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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 5-6 December 2017.

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1. Background and Executive Summary

1. This annual report describes recent development in competition law and policy in Slovenia and summarizes the competition enforcement activities of the Slovenian Competition Protection Agency (hereinafter referred to as “CPA”) for the year 2016.
2. 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 the Economy. The CPA is now organized as an independent administrative authority 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).
3. The long-term objective of the CPA is the promotion of effective competition in all sectors of national economy. This general objective is pursued primarily by decision-making activities and competition advocacy. In this respect, CPA has been dealing with 14 antitrust cases related to anticompetitive practices, including agreements and abuses of dominant positions. In 2016 CPA has issued 35 decisions; 1 issued decisions was related to anticompetitive agreements and concerted practices. Furthermore, in 2016 CPA dealt with several notified concentrations and issued 34 decisions.
4. Concerning the proposed or adopted changes to competition law and policies, there were no new legal provisions that would enter into force in 2016. Nevertheless, a short explanation is provided concerning the amendment of the Slovenian Competition Act implementing the Damages Directive that entered into force on 20 May 2017. The amendment provides for a number of new substantive and procedural rules aimed at facilitating damages actions brought by injured parties against undertakings infringing EU or Slovenian 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 Agency. CPA has the objective of establishing closer ties with other public authorities as also representatives of Chamber of Commerce as also 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.
6. In the field of exchange of experiences at the international level, participation to several conferences and roundtables in EU competition authorities also enabled the staff of CPA to share and exchange experience in competition field.
7. Concerning the authority’s annual budget over the past few years, analysis shows that the budget is more or less stagnating; considering also the number of FTEs, the lion's share of budget is used for labour costs, leaving less room for more demanding market analysis projects and international cooperation.

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

2.1. Summary of new legal provisions of competition law and related legislation

2.2. Government proposal for new legislation

8. In September 2016 the Ministry for Economic Development and Technology published, with the aim of public consultation, a legislative proposal for an amendment of the Slovenian Competition Act (Zakon o preprečevanju omejevanja konkurence, ZPOmK-1) to implement the EU Damages Directive¹.

9. The amendment of the Slovenian Competition Act implementing the Damages Directive entered into force on 20 May 2017, and provides for a number of new substantive and procedural rules aimed at facilitating damages actions brought by injured parties against undertakings infringing EU or Slovenian competition law.

10. Changes include prolonged limitation periods, exemptions from joint liability for SMEs, undertakings being granted immunity from fines, discretionary right of the court to determine the amount of harm, solutions for dealing with passing-on of overcharges and similar.

11. One of the most important changes concerns the disclosure of evidence, where the Slovenian legislator opted to provide claimants with a right to file a separate claim requesting disclosure. The claimants, however, may still decide to request an "ordinary" disclosure in accordance with the existing procedural rules. The court will only order a disclosure if certain conditions are fulfilled, in order to prevent "fishing expeditions" and to protect privileged communication (e.g. leniency statements or settlement submissions). The court can impose monetary fines of up to EUR 50,000 for actions contrary to a disclosure order.

12. Finally, the amendment introduced a rebuttable presumption that cartels cause harm. Contrary to the general liability rules, claimants do not need to prove the existence of harm. Certainly, the approach of the Slovenian courts, when deciding on future damages claims, shall clear some outstanding doubts that have been expressed with the entry into force of this amendment.

3. Enforcement of competition laws and policies

3.1. Action against anticompetitive practices, including agreements and abuses of dominant positions

3.1.1. Summary of activities of competition authority

13. Slovenian Competition Protection Agency (CPA) 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.

¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

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

15. In the field of anticompetitive agreements and concerted practices the statutory provision dealing with anticompetitive agreements is article 6 of the Competition Act. Slovenian competition law prohibits anticompetitive agreements, decisions and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition on the territory of the Republic of Slovenia. Such agreements are null and void.

16. Application of 'object' and 'effect' concepts is in line with the practice developed by the European Commission and the EU courts. Slovenian competition law covers horizontal as well as vertical restrictive agreements. Its main wording corresponds to article 101 TFEU and lists the same examples of restrictive practices as article 101 TFEU such as price fixing, fixing of production, sales quotas and market sharing.

17. Efficiency enhancing agreements fall outside the scope of article 6(1) of the Competition Act. Where in an individual case a restriction of competition within the meaning of article 6(1) of the Competition Act has been proven, article 6(3) can be invoked as a defence. Article 6(3) of the Competition Act provides similar four cumulative conditions as article 101(3) TFEU in order to satisfy the exemption. The burden of proof rests on the undertaking invoking the benefit of the exception rule.

