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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SLOVENIA

-- 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 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 2011, which brought some novelties to be implemented in practice.

3. Due to calls for greater independence of the CPO, including those from the OECD, on 23 April 2011 changes to Competition Law (ZPOmK-1) were enforced which prescribed the reorganization of the CPO into the Competition Protection Agency (CPA) by the end of 2011. However, in November 2011 an amendment to this law was introduced whereby CPO will not achieve its independent status as long as procedural conditions will not be completed successfully. In the meantime CPO remains to be the authority responsible for enforcement of antitrust and merger control rules in Slovenia.

4. In 2011 CPO has issued 28 decisions in cases regarding violation of competition legislation. There was 1 decisions issued related to horizontal agreements and 2 decisions on the abuse of dominant position. In 2011 CPO also dealt with 34 notified concentrations and issued 25 decisions. Apart from 12 approved concentrations, 12 cases were not subject to competition law and one case was cleared with conditions.

5. 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.

6. In 2011 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

7. Further amendments to competition legislation were introduced in 2011, which brought some novelties to be implemented in practice.

8. Due to calls for greater independence of the CPO, including those from the OECD, on 23 April 2011 changes to Competition Law (ZPOmK-1) were enforced which prescribed the reorganization of the CPO into the Competition Protection Agency (CPA) by the end of 2011. The CPA would be organized as an independent public body led by a director and five-member council, both of which would be appointed by the government. There would be a new decision-making body: a five-member Competition Commission (CC) appointed by parliament, of which three members would be chosen from CPA's employees, but not a

director. The CC would adopt decisions in three-member ad hoc panels chosen from among its members. However, in November 2011 an amendment to this law was introduced whereby CPO will not achieve its independent status as long as procedural conditions will not be completed successfully. In the meantime CPO remains to be the authority responsible for enforcement of antitrust and merger control rules in Slovenia.

2. Competition law enforcement

2.1 Summary of activities – action against anticompetitive practices

9. 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.

10. In 2011 CPO issued one decisions related to horizontal agreement. The case on the national level concerned concerted practices / price agreements among six undertakings managing the driving - school services in the local area. The case was set on the national level and had no international implications.

11. 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.

12. 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.

13. In 2011, CPO carried out 2 new investigations and issued 2 decisions. In one case the advertising company Europlakat allegedly abused its dominant position by discriminating purchasers and trying to foreclose competition in the market of outdoor advertising with its rebate scheme and other trading conditions. The second case was related to abuse of dominant position by SAZAS (a society of composers, authors and publishers for the protection of their copyrights of Slovenia), regarding its practices dealing with collective management of copyright to authors and the licensing of public performance music copyrights to users.

14. In 2011 no fines related to restrictive practices were imposed by CPO.

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

- Abuse of dominant position by the Society of Composers, Authors and Publishers for Copyright Protection in Slovenia (SAZAS) regarding the licensing of public performance rights.

SAZAS is a society of composers, authors and publishers for the protection of their copyrights of Slovenia. SAZAS is a non-profit organization.

Based on the information that the Competition Protection Office (hereinafter CPO) had gathered from different applicants (authors and users), CPO had initiated an ex-officio case against SAZAS for breach of competition rules on 08.04.2009. Through its investigation CPO had among other measures also conducted inspection at the premises of SAZAS.

SAZAS provides for granting licenses to the users who wish to use copyright musical works in public (hereinafter users), collection of royalties for the public use of music within the territory of the Republic of Slovenia, and the distribution of the collected royalties to the authors or holders of respective copyrights. The users are legally bound to obtain the right to publicly use copyright musical works on the grounds of copyright and related rights act. SAZAS enables the users of music to obtain this right. With a license a user is granted the complete right to publicly use all music of any given author registered in the SAZAS repertoire. Royalties collected for the broadcast of music through radio and TV stations, as well as in stores, restaurants, hairdresser's saloons and other places within the territory of the Republic of Slovenia, are distributed between Slovenian and foreign authors of the musical works. This represents a partial repayment for the sources invested in their musical works, as well as their source of income, which can be further invested in their present and future work. The royalties are granted to the authors of music, songwriters and arrangers.

In the assessment of the case CPO established that the markets concerned are collective management of copyrights to authors and the licensing of public performance music copyrights to users. SAZAS has a legal monopoly on both markets due to the legislation in the Republic of Slovenia.

The Slovenian Intellectual Property Office (hereinafter SIPO) had issued authorization for collective management of authors' rights to SAZAS. According to Article 149 of the Copyright and Related Rights Act (Official Gazette No 16/2007, No 68/2008) the SIPO shall not issue authorisation if an authorization for collective management of authors' rights has already been issued for the same category of authors' works to another collecting society, unless the legal entity demonstrates that it could provide more efficient and more economical management of authors' rights, and that it could, based on contracts with the authors, manage a more comprehensive repertoire of protected works than the existing collecting society. The earlier authorization shall terminate with the issuance of authorization to the new collecting society. Therefore SAZAS has a monopoly on both of the above mentioned markets.

