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

-- 2012 --

*This report is submitted Slovenia to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 30-31 October 2013.*

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**Background and executive summary**

1. The Competition Protection Office (hereinafter the CPO) was, until the reorganization on 1 January 2013, a functionally independent authority, organised within the Ministry of Economic Development and Technology 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 2012, which brought some novelties to be implemented in practice. Due to calls for greater independence of the Competition Protection Office (CPO), including those from the OECD, several amendments to Competition Law (ZPOmK-1) entered into force. The reform of Slovenian Competition Authority has been processed in 2011 and 2012. Under the adopted amendments structural changes were anticipated and the Competition Protection Office (CPO) has been transferred into an independent public agency - Slovenian Competition Protection Agency (CPA).

3. In 2012 CPO has issued 23 decisions in cases regarding violation of competition legislation. There were 3 decisions issued related to horizontal agreements and 2 decisions on the abuse of dominant position. In 2012 CPO also dealt with several notified concentrations and issued 18 decisions. Apart from 17 approved concentrations, 1 case was 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 2012 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 referred to the reorganization of CPO to a more independent authority which has been fulfilled at the end of 2012.

**1. Changes to competition law**

6. Further amendments to competition legislation were introduced in 2012, which brought some novelties to be implemented in practice. Due to calls for greater independence of the Competition Protection Office (CPO), including those from the OECD, several amendments to Competition Law

(ZPOmK-1<sup>1</sup>) entered into force. The reform of Slovenian Competition Authority has been processed in 2011 and 2012. Under the adopted amendments structural changes were anticipated and the Competition Protection Office (CPO) has been transferred into an independent public agency - Slovenian Competition Protection Agency (CPA).

7. From 1 January 2013, the newly established CPA took over responsibility for the enforcement of competition rules from the Competition Protection Office (CPO). The organization and decision making process of the CPA is based on the amendments to the ZPOmK-1, which entered into force on 28 July 2012. The CPA was established by reorganization of the CPO and took over all the employees of CPA and all of its cases. The CPA is organized as an independent public body led by a director and five-member council. The director is also a member of the council and employees of the CPA could also be appointed as council members. Members of the council and the director are nominated by the Government and appointed by the Parliament for a five-year mandate. The CPA is financed indirectly from the budget, as an indirect budget user; therefore the financial agreement has been concluded between the CPA and the Ministry of Economic Development and Technology, responsible for competition policy.

## **2. Competition law enforcement**

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

8. In the field of anticompetitive agreements and concerted practices one of the fundamental rules of ZPOMK-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.

9. In 2012 CPO carried out 2 new investigations and issued three decisions related to horizontal agreements. The cases concerned (i) an agreement or concerted practice among several undertakings in the construction sector regarding bid rigging, price fixing, exchange of price information and market sharing in the field of construction of highways and high-speed roads in the Republic of Slovenia; (ii) an electricity purchase agreement containing explicit resale price maintenance (RPM) clauses concerning the resale prices of electricity and (iii) a decision by association of undertakings fixing doctor’s and dentist’s fees on the market of health care services (see detailed description in 2.1.1).

10. Article 9 of ZPOmK-1, modelled on article 102 TFEU, prohibits the abuse of a dominant position on the market by one or more undertakings in the territory of the Republic of Slovenia, or in a substantial part of it. Dominance is defined as the ability of an undertaking to act, to a significant degree, independently of competitors, clients or consumers. In addition there is a legal presumption that the undertaking is dominant if its share of the Slovenian market exceeds the 40 per cent threshold and that undertakings are jointly dominant if their share on the Slovenian market exceeds 60 per cent. Determining dominance is assessed with regard not only the market share, CPA takes into consideration also financing

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<sup>1</sup> Prevention of the Restriction of Competition Act-1, Official Gazette RS No. 36/2008, 40/2009, 26/2011, 87/2011, 57/2012, 39/2013(Decision of the Constitutional Court No.U-I-40/12-31) and 63/13-ZS-K.

options, legal or actual entry barriers, access to suppliers or the market and existing or potential competition.

