

Unclassified

DAF/COMP/AR(2016)37

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

18-Oct-2016

English - Or. English

Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

DAF/COMP/AR(2016)37
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SLOVENIA

-- 2015 --

29-30 November 2016

This report is submitted by Slovenia to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 29-30 November 2016.

JT03403031

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

English - Or. English

TABLE OF CONTENTS

Executive Summary.....	3
1. Changes to competition law and policies, proposed or adopted.....	4
2. Enforcement of competition laws and policies.....	4
2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions.....	4
2.2 Mergers and acquisitions.....	8
3. The role of competition authorities in the formulation and implementation of other policies.....	9
4. Resources of the Slovenian Competition Protection Agency.....	9
4.1 Resources overall (current numbers and change over previous year):.....	9
4.2 Resources of CPA- detailed analysis.....	10
4.3 Human resources (person-years) applied to:.....	11
4.4 Period covered by the above information: 2015.....	11

EXECUTIVE SUMMARY

1. The Slovenian Competition Protection Agency (CPA) is an authority with the powers of enforcing competition rules. It was established in 2013 by reorganization of the former Slovenian Competition Protection Office which was a part of the Ministry of Economic Development and Technology. The CPA is now organised as an independent administrative authority led by a director and five council-members, which is responsible for the enforcement of antitrust and merger control rules in Slovenia. If an anti-competitive practice also affects trade between EU member states, the CPA will apply articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).
2. The latest amendment to the Slovenian Competition Act came into force in October 2015. On the proposal of the Ministry of Economic Development and Technology, unfair competition provisions have been transferred from the repealed Competition Protection Act (from 1993) to the actual applicable Competition Act. These amendments do not substantially change the competition (i.e. anti-trust and merger control) rules. It is important to note that although provisions regarding unfair competition are now regulated under the current Competition Act, CPA will not have any jurisdiction over unfair competition matters. All claims regarding unfair competition are now directed to judicial litigation, a procedure, which will now have to be conducted by a competent court.
3. In 2015 CPA has issued 25 decisions in cases regarding violation of competition legislation (including antitrust and merger cases). In the frame of anticompetitive practices CPA dealt with a restrictive agreement amongst three undertakings from the construction sector, involved in bid rigging relating to a single procurement procedure. Furthermore, one decision was issued related to abuse of dominant position by Telekom Slovenije on the wholesale markets for broadband bit-stream access and for access to physical network infrastructure.
4. In 2015 CPA dealt with several notified concentrations and issued 23 decisions, all of them dealing with concentrations on the national level which had no international implications. Out of 19 approved concentrations, CPA cleared four concentrations only after the notifying parties proposed the corrective measures. In these cases the CPA was concerned that the respective mergers might have negative effect on the effective competition in certain relevant markets. This confirms a general trend of increasing importance of commitments in Slovenian merger control and the willingness of the CPA to clear mergers where necessary only upon provision of suitable corrective measures by the parties.
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 Agency. CPA 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.

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

6. The latest amendment to the Slovenian Competition Act¹ came into force in October 24, 2015, repealing the entire *Competition Protection Act*², which, among other matters, regulated acts of unfair competition and related legal remedies since 1993.

7. On the proposal of the Ministry of Economic Development and Technology, unfair competition provisions have been transferred from the *Competition Protection Act* to the *Prevention of the Restriction of Competition Act* (Articles 63a and 63b). The general definition of unfair competition remains the same and the provision defining unfair competition still provides a (non-exhaustive) list of examples of unfair competition acts.

8. These amendments do not substantially change the competition (i.e. anti-trust and merger control) rules, but rather the purpose of the amendments is to transfer the existing rules on unfair competition from one legislation i.e. the Protection of Competition Act of 1993 to the more recent *Prevention of the Restriction of Competition Act* (hereinafter: Competition Act). The main changes introduced are as follows:

- only provisions that govern the relationship between companies in respect of functioning of the market and unfair competition, have been transferred to the Competition Act;
- administrative and misdemeanour procedures concerning unfair competition between companies have been abolished;
- companies must resolve unfair competition matters through civil litigation proceedings; and
- the Competition Protection Act from 1993 has been annulled.

