABM v. Telekom Slovenije (ISDN 3000). Telekom Slovenije, which holds a legal monopoly in the market of fixed voice telephony started to offer services of ISDN technology in the form of the ISDN 3000 package. ISDN 3000 consisted of public monopoly services as well as services of a commercial nature (internet access services). ABM addressed to Telekom Slovenije an offer for business co-operation, asking Telekom Slovenije for inclusion of their offer of access to internet services into the new ISDN package. Telekom Slovenije rejected the offer of ABM. The CPO decided that the rejection by Telekom Slovenije was without justifiable reason. In the view of the CPO Telekom Slovenije abused its dominant position in the market of fixed voice telephony in the Republic of Slovenia by discriminating against ABM. Telekom Slovenija has filed a complaint at the Administrative Court. Judgement is still pending.
5. CONCENTRATION OF UNDERTAKINGS

Concentration under the terms of the Act

Provisions on concentrations under the Act include mergers, acquisitions and full-function joint ventures. Substantial rules are specified in the provisions of Articles 11 to 13, while the provisions of Article 36 to 41 define special rules of procedure.

Article 11 of the Act defines that a concentration of undertakings occurs when:

- two or more previously independent undertakings merge; or
- one or more persons already controlling at least one undertaking, or one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings; or
- two or more undertakings create a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

For the purposes of this Act, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- ownership of the entire capital or of a capital interest;
- ownership or the right to use all or part of the assets of an undertaking;
- right or contract which confers decisive influence on the voting or decisions of the organs of an undertaking.

Article 11 (5) defines that a concentration shall not be deemed to arise where banks, savings banks, or other financial organisations or insurance undertakings, the normal activities of which include transactions and dealing in securities, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them or where investment management undertakings acquire a business interest in undertakings, provided that they exercise the acquired rights only with a view to preserving the full investment value and provided that they do not exercise influence on the competitive conduct of the undertaking.

The obligation to notify a concentration

Not all concentrations that correspond to the elements from Article 11 of the Act are relevant from a competition law perspective. The volume of the concentration should be taken into account. Article 12 defines that a concentration must be notified to the CPO by the participants in the transaction:

- if the combined aggregate annual turnover of all the undertakings concerned, including affiliated undertakings, is more than 8 billion tolaris before tax in the Slovenian market in each of the last two years; or
- if all the undertakings participating in the transaction, including affiliated undertakings, jointly achieve more than 40 per cent of sales, purchases, or other transactions in a substantial part of the Slovenian market, with goods or services which are the subject of the transaction, or with their substitutes.

A concentration must be notified by the participants to the CPO not more than one week after the conclusion of the agreement or the announcement of the public bid, or acquisition of a controlling interest.
That week shall begin when the first of those events occurs. A concentration must always be notified by those acquiring control of another undertaking within the meaning of the provisions of Article 11 of this Act. The notification may be effected jointly.

**Failure to notify**

Failing to notify an intended concentration is sanctioned by Article 53 of the Act. A monetary fine shall be imposed on a legal person and the responsible person of a legal person for committing the misdemeanour of failing to notify an intended concentration to the CPO, or failing to notify such a concentration within the time limit.

**The competencies of the CPO in the process of appraisal of concentrations**

The CPO shall appraise concentrations within the meaning of this Act primarily with a view to establishing whether or not a threat of creating or strengthening of a dominant position exists as a result of which effective competition could be excluded or significantly impeded. Effective competition is determined by reciprocal market characteristics such as its structure, the behaviour of undertakings and of other participants in the market, and the effects of such behaviour. The effects of concentrations are analysed on the relevant product and geographic market. A high market share, however, does not always represent a disputable concentration, so the CPO appraises market share together with other competition parameters, such as the choice available to suppliers and users and the openness of the market for new entrances.

On the basis of the appraisal, the CPO issues the following decisions declaring:

- the compatibility of the concentration with competition rules (approval); or
- approval of the concentration provided that the undertakings concerned comply with the conditions imposed on them; or
- the incompatibility of the concentration with competition rules.