11. In 2012, CPO issued 2 decisions related to abuse of dominant position. In one case SODO, the electricity distribution system operator in the Republic of Slovenia, had infringed article 9 ZPOmK-1. The CPO found that, in the period from 1 January 2008 until 1 April 2010, the company had abused its dominant position in the market for the management of the electric energy distribution network by discriminating against different electricity distributing companies by only charging some companies for excessive electric energy received. The second case was related to abuse of dominant position by the mobile operator Telekom Slovenije (TS) (previously MOBITEL) finding an infringement of article 9 ZPOmK-1 and article 102 TFEU on retail and wholesale mobile market. The CPO found that TS had engaged in predatory pricing of on-net and off-net calls with the introduction of the specific mobile phone package, since the incremental cost of this package were not covered with incremental earnings therefrom (see detailed description in 2.1.1).

12. In 2012 no fines related to restrictive practices were imposed by CPO.

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

- Resale Price Maintenance in the Electricity Market

On 14 August 2012 CPO issued a decision finding that Slovenia's second largest electricity producer GEN Energija d.o.o. (GEN Energija) and the electricity retailer GEN-I d.o.o. (GEN-I) infringed Article 6 of the Slovenian Competition Protection Act and Article 101 TFEU, in the period from January 2007 till April 2010.

The CPO found that the above mentioned undertakings engaged in an umbrella electricity purchase agreement containing explicit resale price maintenance (RPM) clauses concerning the resale prices of electricity which Gen-I had to charge to its private and commercial customers. According to the agreement the energy producer GEN Energija unilaterally controlled the pricing policy of its retailer GEN-I through several provisions; amongst others, the margin to be charged to the end customers was set in the agreement and was linked to the wholesale price.

The minimum price level at which the retailer could sell electricity to its final customers was also fixed in the agreement. Finally, the agreement foresaw a special authorization procedure if the retailer wanted to sell electricity below the set price - a specified form was to be filled and a request sent to the producer, and it was only if this approval was forthcoming that GEN-I could lower the retail price.

The relevant provisions of the agreement were removed and annulled by the contracting parties during the administrative procedure in front of the CPO.

The level of fines will be set in a minor offence procedure conducted separately from the above-mentioned administrative procedure.

- Fixing of doctor's and dentist's fees in the health care services

The Medical Chamber of Slovenia was founded in 1992. It is an independent professional organization of medical doctors and dentists. Membership is an honor and obligation for all those that work as physicians or dentists in Slovenia and have a direct contact with the patients.

One of the tasks of the Medical Chamber of Slovenia is to participate in determining fees and agreeing the prices of health care services. On 10.06.1995 the Medical Chamber of Slovenia adopted a Regulation which set these fees as minimum prices for health care services. On the same day the Medical Chamber of Slovenia also adopted another Regulation and object of the latter was to control the compliance with the previously stated regulation. This Regulation provided sanctions for those doctors and dentists who wouldn't comply with the provisions of the stated Regulation.

Both regulations were obligatory upon all doctors in the Republic of Slovenia and were valid until 30.5.2012. After the initiation of the proceeding before the CPO the Medical Chamber of Slovenia informed the CPO that the regulations are no longer valid.

By setting the minimum prices (fees) in the Regulation the Medical Chamber of Slovenia actually adopted a decision by association of undertakings which was binding upon all members (all doctors and dentists in the Republic of Slovenia). Since the members of the Medical chamber of Slovenia are undertakings according to the competition rules (they are engaged in an economic activity) the Medical Chamber of Slovenia is found to be an association of undertakings according to the competition rules.