9. It is important to note that although provisions regarding unfair competition are now regulated under the Competition Act, the Slovenian Competition Protection Agency will not have any jurisdiction over unfair competition matters. All claims regarding unfair competition are now directed to judicial litigation, a procedure, which will now have to be conducted by a competent 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 Competition authorities

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

11. The rules in Competition act on substantive matters are modelled on EC competition rules and apply to all sectors and all undertakings.

¹ Act on Prevention of Restriction of Competition (Uradni list RS, št. [36/08](#), [40/09](#), [26/11](#), [87/11](#), [57/12](#), [39/13](#) – odl. US, [63/13](#) – ZS-K, [33/14](#) in [76/15](#))

² Law on Protection of Competition (Uradni list RS, št. [18/93](#), [56/99](#) – ZPOmK, [110/02](#) – ZVPot-A in [76/15](#) – ZPOmK-1F)

12. In the field of anticompetitive agreements and concerted practices Article 6 of Competition Act 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.

13. In 2015 CPA assessed 8 issues related to anticompetitive agreements and concerted practices, tackling primarily delays from previous years and a few cases that were remanded back from the Court to CPA for reconsideration. No new investigations were carried out, however CPA issued one decision. The case concerned:

- A restrictive agreement, involving three undertakings from the construction sector. Providers of construction and general medical equipment were involved in bid rigging relating to a single procurement procedure. In May 2015, the CPA issued a prohibition decision against the three undertakings; the case is still pending before the Administrative Court. (See detailed description in 2.1.2).

14. Article 9 of Competition act, 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 options, legal or actual entry barriers, access to suppliers or the market and existing or potential competition.

15. In 2015, CPA issued one decision related to abuse of dominant position. The case concerned the abuse of dominant position by Telekom Slovenije on the wholesale markets for broadband bit-stream access and for access to physical network infrastructure. (See detailed description in 2.1.2).

16. The CPA is empowered not only to establish the infringement of the competition rules, but also to impose fines. In line with the existing Slovenian regulations the CPA conducts two types of procedures: (i) an administrative procedure in which infringements of the Competition Act and articles 101 or 102 of TFEU are assessed and brought to an end and (ii) a minor offence procedure where fines are levied. For the minor offences procedure the provisions of the Minor Offences Act also apply.

17. The CPA has powers to impose fines of up to 10 per cent of the infringing companies' worldwide turnover in minor offences proceedings. When setting a fine, the CPA takes into account the general provisions of the Minor Offences Act and, thus, all circumstances that may reduce or increase the sanction (mitigating and aggravating circumstances).

18. In the case of a breach of articles 6 or 9 of the Competition Act or articles 101 or 102 TFEU, CPA can impose a minor offence fine on a legal entity, entrepreneur or an individual who performs economic activity of up to 10 per cent of the annual turnover of the undertaking in the preceding business year. A fine of between €5,000 and €30,000 can also be imposed on the responsible person of a legal entity or the responsible person of an entrepreneur.

19. In 2015, CPA imposed fines in one minor offence proceeding amounting to a total of € 167.000. Minor offence proceeding was related to a proceeding based on failing to notify a concentration.

2.1.2 *Summary of activities of Courts*

20. Under the present Competition Act, 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.

21. 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.

22. In 2015, within the court review, the Supreme Court of the Republic of Slovenia decided on 30 cases, in which the legality of acts issued by the CPA was examined; the cases referred to the administrative procedure.

23. Within the decisions, 17 judgments the Court upheld the CPA's decision, in 11 judgments the case was fully remanded back to the Agency for reconsideration and in two cases the action was dismissed by the Court.

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

- Anticompetitive agreement and/or concerted practice among providers of construction and general medical equipment regarding bid rigging, in public tenders for Medical Emergency Unit in the University Medical Centre Maribor

24. Based on the information gathered during the analysis of public procurement markets, CPA initiated in November 2013, an ex-officio case against GH HOLDING d.d., TAMES d.o.o. and BEGRAD d.d., providers of construction and general medical equipment, for breach of competition rules regarding bid rigging, and exchange of price and other information in the field of public tenders.