**Appraisal procedure**

The CPO must issue decisions relating to the prior notification of concentration within 30 days of the day of notification, unless it raises serious doubts as to its compatibility with competition rules. If the CPO finds that the concentration notified falls within the scope of the provisions of this Act and raises serious doubts as to its compatibility with competition rules, it shall issue an order to commence a procedure. In that case the CPO must take a decision within 90 days of the day it issued an order to commence the procedure.

**Appraisal of concentrations in year 2000**

In 2000, the CPO issued 39 decisions on the basis of notified concentrations. In 4 cases, the CPO established that the concentrations notified did not fall within the scope of the provisions of the Act. 31 concentrations notified were deemed to be compatible with competition rules, and in 4 cases, the CPO approved the concentration, provided that the undertakings concerned comply with the conditions imposed on them. In term of process of decision making, the CPO, on the base of a first phase procedure, issued 27 decisions within 30 days of the day of notification and in 8 cases, the CPO issued decisions of compatibility (or compatibility with attached conditions).
Problems faced by CPO in appraising concentrations

In appraising concentrations the CPO, recognised that a low level of familiarity with the rules of competition law existed among market participants in 2000. This is evident from failures to notify or delayed notifications of concentration and in a large number of incomplete notifications.

The unavailability of relevant data about companies posed the biggest problem for CPO, which hampered the analysis needed by the CPO to appraise the situation of the company in the relevant market. Where the information obtained by the form of notification was incomplete, the CPO was obligated to initiate the second phase procedure and collect the information from other participants in the market. On the basis of questionnaires prepared for competitors, suppliers or buyers of the company which involved in notification of concentration, the CPO obtained data about market structure (for the territory of Republic of Slovenia and for regions) and changes in market structure over previous years, about changes of prices and other conditions in the market, about the international competitive position of suppliers, opinions regarding the effects of concentrations on other market participants and about intentions for vertical or horizontal integration, existing barriers of entry etc.

The problem of collecting relevant information was in part resolved with the enforcement of the Decree Defining the Contents and Elements Required for the Notification Form for the Concentration of Undertakings. Participants in concentrations consequently became more familiar with the data, which is important for CPO’s decision making. They are aware that correct and complete data result in an easier and earlier CPO decision. A tendency toward even higher interest and responsiveness from market participants has been observed in the context of co-operation during process of decision making.

However, there is still a low level of familiarity with competition law in the market and problems arise when there is a necessity to determine relevant market and calculate market shares. Thus, in the coming year, the educational role of CPO will become an important tool to achieve a higher degree of knowledge of competition law.

Concentration in 2000 by industrial sectors

Retail stores

The process of changing the market structure in retail stores activity, which started in 1998, has continued in 2000. The main issue related to concentrations in the relevant market of daily consumer goods. CPO issued 12 decisions concerning concentrations of undertakings, which operate on above mentioned market.

Mercator, a company which operates stores across the whole territory of the Republic of Slovenia, and which is the market leader in both retail stores and supermarket segments, has acquired several companies, including Povrtnina, Dolenjka, Posavje, Emona Merkur and Potrošnik in 2000. The changed market structure as a result of the above mentioned acquisitions by Mercator also affected other market participants in both vertical and horizontal directions. Consequently, these acquisitions led to similar activities in the sector of daily consumer goods and the alimentary processing industry. In the market of daily consumer goods a counterweight became evident in the form of the Economic Interest Group Suma 2000, which was founded by the companies Veletrgovina, Era, Ivila Kranj, Koloniale Veletrgovina and Veletrgovina Potrošnik. Because of the intention of companies to merge into a holding company Suma in 2001, the CPO has decided to grant an individual exemption for the period of 3 years. Some companies that are members of the association Suma 2000 have acquired certain smaller companies.
which operate in individual regions, the list includes Prehrana, Maxina, Preskrba, Korotan, Jamnica, Dolina, Dravinjski Dom and Gramis. Despite the integration and acquisitions undertaken by the Suma 2000 group, Mercator has been able to retain the leading position in the market. Foreign retail companies are major competitors in the relevant market, the largest is Interspar, and Leclerc entered the Slovenian market in 2000.

