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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SLOVENIA

-- 2010 --

This report is submitted by Slovenia to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19-20 October 2011.

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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. No formal amendments were introduced to competition legislation itself in 2010; nevertheless, the Ministry of Economy has started with preparation of a proposal for an act on the Establishing of the Slovenian Agency for Protection of Competition.

3. In 2010 CPO has issued 23 decisions in cases regarding violation of competition legislation. There was 2 decisions issued related to horizontal agreements and 1 decision on the abuse of dominant position. In 2010 CPO also dealt with 23 notified concentrations and issued 20 decisions. Apart from 12 approved concentrations, 8 cases were not subject to competition law.

4. 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.

5. In 2010 CPO aimed 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 remains to be the future reorganization of CPO to a more independent authority.

1. Changes to competition law

6. No formal amendments were introduced to competition legislation itself in 2010; nevertheless, the Ministry of Economy has started with preparation of a proposal for an act on the Establishing of the Slovenian Agency for Protection of Competition.

2. Competition law enforcement

2.1 Summary of activities – action against anticompetitive practices

7. 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.

8. In 2010 CPO issued two decisions related to horizontal agreements. The cases concerned concerted practices / price agreements among six undertakings managing the biggest ski resorts in Slovenia and The Association Ropeways of Slovenia and a restrictive agreement related to the refusal of guarantee services of Samsung products for certain local distributors. (see detailed description in 2.1.1).

9. 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: “An 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.

10. 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 an 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.

11. In 2010, CPO carried out 2 new investigations and issued 1 decision. The infringement consisted of the conduct of the company Gasilska oprema d.o.o. , who terminated the contract, which is necessary for obtaining official license for servicing of fire extinguishers, with its contractor.

12. In 2010 CPO imposed fines related to restrictive practices in the total amount of 1.573.112 EUR. One decision was related to substantive cartel infringement (in the amount of 1.164.157 EUR) and one to the abuse of dominant position (in the amount of 408.955 EUR).

2.1.1 Description of relevant cases, including those with international implications

2.1.1.1 Price agreements/concerted practices among 6 undertakings managing the biggest ski resorts in Slovenia and the Association Ropeways of Slovenia regarding price fixing of lift ticket prices.

13. Based on the public information CPO had gathered on 28.10.2009, CPO initiated an ex-officio case against undertakings involved for breach of competition rules regarding price fixing of ski lift ticket prices. Through its investigation, where CPO had among other measures, also conducted inspections on premises of three undertakings (ŠC Pohorje d.o.o., ATC Kanin Bovec d.o.o. and Association Ropeways of Slovenia), CPO has gathered enough evidence to prove the price fixing agreement/concerted practices.

14. The undertakings involved had, at least from the year 2000, participated in concerted practice/concluded agreements on prices for ski lift tickets in the Republic of Slovenia. Managers of the involved ski resorts in Slovenia are also the members of The Association Ropeways of Slovenia.

15. Every year before opening a ski season all of the above mentioned managers of ski resorts in Slovenia publish tariffs on the websites of the ski resorts. Furthermore, all the tariffs are later also sent to the Association Ropeways of Slovenia which makes aggregate tariff for each year and publishes it.

16. The CPO had made an analysis of these tariffs which shows that the prices for daily ski lift tickets for adults are similar or even the same. Furthermore, these prices are basis for calculation of daily

ski lift prices for other categories (children, seniors...). The concerned ski resorts differ in several ways as it is apparent from the description of these resorts.

17. As it was apparent from the documents gathered during the inspections, the communication on prices took place at the meetings of the Association Ropeways of Slovenia which served as a forum for discussion. The meetings took place every year before the beginning of the ski season. At these meetings the undertakings concerned had agreed on minimum, maximum and also on recommended prices for daily lift tickets. Furthermore, there were also direct contacts concerning fixing of prices for ski lift tickets between undertakings involved.

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

19. The CPO found that the undertakings involved agreed on prices for ski lift tickets at least from year 2000. Their agreements/concerted practices were seen from the published tariffs as also from the document gathered during the procedure. The ski resorts involved in the case differ significantly in several ways and no justified cause could be found for the same or similar prices for ski lift tickets on the biggest ski resorts in Slovenia. Therefore, the CPO concluded that the conduct of the undertakings concerned is prohibited both under Article 81 of the Treaty (Article 101 TFEU) as well as Article 6 of Slovenian Competition law.

20. With respect to the imposition of fines, CPO also conducted the offence proceedings in which it issued an offence decision imposing fines on the 6 legal persons involved in the sum of 1.017.157 EUR. Moreover, CPO also imposed fines on the responsible persons of the involved legal entities in the sum of 147.000 EUR. In assessing the fine, CPO considered the seriousness of the offence (the nature of the offence, the combined market share of the involved companies in relation to the infringing services, the territorial scope of the infringement, the fact that the offence was committed, the market characteristics and the offence duration).

2.1.1.2 Abuse of dominant position by Gasilska oprema trgovsko podjetje d.o.o., the wholesale company for fire extinguishers and related equipment

21. Gasilska oprema trgovsko podjetje d.o.o. (hereinafter: Gasilska oprema) is a company dealing with the distribution and services related to the market of fire extinguishers and related equipment, civil protection equipment, ecology and work protective/safety equipment. Gasilska oprema is also a daughter company of the producer of fire extinguishers trade mark Pastor from Croatia, and its only agent in Slovenia.

