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

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*This report is submitted by Slovenia to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 17-18 December 2014.*

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## ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SLOVENIA

### Executive summary

1. The Slovenian Competition Protection Agency (hereinafter the CPA) began operating on 1 January 2013, following the amendments of the Prevention of the Restriction of Competition Act (ZPOMK-1) and a Ruling on the establishment of the Slovenian Competition Protection Agency. The CPA is now the authority responsible for the enforcement of antitrust and merger control rules in Slovenia.
2. The CPA is organized as an independent public body led by a director and five council-members, all of which were appointed by the Parliament on the proposal of the government. The director of the CPA is, by default, a member of the Council and also the Chairman of the Council. In the administrative procedure, the decision-making body is a panel consisting of the members of the Council, led by the director of the CPA. In minor offence procedures, the decision-making body is a panel consisting of the members of the Council and employees of the CPA.
3. The CPA's powers of inspection, in accordance with competition law were challenged as unconstitutional before the Constitutional Court in 2012. In its decision from 11 April 2013 the Constitutional Court found that article 28(1), giving CPA the right to conduct inspections at the premises of companies based only on the order of the director of the CPA, 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 been given one year to bring the unconstitutional provisions in line with the Constitution. Therefore the reform of competition law took place in spring 2014 accordingly.
4. In 2013 CPA has issued 30 decisions; 3 issued decisions were related to anticompetitive agreements and concerted practices and 2 decisions to the abuse of dominant position. In 2013 CPO also dealt with several notified concentrations and issued 25 decisions. Apart from 18 approved concentrations, CPA prohibited a concentration in one case and 8 cases were not subject to competition law.
5. CPA 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.

## 1. Changes to competition law and policies, proposed or adopted

6. The Slovenian Competition Protection Agency (CPA) began operating on 1 January 2013, following the amendments of the Prevention of the Restriction of Competition Act<sup>1</sup> (ZPOMK-1) and a Ruling on the establishment of the Slovenian Competition Protection Agency<sup>2</sup>.

7. The Slovenian Constitutional Court found the first sentence of article 28 of the Competition Act – authorizing the Agency to adopt without court approval a decision on the basis of which the investigation of the undertakings is carried out – to be contrary to the Constitution. The Slovenian National Assembly was ordered to remedy the unconstitutionality by 6 May 2014 and hence an amendment of the Competition Act is expected in this respect. The investigative powers of the Agency remained unchanged until the Competition Act is amended.

8. An amendment of the Courts Act that entered into force on 26 July 2013 introduced a lengthier appeals procedure against decisions of the Agency; instead of the Supreme Court, the Administrative Court now decides upon requests for judicial protection against decisions of the Agency. Decisions of the Administrative Court may further be appealed before the Supreme Court.

## 2. Enforcement of competition laws and policies

### 2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

#### 2.1.1 Summary of activities of:

##### 2.1.1.1 Competition authorities

9. Slovenian Competition Protection Agency is the sole authority responsible for the enforcement of competition rules. It is organized as an independent public body led by a director and a five-member council.

10. The rules in ZPOMK-1 on substantive matters are modeled on EC competition rules and applied to all sectors and all undertakings.

11. In the field of anticompetitive agreements and concerted practices Article 6 of ZPOMK-1 prohibits as null and void agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings (agreements), which have as their object or effect the prevention, restriction or distortion of competition on the territory of the Republic of Slovenia with some actions stated as examples of prohibition: 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 Article 101 TFEU; the same applies for the possibility and conditions for exemptions in line with Article 101(3) TFEU.

<sup>1</sup> Official Gazette RS No. 36/08, 40/09, 26/11, 87/11, 57/12, 39/13 Odl.US: U-I-40/12-31 in 63/13-ZS-K and 33/2014.

<sup>2</sup> Official Gazette RS No. 64/2012.

12. In 2013 CPA carried out 3 new investigations and issued three decisions related to anticompetitive agreements and concerted practices. The cases concerned (i) an anticompetitive agreement of four major pharmaceutical wholesalers for selling medicines for human use to public pharmacies in Slovenia; they agreed, inter alia, to fix wholesale prices of medicines for human use and to rig bids in public procurement procedures of public pharmacies (ii) a restrictive agreement related to taxi services, fixing the prices of taxi transport from the airport to the capital or vice versa. The commitment decision has been accepted, bringing the infringement to an end and (iii) an agreement among several undertakings (bus operators) in the market of scheduled intercity carriage of passengers by bus transport. Bus operators were involved in bid rigging and market sharing in public tender for regular linear bus lines operations in the market of Slovenia. (See detailed description in 2.1.1).

13. Article 9 of ZPOMK-1, modeled 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 options, legal or actual entry barriers, access to suppliers or the market and existing or potential competition.

14. In 2013, CPO issued 2 decisions related to abuse of dominant position. The cases concerned (i) abuse of dominant position by Pro Plus, the leading broadcasting and internet media company in Slovenia, on the market for TV advertising via exclusivity clauses and conditional loyalty rebates. (ii) The second case was related to abuse of dominant position by the incumbent telecoms operator Telekom Slovenija d.d., hindering access to its network infrastructure (essential facility). The first prohibition decision was issued by the CPA in 2008; however the Court returned the case for re-evaluation.

