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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SLOVENIA**

-- 2009 --

*This report is submitted by Slovenia to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 27-28 October 2010.*

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## Background and executive summary

1. The Competition Protection Office (hereinafter the CPO) is a functionally independent authority, organised within the Ministry of Economy, with appropriate statutory powers. Its legal competences include ex-post market control of restrictive agreements, the abuse of dominant market positions and control of concentrations. Formal relationship and consultation process with other ministries and departments is established through monitoring of the situation in all areas of national legislation where CPO can issue opinions on new legislative proposals or legislative amendments. CPO also submits its opinions to the national assembly and the government on general issues under its competence, either on its own initiative, or upon request.

2. Further amendments to competition legislation were introduced in 2009, which brought some novelties to be implemented in practice. The new provisions provide for detailed procedure for leniency applicants that were adopted in the form of a Government Decree coming into force on 1st of January 2010.

3. The new rules shall increase transparency and legal certainty concerning the handling of leniency applications. The framework of CPO's leniency policy is based mostly on the Model Leniency Program of the ECN which was duly considered when CPO worked out the leniency rules.

4. The amended Competition Act includes more precise definitions of terms and measures used, brings the competition legislation closer to EU law and above all extends the competences of the CPO and introduce higher and more individualised fines.

5. In 2009 CPO has issued 21 decisions in cases regarding violation of competition legislation. There was 1 decision issued related to horizontal agreements and 2 decision on the abuse of dominant position. In 2009 CPO also dealt with 17 notified concentrations and issued 18 decisions. Apart from 14 approved concentrations, 1 prohibition decision was issued, 2 cases were not subject to competition law and in one case CPO prohibited the implementation of the concentration.

6. CPO in parallel with its legal competences also performed activities aiming to raising competition culture of all market participants and therefore competition advocacy represents important role in the policy of the Office. CPO is entitled to providing comments in the mandatory review process with regard to legislative proposals; from this perspective, competition advocacy is an important tool in the promotion of competition principles and market methods. Successful advocacy may contribute to a higher quality of regulation or to accelerate deregulation processes in situations where new market conditions do not lead to increased competitiveness of the companies.

7. In 2010 CPO aims to focus, apart from the regular legal competences, also to develop further external communication and to deal with further increase of the qualification and education of its employees. One of the priorities is also the future reorganization of CPO to a more independent authority.

### 1. Changes to competition law

8. In 2009, the Prevention of the Restriction of Competition Act (PRCA-1)<sup>1</sup> was amended. The latest amendments which came into effect on 30 April 2009, apart from some editorial amendments, ensure the possibility of the immunity or the reduction of fines in matters of hard core restrictions. The new

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<sup>1</sup> Prevention of the Restriction of Competition Act-1(PRCA-1), OG RS No. 36/2008 and PRCA-1A), OG RS No. 40/2009.

provisions provide for detailed procedure for leniency applicants that were adopted in the form of a Government Decree coming into force on 1st of January 2010.

9. The new rules shall increase transparency and legal certainty concerning the handling of leniency applications. The framework of CPO's leniency policy is based mostly on the Model Leniency Program of the ECN which was duly considered when CPO worked out the leniency rules".

## **2. Competition law enforcement**

### **2.1 Summary of activities – action against anticompetitive practices**

10. One of the fundamental rules of PRCA-1 prohibits “agreements between undertakings... which have as their object or effect the prevention, restriction or distortion of competition in the Republic of Slovenia” (Article 6). This prohibition applies in particular to agreements that (i) directly or indirectly fix purchase or selling prices, or other trading conditions; (ii) limit or control production, markets, technical progress or investment; (iii) apply dissimilar conditions to comparable transactions with other trading parties, thereby placing them at a competitive disadvantage; (iv) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of their contracts; (v) share a market or sources of supply. The listed examples of illegal agreements are substantially the same as in Art. 101 TFEU; the same applies for the possibility and conditions for exemptions.

11. In 2009 CPO issued one decision related to horizontal agreements. The case concerned concerted practices among three retail companies regarding potential price fixing on wholesale and retail level as well as exchange of information and boycott of discounters. (see detailed description in 2.1.1).