18. In addition, according to article 7 of the Competition Act certain types of agreements of minor importance are not prohibited (the *de minimis* exemption). The thresholds are 10% (for horizontal agreements and mixed horizontal-vertical agreements) and 15% (for vertical agreements) of the aggregate market share, in combination with other undertakings in the group, on any of the relevant markets on the territory of the Republic of Slovenia. If competition on a relevant market is restricted by the cumulative effects of parallel or similar agreements between other undertakings, the mentioned market share thresholds are lowered to 5%. However, the article defines certain anticompetitive agreements for which the *de minimis* exemption does not apply even though the thresholds were not exceeded. These are 'hard-core' practices such as price fixing, limiting of production or sales or market sharing in cases of horizontal agreements and fixing of retail prices or granting territorial protection in vertical agreement cases.

19. In 2016 CPA handled 8 cases related to anticompetitive agreements and concerted practices, tackling primarily with cases that were remanded back from the Court to CPA for reconsideration. Over 2016, CPA issued one decision related to anticompetitive agreements and concerted practices. The case concerned anticompetitive qualitative selective distribution agreements among the national distributor of Hyundai vehicles and a network of authorized repair shops for Hyundai vehicles. In May 2016, the Agency accepted a decision that the proposed commitments allow for competition between authorized and independent repair shops during the term of the customer warranty. HAT and the authorized repair shops have to respect the terms of the commitments for the following 3 years (See detailed description in 2.1.2).

20. 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. Article 9(4) of the Competition Act also lists the same examples of infringements as article 102(2) TFEU.

21. 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.

22. Similar to the EU competition law, the abuse of a dominant position as such is not defined by the Competition Act. The Competition Act generally prohibits the abuse of a dominant position and lists four typical examples of abusive behaviour which show that the concept of abuse covers exploitative as well as exclusionary practices. The list of forms of abuse in article 9 of the Competition Act is not exhaustive. Therefore the CPA is not excluded from dealing with other types of abusive practices.

23. In 2016 CPA carried out an investigation in Panteon Group, provider of services of inter-organizational business operations and later on opened a case. Panteon is suspected of allegedly refusing access to certain electronic data exchange systems held by providers of electronic data exchange services and their users.

24. Moreover, there were still a few opened cases that the Administrative Court or the Supreme Court returned to the CPA or the Administrative Court for reconsideration and re-evaluation. However, CPA issued no decision related to abuse of dominant position in 2016.

25. 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.

26. 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).

27. 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.

28. In 2016, CPA imposed fines in one minor offence proceeding amounting to a total of € 35.000. Minor offence proceeding was related to a proceeding based on failing to notify a concentration.

3.1.2. Summary of activities of Courts

29. 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.

30. 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.

31. In 2016, within the court review, the Administrative Court of the Republic of Slovenia decided on 6 cases, in which the legality of acts issued by the CPA was examined; the cases referred to the administrative procedure.

32. Within the decisions, 2 judgments the Court upheld the CPA's decision and in 4 judgments the case was fully remanded back to the Agency for reconsideration.

3.2. Description of significant cases, including those with international implications.

3.2.1. Anticompetitive qualitative selective distribution agreements among the national distributor of Hyundai vehicles and a network of authorized repair shops for Hyundai vehicles

33. Based on the information gathered during the investigative measures, CPA in March 2015 initiated proceedings against Hyundai Avto Trade ("HAT"), the national distributor of Hyundai vehicles, together with a network of authorized repair shops for Hyundai motor vehicles.

34. The proceedings were initiated on the suspicion that the investigated companies were entering into anticompetitive qualitative selective distribution agreements, which were aimed at foreclosing the market for independent repair shops and spare parts distributors.

35. The CPA suspected that the agreements contained clauses which obliged the customers to repair vehicles only at authorized shops and to use original Hyundai spare parts for all cases not covered by the guarantee in order to benefit from the 5 year warranty, in turn closing the market for independent car repair shops and part distributors.

36. These kinds of agreements can distort competition on the motor vehicle aftermarkets and fall into the category of hard-core restrictions, therefore they should not be exempted from the EU Motor Vehicle Block Exemption Regulation.

