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Annual Report on Competition Policy Developments in Slovenia

-- 2017 --

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This report is submitted by Slovenia to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 27-28 November 2018.

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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 2017.
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 2017 CPA has issued 29 decisions; 2 issued decisions were related to anticompetitive agreements and concerted practices and one decision to the abuse of dominant position. Furthermore, in 2017 CPA dealt with several notified concentrations and issued 26 decisions.
4. Concerning the proposed or adopted changes to competition law and policies, the amendment of the Slovenian Competition Act, implementing the Damages Directive 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

8. 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.

9. 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.

10. 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.

11. 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

12. 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.

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

14. 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.

15. 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.

16. 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.

17. 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.

18. In 2017 CPA handled 14 cases related to anticompetitive agreements and concerted practices, tackling primarily with cases that were remanded back from the Court to CPA for reconsideration. Over 2017, CPA issued two decisions related to anticompetitive agreements and concerted practices. The cases concerned (i) sharing of markets in public tender for regular bus lines operations and (ii) a cartel of pharmaceutical wholesalers (See detailed description in 2.1.2).

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

20. 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.

21. 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 behavior 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.

22. As regards administrative proceedings, the CPA initiated two new cases in the area of abuse of dominance. In January 2017, the CPA initiated proceedings against Pro Plus regarding alleged abuse of its dominant position in the national wholesale market for TV programs, and in July 2017 against Renault Nissan Slovenija for allegedly abusing its dominant position in the national market for the provision of technical information and technical training needed by (authorized and independent) service shops of Renault motor vehicles.

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.

23. 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.

24. 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).

25. 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.

26. In 2017, CPA imposed no fines in minor offence proceedings.

Summary of activities of Courts

27. 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.

28. 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.

29. In 2017, within the court review, the Administrative Court of the Republic of Slovenia decided on 3 cases, in which the legality of acts issued by the CPA was examined; the cases referred to the administrative procedure.

30. Within the decisions, in two cases the action was dismissed by the Court and in one judgment the case was fully remanded back to the Agency for reconsideration.

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

Sharing of markets and bid rigging in public tender for regular bus lines operations (Reconsideration)

31. In 2013, the CPA issued a decision finding 12 bus operators in breach of article 6 ZPOmK-1 and 101 TFEU for allegedly sharing markets of scheduled intercity bus transport of passengers in the Republic of Slovenia. Bus operators were involved in bid rigging and market sharing when bidding in the public procurement procedure.

32. 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 (See detailed description in the Annual Report on Competition Developments in Slovenia for 2013).

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

34. The decision in the first proceeding has been initially annulled by the Administrative Court on the grounds that it was not sufficiently clear, whether the infringement was by object or effect as also regarding determination of the relevant market.

35. CPA has conducted several hearings to gather further information and to guarantee the meeting participants to orally express their view of the facts. Namely, the absence of a hearing was the reason for some other annulments of CPA decisions in the recent practice of the courts. It is now made clear in the SO, that the object of the agreement is anticompetitive and that in such an event a detailed market definition is not necessary. However, the object of the agreement is well defined as the intercity liner business that is a service of general economic interest based on the concessions awarded by the state to separate it from other types of bus transport.

36. The second decision of CPA was appealed again, however, the Supreme Court upheld the decision which is now final. The level of fines will be set in a minor offence procedure conducted separately from the above mentioned administrative procedure.

Cartel of pharmaceutical wholesalers (reconsideration)

37. In 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. 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. (See detailed description in the Annual Report on Competition Developments in Slovenia for 2013).

38. The decision was appealed and according to the judgement of the Supreme Court in 2014 partially remanded back to the Agency for reconsideration. Namely, the infringement decision was upheld by the Court for two parties involved in the infringement (Kemofarmacija, Salus), however, the decision for undertakings Farmadent

and Gopharm was, on procedural grounds, annulled by the Court and the case was referred back to the CPA for reconsideration. Furthermore, in the part of the decision that found the infringement of article 101 TFEU, was (also) annulled by the Court, the reason being that CPA failed to prove cross-border effects of the conduct.

39. On 30th November 2017, the CPA reached a final outcome and once again issued an infringement decision for the undertakings Farmadent and Gopharm. However, this time CPA assessed the infringement solely on the grounds of Slovenian Competition Act.

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

Abuse of dominant position on the market of gas supply to large industrial customers (Reconsideration)

41. On 23 December 2014, CPA issued a decision finding that Geoplin, incumbent gas importer and supplier in the Republic of Slovenia, violated its dominant position in the supply of gas to industrial users with long-term contracts that led to excessive gas prices.