12. The second of the two fundamental rules of PRCA-1 prohibits “the abuse of a dominant position in the market by one or more undertakings on the territory of the Republic of Slovenia or its significant portion” (Art. 9). Article 9, paragraph 2 defines dominance as follows: “Un undertaking or several undertakings shall be deemed to have a dominant position when they can act independently of competitors, clients or consumers to a significant degree.” Determining the dominant position is assessed with regard not only the market share, CPO takes into consideration also financing options, legal or actual entry barriers, access to suppliers or the market and existing or potential competition.

13. The concept of per se infringements is not envisaged in PRCA-1. Nevertheless, the market share still remains to be the basic indicator of dominance; the Act states that un undertaking shall be deemed to have a dominant position on the market if its market share exceeds a 40% threshold, in case of two or more undertakings the 60% market share threshold applies accordingly. The listed examples of abuses of dominant position are substantially the same as in Art.102 TFEU.

14. In 2009, CPO carried out 3 investigations and issued 2 decisions. The cases concerned the abuse of dominant position by the biggest retailer on the Slovenian market regarding practices dealing with the suppliers.

15. In 2009 CPO imposed fines in one decision related to substantive cartel infringement. The amount of fines imposed was € 516.400.

### 2.1.1 *Description of relevant cases, including those with international implications*

- Potential concerted practices among 3 retail companies regarding price fixing on wholesale and retail level, exchange of information and boycott of discounters

SPAR Slovenija trgovsko podjetje d.o.o. Ljubljana, Letališka cesta 26, 1000 Ljubljana (hereinafter: SPAR Slovenija), Engrotuš, podjetje za trgovino d.d., Cesta v Trnovlje 10 A, 3000 Celje (hereinafter: Engrotuš), and Poslovni sistem Mercator d.d., Dunajska cesta 107, 1000 Ljubljana (hereinafter: Mercator) are three retail companies with the biggest share on Slovenian retail market.

Based on the information gathered during the analysis of retail and procurement markets, CPO has at the end of 2007 initiated an ex-officio case against three retail companies for breaching of competition rules regarding exchange of information that could lead to price fixing as well as foreclosure of other retailers' (discount chains) access to Slovenian market.

Through its investigation CPO had, among other measures, also conducted inspections on premises of all three companies. CPO had gathered some evidence and issued an SO only regarding the first part of the alleged infringements.

The parties offered commitments which would remove competition concerns regarding the alleged infringements. CPO had decided that the offered commitments were sufficient and adopted a commitments decision.

CPO concluded that there was not enough evidence of concerted practice among the three biggest retailers in Slovenia concerning price-fixing of supply prices. The described practice could have led to the infringement of Article 81 of the Treaty as well as Article 6 of Slovenian Competition law, but the effect of the infringement was not conclusively proven.

Commitments offered by the parties are behavioural and introduce number of rules that retailers have to follow when dealing with their suppliers. They offer the CPO the opportunity to have access to the retailers dealing with suppliers as well as to follow the price movements of the daily consumer goods at the wholesale and retail level. This would allow the CPO to monitor for possible future infringements of competition rules in the retail sector.

- Abuse of dominant position by the largest retailer regarding practices dealing with the suppliers – Poslovni sistem Mercator d.d.

Mercator d.d. (hereinafter: Mercator) is a retail company with the largest market share on Slovenian retail market. Based on the information that CPO had gathered during its analysis of retail and procurement markets, CPO had initiated on 18.12.2007 an ex-officio case against Mercator for potential breach of competition rules regarding its contract clauses in annual supply agreements.

Mercator had included in its supply agreements unfair rebates which were not cost based and were not passed on to the final consumers. In addition it had also charged the suppliers for the provision of services which were not essential to the agreement.

The market concerned was the procurement market for daily consumer goods. CPO has decided not to define separate markets within this group, since based on the obtained evidence, practice described above is common on number of markets within this group.

Since the infringement concerned the biggest retailer in Slovenia and could have effect on all of its suppliers of daily consumer goods, which are also companies from other EU Member States,

apart from the effect on the territory of Slovenia, it could have an effect on substantial part of internal market.

Through its investigation CPO had, among other measures, also conducted an inspection at the premises of Mercator. After the initiated procedure, Mercator offered commitments which were supposed to eliminate the circumstances leading to the likelihood of the existence of alleged infringements.