In the alimentary processing industry, the CPO appraised a concentration in the market of production of non-alcoholic beverages (Pivovarna Laško-Radenska) and a concentration in the market of dairy products (Ljubljanske mlekarne –Mariborska mlekarna). CPO expects that concentrations in the alimentary processing industry will continue through 2001.

**Publishing and media**

The first cases related to concentrations of companies in the book publishing sector arose in 2000. DZS, one of the biggest Slovenian book publishers, acquired a majority capital share in Zalo ba Obzorja and Tehniška zalo ba Slovenije, which represents a typical horizontal concentration in the narrower segment of publishing. Mladinska knjiga Trgovina acquired a controlling share in Mladinska knjiga Birooprema, which led to a concentration of their activities in selling books, school and office stationary and equipment.

CPO also appraised the concentration of the commercial television companies Produkcija Plus and Kanal A. Within the appraisal procedure, a deeper analysis of the situation in the market of electronic media on territory of the Republic of Slovenia was performed, above all an analysis of the market for selling TV programmes, in which both participants of the concentration hold a high market share. On the basis of data gathered from the appraisal procedure, the CPO concluded that the consequent reinforced position of commercial television on the market would not threaten efficient competition.

Other concentrations are to be expected in this sector in the near future, among book publishing and other media; especially with newspapers and magazines, radio, in short concentrations which have in common the mediation of information.

**Chemical and rubber tire industry**

Concentrations in the chemical industry started relatively late in Slovenia. Sava Kranj, the largest Slovenian tire producer, started its acquisition activity in 1999 and continued in 2000 by acquiring several trading companies and companies operating in the colours industry. In addition, Sava Kranj has also been a shareholder in two companies since 1997, which were founded together with the American multinational Goodyear.

Sava Kranj has reinforced its trading activity by acquiring a majority share in the trade and manufacturing company Guma Grosuplje and in Astra tehnišna trgovina Ljubljana in 2000, and so fulfilled its plans of acquiring trade companies to support its chemical activities.

Sava Kranj has also obtained control over the company Teol Ljubljana, to which it will offer support in technical, development and marketing activities for glue production, and over Color Medvode, which is one of the four biggest Slovenian producers of base colours, coats and lacquers. It is to be expected that other companies operating in the relevant market will merge in the coming years.

By the acquisition of the company SKB IP, Sava Kranj also expanded its activity to the real estate market in 2000 and by the acquisition of the company Golf and Camping Bled also to tourist activity. All of these activities have reinforced the power of the Sava concern.
6. INTERNATIONAL ACTIVITIES

Activities for accession to the EU

According to the negotiation commitments with respect to Chapter 6 – competition and state aid, and obligations arising from Article 65 of the European Association Agreement8, the year 2000 was oriented to intensive activities furthering the readiness of Slovenia to join the European Union.

The negotiating position on Chapter 6 encompasses the protection of competition (anti trust), state aid and state monopolies of a commercial character and the field of specific and exclusive rights. Preparation and co-ordination of additional clarifications to the negotiating positions, was one of the key steps taken in 2000 in the process of provisional closing of this chapter.

With the European Association Agreement, Slovenia has undertaken to:

• deal with the restriction of competition in the same manner as in the EU, i.e. in accordance with Articles 81, 82 and 87 of the Treaty of Rome, as renumbered by the Treaty of Amsterdam,
• adopt corresponding implementing rules,
• assure the compatibility of national legislation with the European Union Acquis, including the field of competition law.

Implementing rules for the application of the competition provisions applicable to undertakings were adopted by the Association Committee by the end of 2000 and they came into force on 1 January, 2001. With the passing of these rules the, conditions have been established for active as well as institutional co-operation between the competent authorities of the EU and the Republic of Slovenia.