The CPO found that with the adoption of those rules (i.e. a decision by the association of the undertakings), the chamber had set prices and other conditions for conduct of business on the market for dental and medical services. Therefore the CPO issued a decision against the Medical Chamber of Slovenia finding an infringement both under Article 101 TFEU (Article 81 of the Treaty) as well as Article 6 of Slovenian Competition law. The CPO had with the same decision also imposed on the chamber the obligation to inform its members that those rules were null and void and to change all of its internal acts that are connected to the established infringement of competition rules.

- Anticompetitive agreement and/or concerted practice among undertakings in the construction sector regarding bid rigging, price fixing, exchange of price information and market sharing in the field of construction of highways in the Republic of Slovenia.

Based on the information that CPO had gathered during its analysis of public procurement markets, the CPO had initiated on 09. 03. 2010 ex-officio case against the above mentioned undertakings for breach of competition rules regarding bid rigging, price fixing, exchange of price information and market sharing of the construction service market. Through its investigation CPO had among other measures also conducted inspections on premises of the undertakings.

The service under investigation was the construction and reconstruction of highways and high-speed roads. CPO has decided not to define the relevant market since the infringement is by object anti-competitive.

Since the infringement concerned the biggest undertakings in the construction sector in Slovenia and extended over the whole territory of Slovenia by their very nature had the effect of reinforcing the partitioning of markets on a national basis by hindering the economic penetration. Moreover, there were several undertakings from other Member States, which have also submitted their tenders in the public procurement procedures for the construction and reconstruction of highways and high-speed roads.

The involved undertakings had divided the market of the construction and reconstruction of highways and high-speed roads and some other objects since they have agreed to divide among them the projects, which have been published by the contracting authority – DARS, in accordance with the pre-agreed quotas. The undertakings made several projects' lists, where the projects and the participating undertakings, were indicated. In order to achieve the agreed share of the projects the undertakings rigged the bids in the public procurement procedures, especially by agreeing to submit token tenders that are too high to be accepted in order to ensure that the project would be awarded to the pre-agreed competitor's tender. The undertakings also agreed to refrain from tendering, so that a competitor's tender would be accepted instead.

The CPO concluded that there was evidence of agreement or concerted practice among the above mentioned undertakings in Slovenia concerning market sharing (sharing of the project of construction and reconstruction of highways and high-speed roads), price-fixing of tender prices and bid-rigging.

In March 2012 a partial decision was issued related to construction cartel case initiated in 2010, finding infringement of article 6 ZPOmK-1 and article 101 TFEU. The CPO found that 16 construction companies had been involved in a cartel from 1 January 2000 to 10 March 2010. The cartel covered the construction of highways as a part of the national highway construction program. The cartel included agreements on sharing projects, bid rigging and exchange of information on bid prices before submission of bids.

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

- Abuse of dominant position in Mobile Telecommunications Market

In February 2012, CPO issued a decision finding that Mobitel, (a subsidiary and separate legal entity of Telekom Slovenije, now fully integrated in the Telekom Group) abused its dominant position with the purpose of strengthening or preserving its market power on an important part of the retail mobile telecommunications market by setting unfair retail prices for its mobile services retail package.

According to the CPO's investigation, it appeared that soon after the entrance of two new competitors in the mobile market and furthermore after the introduction of a similar retail package by the strongest competitor Si.mobil, Mobitel's market share was in decrease, as many customers migrated from Mobitel to other mobile operators. Consequently, in November 2008 Mobitel launched a new retail package of mobile services dedicated to the same consumer segment as the package offered by the competitors. Due to the high market saturation, switching of subscribers between operators is the only possibility to increase the market shares of competitors on the Slovenian market.

After an analysis of the costs for providing Mobitel's package, the CPO found that the price charged by Mobitel for the bundle of services included in the suspected retail package was below its costs. Furthermore, it appeared that an equally efficient operator would not have been able to compete without suffering unsustainable losses. It was obvious that with such an aggressive strategy Mobitel intended to exclude its competitors from the market.