#### *2.1.1.2 Courts*

15. Under the present competition law (ZPOMK-1), there is no appeal in the administration procedure against the decisions and orders issued by the CPA. However, the parties and other participants to the procedure can file a lawsuit against the CPA's decisions (and orders) with the Administrative Court of the Republic of Slovenia and the revision against the judgment to the Supreme Court. A request for judicial protection has to be filed within 30 days from the issue of the decision or the order.

16. Pursuant to currently valid legislation, if the CPA determines that fines should be imposed to parties subject to a final decision in the administrative procedure, it can do so in a separate minor offence procedure. The parties can then file a case in the District Court of Ljubljana, seeking to have the fine overturned or reduced with the possibility of an appeal to the High Court and file extraordinary legal remedies with the Supreme Court.

17. As mentioned above, decisions by the CPA can only be challenged in judicial proceedings. In administrative proceedings, the Supreme Court until recently still had full jurisdiction to hear cases. There was only one stage in proceedings, and no complaints or requests for revision could be made against the decision of the Supreme Court.

18. Following August 2013's amendment of the Courts Act, the jurisdiction for the review of the CPA's decisions in administrative proceedings, has been moved from the Supreme Court to the Administrative Court. Therefore judicial proceedings are now two-stage.

19. In 2013, within the court review, the Supreme Court of the Republic of Slovenia decided on 15 cases, in which the legality of acts issued by the CPA was examined; the cases referred to the administrative procedure.

20. Four judgments upheld the CPA's decision, 8 of them partially upheld the CPA's decision and in 3 judgments the case was fully remanded back to the Agency for reconsideration.

### 2.1.2 *Description of significant cases, including those with international implications.*

#### 2.1.2.1 *Agreement/Concerted practice in the Pharmaceutical Sector*

21. On 14 October 2013, the Slovenian Competition Protection Agency (CPA) issued a decision finding that four Slovenian wholesalers of pharmaceuticals, namely Kemofarmacija, Salus, Farmadent and Gopharm, infringed Article 6 of the Slovenian Competition Protection Act and Article 101 TFEU from December 2007 until the CPA's decision was issued.

22. The CPA found that these pharmaceutical wholesalers engaged in an anticompetitive agreement or concerted practice for selling medicines for human use to public pharmacies in Slovenia. They agreed to fix wholesale prices of medicines for human use, to rig bids in public procurement procedures of public pharmacies and to divide among themselves the supplies of these medicines to public pharmacies – mostly in order to preserve their previously obtained supply market shares.

23. The case was triggered by the CPA's 2010 in-depth analysis of the Pharmaceutical Sector in Slovenia, through which it had gathered enough information to initiate an ex-officio case for breach of the competition rules regarding bid rigging, price fixing, exchange of price information and market sharing. The CPA among other measures also conducted inspections at the premises of the undertakings involved. In October 2012 the CPA issued a statement of objections and later on a supplementary SO.

24. The CPA found that the four undertakings rigged their bids in public procurement proceedings conducted by public pharmacies, as they submitted mostly identical offers in terms of prices and rebates. Although wholesale prices of medicines for human use are set as legally binding maximum prices, this does not prevent suppliers from offering lower prices or discounts.

25. The evidence obtained also showed that the undertakings were involved in an agreement as well as a concerted practice to divide amongst them shares of the supply contracts awarded in public procurements commissioned by public pharmacies. This enabled the undertakings to retain their market shares for a long period of time (more than five years). The CPA therefore declared that the parties infringed Article 6 of the Slovenian Competition Protection Act and Article 101 TFEU.

26. The decision was appealed and according to the judgement of the Supreme Court in 2014 partially remanded back to the Agency for reconsideration. The level of fines will be set on a later stage in a minor offence procedure conducted separately from the above mentioned administrative procedure.

#### 2.1.2.2 *Sharing markets in public tender for regular bus lines operations*

27. On 10 October 2013, the CPA issued a decision finding 12 bus operators in breach of article 6 ZPOmK-1 and 101 TFEU for allegedly sharing markets in public tender for regular internal bus lines operations in the market of Slovenia.

28. Case concerned an agreement among 12 undertakings (bus operators) in the market of scheduled intercity bus transport of passengers. Bus operators were involved in bid rigging and market sharing when bidding in the public procurement procedure.

29. The obtained evidence showed that, over the business meetings and via e-mail, the parties in the procedure (bus operators) agreed not to compete with each other and to submit only one previously agreed bid for each concession area. The parties created a contract for each concession area, where they stated the concessionaire and sub-contractors. The parties also agreed that they will cooperate only with each other and not with other potential bidders; in the event of cancellation of the specific public procurement, they would participate in the new public procurement only with parties of the agreement.

30. After the first SO was issued, CPA received a leniency application from one of the parties in the procedure; afterwards a supplementary SO was issued.

31. In its decision CPA concluded that there was evidence of an anticompetitive agreement among the above mentioned undertakings in Slovenia concerning market sharing and bid-rigging.