SAZAS has established a non-transparent system according to which only few authors have a right to decide on the rules on the distribution of the collected royalties to authors. With this system SAZAS has favoured some authors, especially those who were included in the process of distribution of the collected royalties.

SAZAS performed discrimination among the same type of users by setting and performing the rules for public performance of music copyrights, part of which are also tariffs, in a non-transparent manner. SAZAS also dictated condition of use to users and discriminated them in that way too.

The CPO had concluded that SAZAS has set and collected licensing fees for the public performance of works in a non-transparent manner which led to discrimination among types of users and groups of users that are of the same type. SAZAS has also set and divided collected fees among authors in a non-transparent way which led to discrimination among authors. All these established activities therefore constitute a breach of Article 9 of Slovenian Competition Law as well as Article 102 of TFEU.

Since the infringement by SAZAS 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.

In April 2011 the CPO issued a partial decision in administrative proceedings finding an infringement of article 9 ZPOmK-1 and article 102 TFEU by the Society of Composers, Authors and Publishers for Copyright Protection in Slovenia (SAZAS).

The CPO found that SAZAS had abused its dominant position by sharing collected funds among its members based on non-transparent, subjective and retroactively set rules adopted by certain members only - thereby granting some authors a better competitive position on the market. With its decision the CPO also imposed obligations on SAZAS regulating relations between the Society's members.

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.

- Commitment decision in the case of potential abuse of dominant position by advertising company Europlakat in the market of outdoor advertising

The case concerned the potential abuse of dominant position by the largest Slovenian provider of outdoor advertising Europlakat by offering discriminatory discounts to customers and by obliging them to exclusionary deal only with Europlakat.

The market concerned was a market for providing the outdoor advertising on the territory of Slovenia. However, the infringement may also have effect on substantial part of common market.

Europlakat is the largest provider in the field of outdoor advertising with the market share of over 60 % and also according to other parameters (actual competitors, entry barriers, and market structure) it holds the dominant position on the market. It is privately owned and has its own network of advertising surfaces which includes large advertising formats, city lights, roto panels and rolling boards, covering the entire national territory. Thereby Europlakat is offering the most attractive top locations on the relevant market.

Based on the information that the CPO had gathered from the second largest provider of outdoor advertising in Slovenia and competitor Epamedia, an ex-officio case was initiated against Europlakat for breaching of competition rules by the anticompetitive practice of offering the discounts on the discriminatory and non-transparent base.

Analysis of contracts concluded between Europlakat and its largest customers in 2007 and 2008 showed that discounts and conditions granted by Europlakat could have been discriminatory and granted on non-transparent base. Furthermore, it was also evident that the contracts were exclusionary in relation to other competitors.

The CPO concluded that there is some evidence of possible abuse of dominant position by Europlakat in Slovenia concerning the non-transparent and discriminatory granting of discounts to its customers in order to prevent them to collaborate also with other competitors. The described

practice could have led to the infringement of Article 102 of the Treaty as well as Article 9 of Slovenian Competition law, but the effect of the infringement was not conclusively proven.

During the proceedings, Europlakat offered commitments which would remove competition concerns regarding the alleged infringement. The offered commitments were predominantly of behavioural nature apart from the structural commitment to rent some of Europlakat's advertising surfaces. The commitments introduced a number of rules that Europlakat have to follow when dealing with its customers. This would allow the CPO to monitor the conduct of Europlakat on the market and to detect possible future infringements of competition rules. The CPO had decided that the offered commitments were sufficient and the commitment decision was adopted accordingly.

2.2 *Mergers and acquisitions*

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

16. 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:

- 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

17. 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.

18. 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.

19. In 2011 CPO dealt with 34 notified concentrations and issued 25 decisions. Apart from 12 approved concentrations, one case was cleared with conditions and 12 cases were not subject to competition law.

2.3 *Courts*

20. In 2011, within the court review, the courts of the Republic of Slovenia decided on 5 cases, in which the legality of the acts issued by the CPO was examined; in all, 2 referred to the administrative procedure (hereinafter: administrative cases) and 3 to the offence procedure (hereinafter: offence cases).

¹ Prevention of the Restriction of Competition Act-1, OG RS No. 36/2008, 40/2009, 26/2011, 87/2011 and 57/2012.

21. Administrative 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. Moreover, in 1 case, the court granted the action, abrogated the act issued by CPO and remanded the case back to CPO.

22. Offence cases: in 2 cases, 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 Court rejected the action.

23. The courts currently examine 7 administrative decisions and 3 minor offence decisions issued by CPO, pending a decision.

3. Resources of Competition Authority

3.1 *Employees and annual budget of CPO*

	Person-years	Budget expenditure
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 €

24. The administrative resources are not sufficient; therefore CPO continues to have inadequate resources and funding for carrying out its tasks. The reasons are mostly related to financial and budgetary crisis, however, the improvement strongly depends on the Governments' staff policy guidelines and budgetary priorities.

3.2 *Advocacy efforts*

25. 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.

26. 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.