25. The involved undertakings, dealing mainly with construction, trade and engineering, engaged in the public tender procurement procedure for the implementation of building, craft and installation work (BCI) for the Medical Emergency Unit in the University Medical Centre Maribor. They have agreed to submit customised joint and individual offers after they exchanged various sensitive information from the public tender procedure. This enabled the undertakings to succeed in the public tender and acquire the transaction; therefore CPA declared that the parties infringed Article 6 of Competition Act.

26. In May 2015, the CPA issued a prohibition decision finding the involved undertakings in breach of article 6 of Competition Act. The decision was appealed and the case is still pending before the

Administrative Court. The level of fines will be set on a later stage in a minor offence procedure conducted separately from the above mentioned administrative procedure.

- Abuse of dominant position on the wholesale markets for broadband bit-stream access and for access to physical network infrastructure

27. Telekom Slovenije (Telekom) is a vertically integrated telecommunication operator. Its network enables internet service providers to provide customers with broadband services on the whole territory of the Republic of Slovenia. Other existing networks are not capable of exercising effective competitive pressure on the incumbent; therefore the access for alternative operators on the market needs to be regulated.

28. Access to its network is possible over two wholesale services where Telekom is the sole service provider. Moreover, since Telekom is active on the retail market for fixed broadband services with its own "SIOL" brand, it is not acceptable to provide worse conditions for the alternative operators. Apart from measures imposed by the regulator, Telekom has a special responsibility not to allow his conduct to impair undistorted competition on the market.

29. On 2 February 2015 CPA has concluded with the assessment of abuse of dominant position by Telekom and determined that the incumbent operator abused its dominant position on the wholesale markets for broadband bit-stream access and for access to physical network infrastructure. The single and continuous infringement lasted at least until March 2014.

30. During the proceedings, the dawn raid at Telekom premises was carried out; CPA has established the infringements for 5 out of 15 charges. Given the lack of evidence, the remaining part of proceedings was brought to an end without establishing an infringement.

31. Evidence showed that since 2005 Telekom was, by various individual conducts that jointly represent a single continuous infringement of Article 102 TFEU and its equivalent in the Slovenian Competition Protection Act, raising the entry costs and risks of the alternative operators that would enter the retail market using one or both wholesale services, which resulted in less favourable conditions for alternative operators in comparison to Telekom's own downstream business.

32. As concerns bitstream access, Telekom abused its dominance by refusing (in the period from January 1, 2005 to October 24, 2005) alternative operators' access to the service access nodes (DSLAMs), which it has previously sold to its wholly owned subsidiary, and by (from July 1, 2005 to September 22, 2008) not providing the wholesale "naked xDSL" service to alternative operators, thereby disabling them to provide the xDSL service without the underlying telephone subscription to final costumers. From April 2007, however, Telekom has offered "naked xDSL" downstream to its final costumers.

33. On the market for access to the physical network infrastructure Telekom provided less favourable conditions to alternative operators with regard to establishing collocations (delays, formalistic barriers, refusing access to general information, etc.). It also refused access to the optical local loop even in locations where copper loops were not available. Furthermore, Telekom did not allow alternative operators to offer broadband bitstream access services to third party operators on its unbundled local loops.

34. With these actions Telekom is found to have restricted competition in Slovenia, and thereby on a substantial part of the EU internal market, which may have affected trade between Member States.

35. The decision is not yet final since Telekom as also Amis, Tušmobil and T-2 as intervenients have the right to appeal to the Administrative Court. The fines will be set in a separate minor offences procedure.

2.2 *Mergers and acquisitions*

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

37. Merger control is regulated by the Prevention of the Restriction of Competition Act (Competition Act), which implemented Council Regulation (EC) No. 139/2004 (EC merger Regulation).

38. The concept of concentration, as provided in article 10 of the Competition Act, shows that a concentration is deemed to arise where a change of control on a lasting basis results from the merger of two or more previously independent undertakings or parts of undertakings; the acquisition of direct or indirect control of the whole or parts of one or more other undertakings; or the creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity.