32. The decision was appealed and by the judgement of the Supreme Court in September 2014, remanded back to the Agency for reconsideration.

33. The level of fines was set on a later stage in a minor offence procedure conducted separately from the above mentioned administrative procedure.

#### *2.1.2.3 Abuse of dominant position on the market for television advertising airtime*

34. PRO PLUS is a leading broadcasting and internet media company in Slovenia, part of multinational enterprise CME. It broadcasts two leading television channels POP TV and KANAL A, payable multi-channel television POPNONSTOP, most visited internet page 24ur.com, eleven internet magazines each designed for its specific audiences and video on demand product VOYO.

35. On 24 April 2013 CPA issued a decision finding PRO PLUS has abused its dominant position on the market for television advertising airtime on the territory of the Republic of Slovenia as well as on the Internal Market by concluding exclusive dealing arrangements with advertisers and granting conditional rebates with loyalty – inducing effects.

36. The conduct of abuse of dominance was implemented in particular with requiring individual advertisers to devote their entire advertising budget exclusively to PRO PLUS; granting a high level of discount as a reward for exclusivity and therefore exclude competitors from the advertising market or prevent them access to the market and prevent their development accordingly.

37. CPA concluded in its decision that the above described actions represent infringement of Article 9 (ZPomK-1) as well as Article 102 of TFEU.

38. The Supreme Court upheld the decision in December 2013. The level of fines was set in 2014 in a minor offence procedure conducted separately from the above mentioned administrative procedure.

## **2.2 Mergers and acquisitions**

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

40. 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:

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

41. 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.

42. 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.

43. In 2013 CPA dealt with several notified concentrations and issued 25 decisions, all of them dealing with concentrations on the national level which had no international implications. Apart from 18 approved concentrations, CPA prohibited a concentration in one case and six cases were not subject to competition law.

#### 2.2.1 *Statistics on number, size and type of mergers notified and/or controlled under competition laws*

<b>Decisions on Concentrations</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>
Cleared	31	14	12	12	17	18
Cleared with conditions	-	-	-	1	-	-
Prohibited	-	1	-	-	-	1
Prohibition on the implementation	-	1	-	-	-	-
Not falling within the scope of ZPOMK-1	9	2	8	12	1	6
<b>TOTAL</b>	<b>41</b>	<b>18</b>	<b>20</b>	<b>25</b>	<b>18</b>	<b>25</b>

### **3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**

44. CPA 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. 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.

#### 4. Resources of the Slovenian Competition Protection Agency

##### 4.1 Resources overall (current numbers and change over previous year):

##### 4.1.1 Annual budget of Slovenian Competition Protection agency (CPA) in 2013

	2013	Change over previous year*
Approved budget in EUR	1.248.342	+639.605
Approved budget in USD	1.539.330	+ 788.697

\*the complete rise of budget is due to the increased number of employees

##### 4.1.1.1 Resources of CPA- detailed analysis

46. According to the provisions of Article 13a of the competition act, the Government shall grant approval regarding the Agency's program of work and the financial plan for the next year. If the Government does not grant approval by 15 December, the financial plan for the previous year shall apply pending approval.

47. In the first step, the CPA's annual budget is negotiated with the competent ministry as part of the CPA's working programme. When approved, the annual budget can in principle be publicly available.

48. CPA does not generate its own income and depends totally on the budgetary resources. According to the existing legislation, the fees or fines imposed on undertakings are part of the income of the general budget.

49. Detailed analysis of the authority's annual budget in the past five years shows that the budget is in constant trend of decrease; considering also the increased number of FTEs it is evident that the lion's share of budget is used for labour costs, leaving less room for more demanding market analysis projects and international cooperation. This development is mostly due to consequences of financial and budgetary crisis.

BUDGET - CPA	2009	2010	2011	2012	2013
Labour costs (salaries)	620.869	597.169	467.358	444.287	989.565
Material costs	245.363	204.052	197.984	160.900	236.972
Market analysis	45.197	39.960	-	-	-
Investment assets (equipment)	6.984	3.356	13.078	3.550	21.805,00
Budget spent on salaries (%)	67,6	70,7	68,9	73	79
<b>TOTAL - €</b>	<b>918.413</b>	<b>844.537</b>	<b>678.420</b>	<b>608.737</b>	<b>1.248.342</b>
<b>TOTAL - US \$</b>	<b>1.132.495</b>	<b>1.041.398</b>	<b>836.559</b>	<b>750.633</b>	<b>1.539.330</b>

##### 4.1.2 Number of employees (person-years):

	2009	2010	2011	2012	2013
<b>FTEs employed</b>	<b>17</b>	<b>17</b>	<b>14</b>	<b>18</b>	<b>27*</b>

\* Administrative capacity of the institution was strengthened considerably in October 2012; 10 people were transferred from the Ministry of Economic Development and Technology in order to reinforce the institution.

#### 4.2 Human resources (person-years) applied to:

	2013	Change over previous year
Lawyers	8	-
Economists	13	+8
Other professionals	3	+1
Support staff	2	-
All staff combined	27	+ 9

#### 4.3 Period covered by the above information:

- 2009 - 2013