Within the framework of accession negotiations, specifically in the field of preparing negotiation and other documents, there was co-operation and harmonisation in the following fields of activities:

• Preparation of Slovenia’s Report on the Meeting of Commitments Arising from Negotiating Positions
• Screening update for Chapter 6,
• Preparation of the document Implementation of Commitments Arising from the Negotiating Position for Chapter 6,
• Preparation of a substantive basis for the Regular Report on Slovenia’s Progress towards Accession for Chapter 6.

International conferences

The implementation of a competition policy as implemented in the EU, imposes broader obligations and competencies on the CPO than it had in the past. To carry out those obligations and competencies, international co-operation and specialisation is necessary in order to follow up the current changes in competition policy and monitor the actual legislation itself.

8 European Agreement Establishing an Association Between the European Communities and Their Member States, Acting Within the Framework of the European Union, of the One Part, and the Republic of Slovenia, of the Other Part, Official Gazette of the Republic of Slovenia, No. 44/1997.
In 2000, international co-operation was conducted within the framework of the following activities and international organisations:

- Participation in the Expert Meeting on the Impact of Anti-Dumping and Countervailing Actions within the Framework of UNCTAD (Geneva, Swiss),
- International Conference on Competition Policy (Warsaw, Poland),
- Symposium Different Stages in the Competition Policy Development of the Countries in the Region – organised by the German Office for Competition Protection (Bundeskartellamt), the CPO and the Stability Pact (Ohrid, Macedonia),
- 6th Annual Competition Conference between Candidate Countries and the European Commission (Tallinn, Estonia),
- EC Merger Control: 10th Anniversary Conference (Brussels, Belgium),
- Regional Competition Policy Conference – organised by UNCTAD (Kiev, Ukraine),
- Participation in the working group Interaction between Trade and Competition Policy (Geneva, Swiss)
- Competition Conference / European Competition Day (Lisbon, Portugal),
- 2nd meeting of Association Committee (Brussels, Belgium),
- Working meetings and expert co-operation with the European Commission representatives – DG Competition (Brussels, Belgium).

Specialisation and training of officials

The CPO has been employing different forms of technical aids, in particular the horizontal (multicountry) PHARE programme, in the field of competition ever since its foundation. This programme is designed for training of accession countries’ officials. The same emphasis was noted in bilateral technical aids for the year 2000.

In the field of bilateral co-operation with France, a working visit of a competition expert from the French office for competition protection (DGCCRF) was realised. The purpose of the visit was to communicate and explain practical past experiences of implementing competition legislation in France.

In the field of traditional bilateral co-operation with Germany (realised through the Transform programme), there were several expert meetings with German competition experts. In addition, a one week specialisation course was organised in the German office for competition protection (Bundeskartellamt) for a CPO official.

Training took place within the following specialised programmes, seminars and workshops in the field of competition protection:

- OECD Seminar on Topics in Competition Policy (Vienna, Austria),
- WTO Regional Seminar on Rules on Anti-dumping and Countervailing Actions (Vienna, Austria),
- Seminar/Workshop Competition in the Telecommunication Sector and the role of National Regulatory Authorities (Brussels, Belgium),
- Seminar on Competition Law, organised by the Croatian Agency for Protection of Market Competition, Federal Trade Commission and US Department of Justice (Zagreb, Croatia).

7. DUMPING AND SUBSIDISED IMPORTS

On the basis of the still valid provisions of the Protection of Competition Act, the CPO performs technical tasks within the scope of procedures referred to in Decree on Dumped and Subsidised Imports.
This decree defines the procedures and methods of determining the existence of dumped or subsidised imports, the existence or threat of material injury that may be caused by such imports as well as the methods of collection of anti-dumping or countervailing duties.