Therefore, the CPO concluded that with the introduction of the suspected retail package to the market, Mobitel abused its dominant position in the retail market for mobile telecommunications

services and thus foreclosed its competitors from the market in the period from November 2008 to July 2010.

A judicial proceeding was initiated against the decision of CPO issued in the administrative procedure; a decision of the Court is still pending. 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**

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

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

1. two or more previously independent undertakings merge;
2. 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
3. two or more undertakings create joint venture performing on a lasting basis all the functions of an autonomous economic entity

15. 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.

16. 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.

17. In 2012 CPO dealt with several notified concentrations and issued 18 decisions, all of them dealing with concentrations on the national level which had no international implications. Apart from 17 approved concentrations, one case not subject to competition law.

## **2.3 Courts**

18. Decisions by the CPO can only be challenged in judicial proceedings. In administrative proceedings, the Supreme Court in 2012 still had full jurisdiction to hear cases<sup>2</sup>. There is only one stage in proceedings, and no complaints or requests for revision can be made against the decision of the Supreme Court. Parties cannot introduce new facts in the judicial proceedings. A request for judicial protection has to be filed within 30 days from the issue of the decision or the order.

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<sup>2</sup> There were changes to this procedure in 2013.

19. Decisions of the CPA in minor offence proceedings can be challenged in accordance with ZP-1<sup>3</sup> with a request for judicial protection before the Local Court in Ljubljana. Decisions of the Local Court can be appealed before the High Court in Ljubljana.

20. In 2012, within the court review, the courts of the Republic of Slovenia decided on 1 case, in which the legality of acts issued by the CPO was examined; the case referred to the offence procedure (hereinafter: offence cases), meanwhile there were no court review decisions related to the administrative procedure (hereinafter: administrative cases).

21. Administrative cases: The CPO's powers of inspection, in accordance with ZPOmK-1, were challenged as unconstitutional before the Constitutional Court in 2012. Therefore, the Supreme Court withheld its decision making until the ruling of the Constitutional Court (see point 46).

22. Offence cases: in 1 case, the court granted the action and stopped the procedure, which means that the court ruling decided that the acts of CPO were not issued in accordance with the law.

23. The courts currently examine 7 administrative decisions and 4 minor offence decisions issued by CPO, pending a decision.

24. The CPO's powers of inspection, in accordance with ZPOmK-1, were challenged as unconstitutional before the Constitutional Court in 2012. The Supreme Court referred as unconstitutional rules of articles 28 and 29 ZPOmK-1. In its decision from 11 April 2013 the Constitutional Court found that article 28(1), giving CPO the right to conduct inspections at the premises of companies based only on the order of the director of the CPO, is in breach of article 37 of the Constitution on communications privacy. The Constitutional Court has found that the current regime is unconstitutional since it allows for intrusion of communication privacy without the order of the competent court. The Parliament has now been given one year to bring the unconstitutional provisions in line with the Constitution. However until the changes to the ZPOmK-1 are adopted, the current regime can still be used by CPA.

### **3. Resources of Competition Authority**

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

	<b>person-years</b>	<b>budget expenditure</b>
2012	18	680.535 €
2011	13	678.419 €
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 €

<sup>3</sup> ZP-1 (Minor Offences Act), Official Gazette RS No. 3/2007, 109/2009 Odl.US: U-I-56/08-15, 10/2011 Odl.US: Up-319/10-14, U-I-63/10-7, 26/2011 Odl.US: Up-456/10-22, U-I-89/10-16 and 43/2011 Odl.US: U-I-166/10-8.

25. Just before establishing the new independent enforcement body (CPA), the administrative capacity of the institution was strengthened in October 2012 from 16 to 28 employees. 12 people were transferred from the Ministry of Economic Development and Technology and from the Ministry of Science in order to reinforce the institution. However, one of the challenges remains to be further increase of the qualification and education of its employees through continuous training process.

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

26. 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.

27. 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.