22. On 11 November 2008 CPO has received the complaint from Marko Paternoster s.p. regarding the termination of contract for after sale services of fire extinguishers brand Pastor he had with Gasilska oprema. Based on the complaint CPO had initiated an ex-officio case against Gasilska oprema for the abuse of its dominant position in the market of selling the fire extinguishers.

23. According to the relevant legislation, a contract with the producer or his agent is one of the necessary preconditions for a person (legal or natural) to obtain a license for after sales services of certain trade mark of fire extinguishers. License is granted by Ministry of defence – Administration for civil protection and disaster relief.

24. The market share of fire extinguishers trade mark Pastor on the market for maintaining and after sales services in the period between 2004 and 2009 varies from 75% to 68 % and therefore presents one of the crucial facts for a person involved in after sales services of fire extinguishers to stay on the market. The

market share of trade mark Pastor on the market for sale of new fire extinguishers in the period between 2002 and 2008 varies from 53% to 43 %. In the year 2008, the market share of this trade mark represented 45% of new fire extinguishers.

25. In one of the previous decisions in the year 2000 against the company Gasilska oprema, CPO has already concluded that article 7.1. of the “Typical contract for maintaining of fire extinguishers” was identified as anticompetitive and as such null and void.

26. On the basis of the same contested provision of article 7.1. of the “Typical contract for maintaining of fire extinguishers”, Gasilska oprema has in November 2007 terminated the contract for after sales services of fire extinguishers Pastor with Marko Paternoster s.p. The termination occurred after he concluded a contract for after sales service of another trade mark of fire extinguishers trade mark Červinka.

27. The competitive trade mark Červinka entered the market in 2007, however the sales in 2008 to 2009 dropped almost by 90% due to the fact that it was impossible to conclude a firm contract for after sales services and maintaining of the trade mark brand on the territory of Slovenia. Gasilska oprema has also distributed several notices to persons who maintain after sales services of fire extinguishers, that selling fire extinguishers of competing brands is an unfair act against Gasilska oprema and could be the reason for the termination of the contract.

28. Gasilska oprema d.o.o. has, according to the market shares, a dominant position on the upstream market of sale of new fire extinguishers. Although not directly involved in after sales services and maintaining of fire extinguishers, it is indirectly present on the downstream market through its right to conclude or not to conclude a contract for after sales services and maintenance of the trade mark Pastor. This position gives Gasilska oprema a significant power to control both markets, since persons providing after sales services usually also provide these services for other brands. After sales services providers highly depend on the amount of fire extinguishers they service. Since the share of trade mark Pastor on the market is significant, the termination of the “Typical contract for maintaining of fire extinguishers” Gasilska oprema with the after sales services provider Marko paternoster s.p. represents a pressure also on new entrants in an upstream market and therefore an abuse of its dominant position.

29. The CPO had concluded that Gasilska oprema, by termination of the above mentioned contract and threats to terminate the “Typical contract for maintaining of fire extinguishers” with the after sales services provider, who would sell competing brands of fire extinguishers, imposed a pressure on other participants on the market and weakened effective competition on the market for selling new fire extinguishers.

30. Since the infringement by Gasilska oprema concerns 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 the substantial part of internal market.

31. The CPO had concluded that actions by Gasilska oprema had the effect of excluding all competition on the markets for of sale of new fire extinguishers and after sales services and maintaining of fire extinguishers and therefore constitute a breach of Article 9 of Slovenian Competition Law as well as Article 82 of the Treaty.

32. A judicial proceeding was initiated against the decision of CPO issued in the administrative procedure; a decision has not yet been issued. In the case concerned, CPO has not yet issued an offence decision, which will be initiated after the court ruling is reached.

2.2 *Mergers and acquisitions*

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

34. Merger control is regulated by the Prevention of the Restriction of Competition Act (PRCA-1)¹, 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

35. 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.

36. 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.

37. In 2010 CPO dealt with 23 notified concentrations and issued 20 decisions. Apart from 12 approved concentrations, 8 cases were not subject to competition law.

38. In 2010 CPO imposed a fine in one case related to merger control. The amount of fine imposed was € 10.000, for missing the deadline set for the notification.

2.3 *Courts*

39. In 2010, within the court review, the courts of the Republic of Slovenia decided on 12 cases, in which the legality of the acts issued by the CPO was examined; in all, 6 referred to the administrative procedure (hereinafter: administrative cases) and 6 to the offence procedure (hereinafter: offence cases).

40. Administrative cases: in 4 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 1 case, the court rejected the action, in 1 case, the court granted the action, abrogated the act issued by CPO and remanded the case back to CPO.

41. Offence cases: in 1 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 1 case the decision was repealed and in three cases the procedure was halted because of the limitation period. In one case the Court partly granted the action.

42. The courts currently examine 7 administrative decisions and 5 minor offence decisions issued by CPO, pending a decision.

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

3. Resources of Competition Authority

3.1 *Employees and annual budget of CPO*

	person-years	budget expenditure
2010	17	845.637 €
2009	17	939.176 €
2008	17	921,393 €
2007	20	697.341 €
2006	21	663.003 €
2005	17	653.530 €
2004	12	545.068 €
2003	10	433.212 €

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

3.2 *Advocacy efforts*

44. 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.

45. 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.