On the basis of the notification of a Slovenian turkey meat producer, a representative of the Slovenian domestic industry, CPO initiated an anti-dumping procedure regarding the import of turkey meat – fiIle from the Republic of Hungary. The investigation, which included the period between 1 July, 1997 and 30 June, 1998, showed that the turkey meat was not imported into Republic of Slovenia at a price lower than its normal value. On that basis the procedure was closed in 2000.
PRICE CARTELS AND BID RIGGING

Andrej Plahutnik

Competition Protection Office
of the Republic of Slovenia

Introduction

Competition is the basic element of a market economy, the level of competition is a reflection of the development of an economy and as there is no perfect economic system there is no ideal competition. It would not be realistic to expect ideal competition, but it is realistic and necessary to raise the level of effective competition, to reach the situation in which competition is the best regulator of the market, the situation in which competition authorities would exceptionally intervene.

There are different kinds of competition distortions, sometimes certain types of distortions are more likely to happen than others, depending on (among others) economic situation, the level of the market development etc.

This presentation focuses on different competition distortions (especially definition of minimum prices and bid rigging) in an economy in transition, with special regard to respond of the players on the market to economic development and liberalisation of such economy.

Competition distortions

In the past, certain economic systems were considered to be self-sufficient and markets were regulated by state authorities and dominated by monopolies. Competition was more an exception than a rule.

With political and economic reforms competition was introduced, the market as such began to play the role. Entry barriers have been removed and better conditions for effective competition have been created and subsequently followed by certain changes of competition distortions.

The reflection of less developed economy is usually seen through number of different abuses of a dominant position of the companies on the market. Sometimes a dominant position is a result of less developed competition, sometimes it is a result of a legal monopoly. In such situation the companies having a dominant position are (usually) not forced to optimise their businesses and they are only exceptionally able to face effective competition.

With the introduction of competition, companies holding a dominant position or even a monopoly are faced with a totally different situation according to which they have to compete on a market, they have to care about the costs, they have to change their business philosophy. Sometimes they succeed, sometimes they do not. Sometimes they are still significant market players, sometimes they lose the game.

In certain, especially sensitive sectors like the sector of electricity, telecommunications etc. introduction of competition, affects the so called “national champions”, sometimes one company is divided into several new ones, former colleagues become competitors.

Situation has been changed not only on a horizontal level, significant changes have happened also in vertical relationships, the customers expect better products and services, more value for their money, because they have the possibility and right to choice.
A situation of suppliers is different, usually they compete, good becomes better, innovative element of competition becomes very important. Not all companies are able to follow new challenges, not all of them are willing and able to do so, not all of them are willing to compete.

Some of them rather decide to create the market together with their competitors according to their ideas; they decide how to define prices, how to share the market, they simply decide to exclude competitors. Instead of going for effective competition they decide to limit competition, they regulate certain markets by themselves, they are not forced to optimise their businesses, they are gaining excessive profits on a short-run, on a long-run they do not establish the necessary competitiveness, they exclude the basic element of an effective market economy—competition.

The black scenario can bring us from one non-effective market system to another of the same type. Competition was in the past limited by authorities and when the market was liberalised it might be limited by cartels. The result is obviously the same, there is no competition on the market.

**Certain type of price cartel**

Especially in economies in transition price regulation for certain goods and services has often been used as a tool to provide citizen with necessary goods and services at a reasonable price in comparison with common economic situation. Price regulation, once determined by the state, is sometimes replaced by price determination by a cartel. In the past, state determined maximum prices, nowadays cartel members tend to agree on minimum prices.

Cartel members find different excuses (when such cartel is detected) for agreements on minimum prices, one of the usual excuses is that the definition of a minimum price excludes unfair competition.

Minimum prices are defined in different ways, sometimes as selling prices and even brought into the price lists, sometimes certain elements of the prices are agreed so that the selling price may not vary significantly.

Cartel members try to explain that certain goods, but much more often services, can not be provided under certain price, that is usually thoroughly calculated by a cartel. They try to explain that selling under the set minimum prices would be an unfair trading practice and their usual explanation is that the selling under the set minimum prices would be a selling under the normal price and such prices (i.e. under the price, determined by the cartel members) would not cover all the costs and would be possible only when such competitor would not follow the law; usually grey economy elements are pointed out.