37. After the completion of the official investigation into HAT's activities, the parties involved proposed to the CPA a set of commitments, aimed to remedy the perceived breach of competition rules. Furthermore, the Agency was afforded the chance to monitor the parties' business operations, in order to secure compliance with the stipulated commitments, including:

- appropriate customer information on the conditions under which the guarantee can be used when vehicle repairs are performed by independent repair shops and when non-original spare parts are installed;
- prohibition of any discrimination against customers who use non-original spare parts or have their vehicles repaired by non-authorized repair shops, including informing the

authorized shops, who undertook to enforce the new warranty policy, on the use of guarantees by such customers;

- appropriate customer information concerning free factory campaigns and safety repairs applicable for their vehicles; and
- providing access to original spare parts, technical information and trainings for all authorized and independent repair shops.

38. On 5 May 2016, the CPA accepted a decision that the final commitments allow for competition between authorized and independent repair shops during the term of the customer warranty. HAT and the authorized repair shops have to respect the terms of the commitments for the following 3 years. The adopted commitments are also expected to have a positive impact on the prices of the aftermarket services.

39. The case led to further investigations by the CPA in the motor vehicle sector, where the CPA looked into any similar practices by other motor vehicle companies. Consequently, in July 2017 CPA has started proceedings to establish whether Renault Nissan Slovenija abuses its dominant position in Slovenia by restricting access to technical information to independent car repair shops.

3.3. Mergers and acquisitions

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

41. 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).

42. 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.

43. 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.

44. 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.

45. In 2016 CPA dealt with several notified concentrations and issued 34 decisions, all of them dealing with concentrations on the national level which had no international implications. Apart from 28 approved concentrations, six cases were not subject to

competition law². In 2016 there were five decisions of note, which were adopted in the banking sector (*Gorenjska banka dd, Kranj/Hypo Alpe-Adria-Leasing*), the construction sector (*Kolektor Koling d.o.o./CPG*), the railway freight-forwarding and postal services sector (*Rail Cargo Logistics - Austria GmbH/InterEuropa-FLG d.o.o.*), the telecommunications sector (*Telemach d.o.o./Maxtel d.o.o. Ljubljana*), the sale of natural gas and electricity sector (*GEN-EL d.o.o. and GEN d.o.o./GEN-I d.o.o.*) and others.

Table 1. Statistics on number, size and type of mergers notified and/or controlled under competition laws

Decisions on Concentrations	2009	2010	2011	2012	2013	2014	2015	2016
Cleared	14	12	12	17	18	22	15	28
Cleared with conditions	-	-	1	-	-	-	4	-
Prohibited	1	-	-	-	1	-	-	-
Prohibition on implementation	1	-	-	-	-	-	-	-
Not falling within the scope of Competition Act	2	8	12	1	6	3	4	6
TOTAL	18	20	25	18	25	25	23	34

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

46. 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.

47. 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.

48. In 2016 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.

49. 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.

50. CPA has the objective of establishing closer ties with other public authorities as also representatives of Chamber of Commerce and Industry and various branch

² 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.

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.

5. Resources of the Slovenian Competition Protection Agency

5.1. Resources overall (current numbers and change over previous year):

Table 2. Annual budget of Slovenian Competition Protection Agency in 2016

		Change over previous year
Approved budget in EUR	1.177.981	- 3.300
Approved budget in USD	1.361.982	+ 50.921

5.1.1. Resources of CPA- detailed analysis

51. 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.

52. 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.

53. 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.

54. Detailed analysis of the authority's annual budget in the past few years shows that the budget is more or less stagnating; considering also the 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 general budgetary limitations and inability to negotiate a higher annual budget with the competent ministry.

Table 3.

BUDGET - CPA	2011	2012	2013	2014	2015	2016
Labour costs (salaries)	467.358	444.287	989.565	872.918	867.324	914.168
Material costs	197.984	160.900	236.972	199.306	228.758	220.705
Market analysis	-	-	-	-	-	-
Investment assets (equipment)	13.078	3.550	21.805	29.330	4.769	8.447
Budget spent on salaries (%)	68,9	73	79	79,3	78,8	80,0
TOTAL - €	678.420	608.737	1.248.342	1.101.554	1.100.850	1.143.320
TOTAL - US \$	836.559	750.633	1.539.330	1.206.752	1.228.659	1.321.907

Table 4. Number of employees (person-years)

	2011	2012	2013	2014	2015	2016
FTEs employed	14	18	27	26	27	24

Table 5. Human resources (person-years) applied to

		Change over previous year
Lawyers	9	-2
Economists	10	-1
Other professionals	3	-
Support staff	2	-
All staff combined	24	-3

Note: Period covered by the above information: 2016