The commitments offered by the party were of behavioural nature and introduced a number of clauses that Mercator has to include in its supply agreements. They also prescribe the duty of Mercator to manage the relations with its suppliers in a written form and to make the text of the commitments public. This would allow the CPO to monitor the retail market for possible future infringements of competition rules. The CPO had decided that the offered commitments were sufficient and concluded the case with the commitment decision.

- The abuse of dominant position by the operator of the port - Luka Koper d.d.

Luka Koper d.d. (hereinafter: Luka Koper) is an operator of the seaport of Koper. It is also the majority owner of the sole company that performs towing services in the port of Koper–Adria Tow d.o.o. and sole company that performs mooring of ships in the port of Koper.

S5 vleka ladij d.o.o., (herinafter: S5) is a company that is active in maritime port services. S5 made the complaint that was the basis for opening the procedure and was granted a role of the intervener in the case.

Luka Koper had refused without justification to allow the access to its competitor to the port, therefore making it impossible for the competitor to perform towing and mooring activities. Regarding the towing services, Luka Koper claimed that it had no available space in the port, while its daughter company Adria Tow was given access to the port and had freely performed the towing services; moreover, the demand for towing services has been rising in last years. Regarding the mooring services, Luka Koper had prolonged its decision to allow access to the workers of its competitor to the port in order to perform mooring, until the legal basis was changed and the services were included as the exclusive rights of the concessionaire (Luka Koper d.d.). Mooring activities were also performed by Luka Koper's daughter company, in this case Luka Koper INPO d.o.o.

On 29.07.2008 a new decree entered into force, which gave the authority to decide on access to the port infrastructure to its owner, government of Republic of Slovenia.

Three relevant markets were defined in order to examine the behaviour of Luka Koper. The first market was the market for organization of port services, where Luka Koper enjoys a legal monopoly. Second and third market, market for towing services and market for mooring services, constitute neighbouring markets, although separate from the first market, yet are affected by the actions of the dominant company on that market, in which Luka Koper d.d. enjoyed de facto monopoly through its subsidiaries.

Since the infringement concerns the operator of the only seaport in Slovenia it has an effect on the whole territory of Slovenia and has effect on services provided by and for companies from other EU Member States, it has an effect on substantial part of internal market.

The CPO had concluded that refusing the access to the port infrastructure by Luka Koper had the effect of excluding all competition on the markets for towing and mooring services in the port of Koper and therefore constitute a breach of Article 9 of Slovenian Competition Law as well as Article 82 of the Treaty.

## 2.2 *Mergers and acquisitions*

16. The authority over merger review is solely within the Competition Protection Office. As a rule mergers are reviewed solely on competition principles.

17. Merger control is regulated by the Prevention of the Restriction of Competition Act (PRCA-1)<sup>2</sup>, which implemented Council Regulation (EC) No. 139/2004 (EC merger Regulation). Merger control applies to concentrations, which arise when:

*(i) two or more previously independent undertakings merge;*

*(ii) one or more persons already controlling at least one undertaking, or one or more undertakings, acquire whether by purchase or securities or assets, by contract or by other means, direct or indirect control of the whole or parts of one or more other undertakings; or*

*(iii) two or more undertakings create joint venture performing on a lasting basis all the functions of an autonomous economic entity*

18. A concentration must be notified if (i) the combined aggregate annual turnover of all the companies concerned, including the affiliated companies, exceeded €35 million before tax in the Slovenian market in the preceding financial year; and (ii) the annual turnover of the target, including the affiliated companies, exceeded €1 million before tax in the Slovenian market in the preceding financial year; or (iii) in cases of joint ventures, the annual turnover of at least two companies concerned, including affiliated companies, exceeded €1 million before tax in the Slovenian market in the preceding financial year.

19. Regardless of the matched thresholds, the concentration does not need to be notified if it is subject to review of the EC Commission under the Regulation 139/2004/EC.

20. In 2009 CPO dealt with 17 notified concentrations and issued 18 decisions. Apart from 14 approved concentrations, 1 prohibition decision was issued, 2 cases were not subject to competition law and in one case CPO prohibited the implementation of the concentration.