One of the statements that is quite usual is that cartel members are not able to provide certain goods or services under certain price what is especially significant. Instead of identifying and removing the problems in their business process they set a standard price that is a reflection of their (an)ability and not the reflection of the market. To a certain extent such approach is understandable (but far away from acceptable) because in the past in certain economies the companies need not apply all economic elements and need not make the best price calculation, because the price was determined (regulated) by the state.

What makes a lot of thorough is the following: hard-core cartels that agree on minimum prices are often established as business associations under the chambers of economies and deem the minimum price definition as normal, being in conformity with the law, preventing from unfair competition, providing customers good product and/or service. In the majority of cases they are able to condemn competitors that do not follow cartel decisions as the ones breaking the law, they adopt certain measures against them, sometimes such companies are excluded from such business associations. Not rarely, they can even count on public support.
The real problem is not as much in the reactions of the cartel members, problem is much deeper. Cartel members, sometimes organised as business associations, understand such approach as normal. As there is almost only the competition authority that do not accept such excuses, it could be said that a non-appropriate level of competition culture and general level of awareness, based on certain questionable experience, create circumstances for the existence of such cartels; it is very usual, but far from understandable and acceptable, that such cartels are organised as associations under chambers of economy.

**Bid rigging (collusive tendering)**

Introduction of competition brought changes to the field of government/public procurement, too. Instead of direct contracts between the government and its bodies as well as bigger companies on one side and the in advance chosen supplier on the other side for certain substantial purchases, the purchasers tend to call for bids in order to get the best price/quality ratio of certain goods and/or products.

Government/public procurements open a new dimension for market players. Contracts concluded under the said frame are very interesting because there are certain elements granted that are not always so clearly defined and secured as under such procurements; especially financing is very important and usually the planning of the production facilities is much easier and there is a lot of playground for other business operations and marketing activities, when certain (substantial) part of production (service) facilities is firmly engaged in advance.

Gaining a contract under an open bid is not only a challenge, it is a very good result, usually deemed to be reached in a fair game and it can provide a certain economic stability for a winner. The original idea of a public procurement philosophy is very probably two-fold: on one hand the customer can get the best price/quality ratio and on other hand the products and/or services would be provided by the most competitive bidder.

Unfortunately, that is not always the case. Especially contracts (bids) that represent high value or can be executed over longer period of time, can be a subject of an anti-competitive behaviour.

As substantial contracts are awarded to companies that can prove that they are able to provide requested goods and/or services under determined quality in a certain time frame and under very strict demands of a customer etc., the number of potential bidders is already limited. Not all competitors are able to bid, according to different reasons, some of them can not present requested references, which could be very important for a customer in order to feel secure to get requested goods and services on time, in a proper quality, over a longer period of time, some of them are not able to organise their facilities according to requests in a bid, some of them are even not able to provide bid bonds or performance bonds etc.

Potential bidders (or better: potential competitors) can be competitors but it is not necessarily always the fact. As the number of competitors can be pretty known in advance, the chance of having collusive tendering is not to be excluded in advance, especially when there are bids for contracts over a longer period of time. Especially civil engineering and construction and other investments into infrastructure as well as long term supplies of commodities can be severely affected in economies in transition.

The reasons why bid-rigging can happen are different; economic interest was already pointed out, but there is also another important reason: in a new situation potential competitors are still not aware of the fact that they should compete, they rather agree on taking agreed piece of the pie, because still non-appropriate level of competition allows them to do so.
Bid rigging can have local as well as international dimension, it depends on the industry and the scope of a bid as well as on entry barriers to certain markets. If a market is still restricted, local competitors tend to agree among themselves how to define “fair” shares on a long term.

If a market is open for full competition, for new entrants, local competitors tend to agree how to exclude new entrants, how to split the pie among themselves, sometimes unfortunately backed by hidden technical barriers to trade provided by a state, not being aware that a harm is done to the same backing party, a state.