39. 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.

40. 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.

41. In 2015 CPA dealt with several notified concentrations and issued 23 decisions, all of them dealing with concentrations on the national level which had no international implications. Apart from 19 approved concentrations, four cases were not subject to competition law³. The CPA cleared four concentrations only after the notifying parties proposed the corrective measures themselves to provide for adherence of anti-trust rules. In these cases the CPA was concerned that the respective mergers might have negative effect on the effective competition in certain relevant markets. Proposals for corrective measures were related to various industry sectors, such as beer production (Heineken N.V./Pivovarna Laško, d.d.), urban and suburban passenger land transport (Arriva Dolenjska in Primorska./Alpetour–Potovalna agencija), telecommunications (Telekom Slovenije / Debitel telekomunikacije) and trade of electricity (GEN-I / Elektro Energija). This confirms a general trend of increasing importance of commitments in Slovenian merger control and the willingness of the CPA to clear mergers where necessary only upon provision of suitable corrective measures by the parties.

³ Every potential concentration has to be notified if the thresholds from Article 42 of Competition Act are met. After examination, CPA can issue various decisions, i.e. a proposed concentration can be cleared, cleared with conditions, prohibited or, in case both - economic and legal conditions are not met - CPA issues a decision that the concentration is not falling within the scope of Competition Act.

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

Decisions on Concentrations	2008	2009	2010	2011	2012	2013	2014	2015
Cleared	31	14	12	12	17	18	22	15
Cleared with conditions	-	-	-	1	-	-	-	4
Prohibited	-	1	-	-	-	1	-	-
Prohibition on implementation	-	1	-	-	-	-	-	-
Not falling within the scope of Competition Act	9	2	8	12	1	6	3	4
TOTAL	41	18	20	25	18	25	25	23

3. The role of competition authorities in the formulation and implementation of other policies

42. 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 Agency. CPA 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.

43. 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.

44. In 2015 CPA has, in the framework of inter-ministerial coordination, actively followed government proposals for new legislation. However, no opinion has been issued related to potential regulatory limitations.

45. The competition culture activity of CPA encompasses various activities. In the field of exchange of experiences on the international level, CPA participated at various events Participation to several conferences and roundtables in EU competition authorities also enabled the staff of CPA to share and exchange experience in competition field.

46. CPA has the objective of establishing closer ties with other public authorities as also representatives of Chamber of Commerce and Industry and various branch associations. In the framework of various consultations the competences and areas of action of CPA were introduced, in order to better understand the scope of competition law and policy.

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 in 2015

		Change over previous year
Approved budget in EUR	1.174.681	+57.211
Approved budget in USD	1.311.061	-86.873

4.1.2 Resources of CPA- detailed analysis

47. 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.

48. 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.

49. 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.

50. Detailed analysis of the authority's annual budget in the past six years shows that the budget is more or less in the 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 and inability to negotiate a higher annual budget with the competent ministry.

BUDGET - CPA	2010	2011	2012	2013	2014	2015
Labour costs (salaries)	597.169	467.358	444.287	989.565	872.918	867.324
Material costs	204.052	197.984	160.900	236.972	199.306	228.758
Market analysis	39.960	-	-	-	-	-
Investment assets (equipment)	3.356	13.078	3.550	21.805	29.330	4.769
Budget spent on salaries (%)	70,7	68,9	73	79	79,3	78,8
TOTAL - €	844.537	678.420	608.737	1.248.342	1.101.554	1.100.850
TOTAL – US \$	1.041.398	836.559	750.633	1.539.330	1.206.752	1.228.659

4.2 *Number of employees (person-years):*

	2010	2011	2012	2013	2014	2015
FTEs employed	17	14	18	27	26	27

4.3 *Human resources (person-years) applied to:*

		Change over previous year
Lawyers	11	+1
Economists	11	-
Other professionals	3	-
Support staff	2	-
All staff combined	27	+1

4.4 *Period covered by the above information: 2015*