21. In 2009 CPO imposed fines in 5 decisions related to merger control. The amount of fines imposed was € 137.500, most of them for failing to notify a concentration or for missing the deadline set for the notification.

### 2.2.1 *Summary of significant cases*

- First decision finding a concentration incompatible with the competition rules - Delo d.d. and ČZP Večer d.d.

On 23 September 2009, CPO has issued its first decision prohibiting a concentration in the case involving Delo d.d. (hereinafter: Delo), the largest daily newspaper publishing company, and ČZP Večer d.d. (hereinafter: Večer), the third largest daily newspaper publishing company in the Republic of Slovenia.

The concentration took place on 10 November 2008, when Delo acquired direct control over the Večer by acquisition of 74,76 % of shares, increasing its total share to 79,23 % of shares.

During the assessment of the concentration CPO identified possible overlap on the number of relevant markets, but found that the competition concern existed only on two relevant markets,

<sup>2</sup> Prevention of the Restriction of Competition Act-1, OG RS No. 36/2008 and PRCA-1A, OG RS No. 40/2009.

namely market for publishing of general information daily newspapers and market for advertising in daily newspaper markets. Due to the large post merger market share of merging companies on the two mentioned markets, the CPO concluded that the concentration would impede effective competition in the Republic of Slovenia. The Office identified both possible unilateral and coordinated anticompetitive effects. Since the concentration would significantly increase the market power of merged companies, it would allow it to act in a way that could have a foreclosure effect on the market. It would increase barriers to entry on the market to potential competitors in such a way that it is unlikely that entry would be possible in any other way, except by purchasing already established publisher.

At the time when the decision was adopted, the concentration had already been completed; therefore CPO also imposed structural remedies in order to restore conditions of effective competition. CPO decided, that Delo has to sell 75 % Večer shares to a third party within one year after the receipt of the decision. This would remove the possibility of Delo having control over the undertaking Večer any more and therefore remove all competition concerns. In order to prevent the concentration from having further effect on competition until such divestiture has been implemented, Delo will be allowed to exercise its voting rights only from 16,94 % of the acquired shares and from other shares only with the permission of CPO.

### 2.3 *Courts*

22. In 2009, within the court review, the courts of the Republic of Slovenia decided on 24 cases, in which the legality of the acts issued by the CPO was examined; in all, 20 referred to the administrative procedure (hereinafter: administrative cases) and 4 to the offence procedure (hereinafter: offence cases).

23. Administrative cases: in 10 cases, the court dismissed the action, which means that the court ruling decided that the acts of CPO were issued in accordance with law. Moreover, in 6 cases, the court rejected the action, in 3 cases, the court granted the action, abrogated the act issued by CPO and remanded the case back to CPO. In one case the Court partly granted the action.

24. Offence cases: in one case, the court dismissed the action, which means that the court ruling decided that the acts of CPO were issued in accordance with law. In one case the court rejected the action, in one case the decision was repealed and in one case the procedure was halted because of the limitation period.

25. The courts currently examine 6 administrative decisions and 2 minor offence decisions issued by CPO, pending a decision.

## 3. **Resources of competition authority**

### 3.1 *Employees and annual budget of CPO*

	<b>person-years</b>	<b>budget expenditure</b>
<b>2009</b>	17	939.176 €
<b>2008</b>	17	921.393 €
<b>2007</b>	20	697.341 €
<b>2006</b>	21	663.003 €
<b>2005</b>	17	653.530 €
<b>2004</b>	12	545.068 €
<b>2003</b>	10	433.212 €

26. The administrative resources are not sufficient although the number of staff has doubled in the last ten years. The reasons are mostly the high rate of fluctuation. Administrative (and financial) strengthening of the CPO is one of priorities for further activities; however, the realisation strongly depends on the Governments' staff policy guidelines and priorities.

### **3.2 *Advocacy efforts***

27. CPO in parallel with its legal competences also performed activities aiming to raising competition culture of all market participants and therefore competition advocacy represents important role in the policy of the Office. CPO is entitled to providing comments in the mandatory review process with regard to legislative proposals; from this perspective, competition advocacy is an important tool in the promotion of competition principles and market methods.

28. There are no explicitly dedicated employees for this task however, a number of lawyers participate in the mandatory review process with regard to legislative proposals.