Sometimes, so called national consortiums between potential competitors can be established in order to control series of bids, and the so called national interest could be pointed out (but hardly properly explained) as an excuse.

Bid rigging is harmful especially due to the following (among others):

- cartel members exclude potential competitors in advance, not allowing them to enter the market (and they can do so, because they control the market over a longer period of time and they can offer the prices that are always more competitive than prices from independent bidders)
- cartel members exclude competition between themselves, because they agree in advance about the market sharing, about the prices, about other competition parameters that represent basis for competitiveness
- cartel members do not respond to demands of the market completely, they change in a way demands of market, they can artificially create new demands; they can even create different demands over agreed limited supplies, different prices, even different technical standards
- prices may not necessarily be a result of economic calculation but an agreement of bidders (cartel members)
- as government (public) procurement may represent important part of budget resources, bid rigging can have negative macro-economic effects on national economies
- the intention of government (public) procurement is to introduce competition to a very important and sensitive fields which can affect all sectors of economy and which aim to a better price/quality ratio; bid rigging is excluding all these expected effects
- instead competition as market regulator, cartel members (bid riggers) take over that role.

**Conclusion**

Hard core cartels are one of the most dangerous threats to competition, to market economy. Cartels are in certain systems, by certain undertakings still not considered as harmful as they are. That is perhaps due to the fact that competition is still a new category, not widely spread and known and that there is still a low level of competition, a low level of competition culture.

Competition advocacy is extremely important to raise a level of competition culture in each country, because proper awareness is a basis for a modern legal framework and successful implementation of an effective competition protection.

Co-operation between authorities, in the countries as well as on a multinational level can and shall bring us a progress in fighting cartels, and although there is a very simple rule - it is better to prevent than cure - we have to consider the importance of sanctions very thoroughly. Substantial fines and even criminal sanctions may be considered as proper tools to fight cartels without unnecessary sympathies for cartel members.
Detecting cartels, demanding fines is our responsibility, our goal and we can do it better if we co-operate.
ANSWERS TO THE QUESTIONNAIRE ON ANTI – CARTEL ACTIONS

Since January 1st, 2000, two cases of hard core cartel have been assessed. The first involved major electricity producers, while the second involved two major cultural events organisers.

1. Respondent’s name: (all are producers of electric energy)

- Dravske elektrarne Maribor d.o.o., Obre na ulica 170, Maribor;
- Savske elektrarne Ljubljana d.o.o., Gorenjska cesta 46, Medvode;
- Soške elektrarne Nova Gorica d.o.o., Erjavčeva ulica 20, Nova Gorica;
- Nuklearna elektrarna Krško d.o.o., Vrbina 12, Krško;
- Termoelektrarna Šoštanj d.o.o., Cesta Lole Ribarja 18, Šoštanj.

The relevant product market is the market of selling electric power, originated within Republic of Slovenia, to electrical energy customers which exceed a connected load of 41 kW at one take-off point and the parties engaged in electrical energy distribution activities (eligible customers). Eligible customers are allowed to choose their supplier of electric power freely. The legal framework for such design of the market comes from the Energy Act (Ur. list, No.79/1999; hereafter referred to as EA). By virtue of Article 19 EA the supply of electric energy is a market-based service, i.e. the sellers and buyers of electricity are free to negotiate the amount and price of the supplied energy, unless the law provides differently. The third paragraph of the above mentioned Article defines eligible customers as electrical energy customers, which exceed a connected load of 41 kW at one take-off point and the parties engaged in electrical energy distribution activities shall be eligible customers.

As the application of Article 19 is restricted until January 1 2003 to the electricity generated on the territory of the Republic of Slovenia, the relevant geographic market is the national territory.

The above mentioned companies agreed to form a common offer for the selling of electricity to eligible customers (i.e. electrical energy distributors and electrical energy customers which exceed a connected load of 41 kW at one take-off point). The content of the offers to both groups of customers was equal for all the types of the offered power. The joint offer also embraced the terms of sales, which included prices, terms of payment and payment insurance. In addition, the electricity producers agreed to act in concert after the opening of the market. Termoelektrarna Šoštanj (TES) was chosen as co-ordinator of actions among companies. In this way an organised form of co-operation for the common setting of competitive parameters between the involved companies, which operate in the same industry, has been established. Therefore the evidence of collusion was direct.