42. CPA established that Geoplin abused its dominant position predominantly by concluding long-term contracts with industrial customers connected to the transmission network. These long-term contracts included contracted quantities of gas to be taken over for the whole contract period as also obligation to take delivery of minimum quantities. Penalties and other fees were also set out in the long-term contracts for the quantities that have not been taken over, whereby preventing the industrial customers the right to use the surplus quantities or to be resold. Therefore industrial customers connected to the transmission network were entirely tied to Geoplin.

43. In order to prevent further infringements of competition rules as also to ensure effective redress of infringements, Geoplin was given the possibility to autonomously and at its own choice take the necessary measures, including the corresponding adjustments of still valid long-term contracts.

44. However, the decision was appealed and, according to the judgment of the Administrative Court, in 2015 remanded back to CPA for reconsideration.

45. CPA has supplemented its initial decision with a supplementary SO in accordance with the decision of the Court. CPA added testimonies of the witnesses and added its own analysis for establishment of the relevant market.

46. On 10 November 2017, CPA has adopted a decision that renders legally binding the commitments offered by GEOPLIN. The commitments address the CPA's preliminary competition concerns relating to the alleged infringement of Article 9 of the Slovenian Competition Act and Article 102 of the TFEU.

47. The accepted proposed commitments are limiting future contracts with industrial customers to 3 years of duration. Geoplin also abstained from charging for minimal quantities for all the contracts concluded before 2015 and waived exclusivity clause and other unfair clauses in their future contracts. The duration of commitments is limited to 3 years.

3.2. Mergers and acquisitions

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

49. 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).

50. 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.

51. 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.

52. 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.

53. In 2017 CPA dealt with several notified concentrations and issued 26 decisions, all of them dealing with concentrations on the national level which had no international implications. Apart from 22 approved concentrations, four cases were not subject to competition law¹. In 2017 there were two decisions of note, which were adopted in the railway freight-forwarding services sector (Fersped - *VV-LOG*) and the telecommunications sector (*Telekom Slovenija / Izi Mobil*).

54. The CPA recently dealt with the growing practice in M&A transactions to include in the underlying agreements a condition precedent that provides for a “long-stop date” by which the transaction must be completed at the latest, including receipt of concentration clearance. The CPA underlined that such long-stop condition precedents are by no means binding for the CPA and recommended that the parties to transaction should provide for a reasonable long-stop date when drafting the agreements.

¹ 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.

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

Table 1.

Decisions on Concentrations	2010	2011	2012	2013	2014	2015	2016	2017
Cleared	12	12	17	18	22	15	28	22
Cleared with conditions	-	1	-	-	-	4	-	-
Prohibited	-	-	-	1	-	-	-	-
Prohibition on implementation	-	-	-	-	-	-	-	-
Not falling within the scope of Competition Act	8	12	1	6	3	4	6	4
TOTAL	20	25	18	25	25	23	34	26

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

55. 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.

56. 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.

57. In 2017 CPA has, in the framework of inter-ministerial coordination, actively followed government proposals for new legislation. No opinion has been issued related to proposals for new legislation. Moreover, CPA issued two formal opinions related to potential regulatory limitations on (i) activities in funeral services and (ii) restriction of competition in case of local boat transfers to the island of Lake Bled.

58. 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.

59. 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.

5. Resources of the Slovenian Competition Protection Agency

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

5.1.1. Annual budget of Slovenian Competition Protection Agency in 2017

Table 2.

		Change over previous year
Approved budget in EUR	1.177.981	0
Approved budget in USD	1.355.384	- 6.598*

*: Due to exchange differences.

Resources of CPA- detailed analysis

60. 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.

61. 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.

62. 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.

63. Detailed analysis of the authority's annual budget in the past few year's 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. However, over negotiations for the next two years budget, agreement was reached for the budget increase according to the needs of the CPA.

Table 3.

BUDGET - CPA	2012	2013	2014	2015	2016	2017
Labour costs (salaries)	444.287	989.565	872.918	867.324	914.168	889.200
Material costs	160.900	236.972	199.306	228.758	220.705	234.278
Market analysis	-	-	-	-	-	-
Investment assets (equipment)	3.550	21.805	29.330	4.769	8.447	15.954
Budget spent on salaries (%)	73	79	79,3	78,8	80,0	78
TOTAL - €	608.737	1.248.342	1.101.554	1.100.850	1.143.320	1.139.432
TOTAL - US \$	750.633	1.539.330	1.206.752	1.228.659	1.321.907	1.311.030

5.1.2. Number of employees (person-years):

Table 4.

	2012	2013	2014	2015	2016	2017
FTEs employed	18	27	26	27	24	24

5.2. Human resources (person-years) applied to:

Table 5.

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

5.3. Period covered by the above information:

64. 2017