PENAL PROVISIONS:

Article 52 of Prevention Of The Restriction Of Competition Act implies the following penal provisions:

(1) A monetary fine from SIT 10,000,000 to SIT 30,000,000 shall be imposed on a legal person for committing the misdemeanour by:
- Concluding an agreement on restriction of competition (Article 5);
- Abusing its dominant position in the market (Article 10).
A monetary fine from SIT 3,000,000 to SIT 15,000,000 shall be imposed on an individual performing independently in the market for committing the misdemeanour referred to in the preceding paragraph.

A monetary fine from SIT 1,000,000 to SIT 1,500,000 shall be imposed on a responsible person of a legal person for committing the misdemeanour referred to in the first paragraph.

The Office had prohibited the agreement.

2. **The most colourful statement** revealing the intent of cartel members is the following.

Companies, which are involved in the cartel, said that preparations of electric energy producers to pending opening of the electricity market were running late, as they also found out that the openness of the market to the foreign competition causes many changes (contracts, rules which define the functioning of electroenergetic system, flow of information), so they agreed to form a common offer as electric energy producers for the period of transition. As the cartel co-ordinator put it: “to make a rapid, temporary offer, by which the cartel will ensure uninterrupted functioning of electroenergetic system and operation of electric energy customers during the transition period”. The co-ordinator also stated that there was no agreement about concentration or any other cartel agreement, which would influence the degree of competition in the market.

The producers on one hand denied any mutual cartel agreement, while on the other hand they admitted to go ahead with a common offer to eligible customers. The Office concluded that a group of independent companies that is jointly selling their product forms a price cartel, which is within the competition protection framework one of the most dangerous forms of restrictions of competition in the market.

The second case involved two cultural events organisers.

1. **Respondent’s name:**
   - Festival Ljubljana, Trg francoske revolucije 1-2, Ljubljana;
   - Cankarjev dom, kulturni in kongresni center, Prešernova 10, Ljubljana.

**The relevant product market** includes:

- market for renting out concert and other halls,
- market for renting out technical equipment and musical instruments,
- market for organising cultural, congressional and other entertainment events.

**The relevant geographic market** for all above mentioned product markets is the territory of Republic of Slovenia.

Undertakings Festival Ljubljana and Cankarjev dom were in breach of Article 5 (1) of Prevention of Restriction of Competition Act because the parties in the Agreement on mutual co-operation dated November 11th 2000 agreed the following:
• Each party of the agreement will inform each other on the organisation of events or they will try to prevent an event of any other organiser in the same week, when the other party has already planned the same kind of event.

• Festival Ljubljana and Cankarjev dom are accepting by this agreement the limitation of competition clause, which will be mutually respected. The acceptance of this agreement is a moral obligation to both parties in the sense that if one party will sign or put a significant effort in engaging a top artist or an ensemble, the other party would withdraw from any effort to engage the same artist before the performance takes place in Ljubljana.

One of the most colourful statement:

The parties are claiming that as companies serving the public interest being active in the field of culture, they cannot be undertakings in the sense of Prevention of the Restriction of Competition Act. Parties also claim that for their activities they receive significant budget resources, which demand rational usage, so competition rules do not apply to their activities.

Provisions of Prevention of the Restriction of Competition Act are binding for all legal subjects that engage in activities in the market against receiving payment. Cankarjev dom and Festival Ljubljana do engage in activities against payment in the market. The Office concluded that the agreement is in breach of competition rules, because the agreement exists between two parties about terms of market operations, which aims at preventing, hindering or deforming competition in Republic of Slovenia. The provisions of the agreement are therefore prohibited and void. The Office submitted the proposition to impose fines to the misdemeanour judge.