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INDEPENDENCE OF COMPETITION AUTHORITIES--FROM DESIGNS TO PRACTICES

Contribution from Slovak Republic

-- Session III --

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INDEPENDENCE OF COMPETITION AUTHORITIE--FROM DESIGNS TO PRACTICES

-- Slovak Republic --

1. Introduction

1. The Antimonopoly Office of the Slovak Republic (hereinafter “AMO”, “Office”) is a Central State Administrative Body. The Office shall exercise powers in the field of protection and promotion of competition. Powers and scope of activities of the Office are regulated by the Act No. 136/2001 Coll. on Protection of Competition and on Amendments and Supplements to Act of the Slovak National Council No. 347/1990 Coll. on Organisation of Ministries and Other Central Bodies of State Administration of the Slovak Republic as amended as amended (hereinafter “the Act”).

2. The Act applies to undertakings, state administration authorities during the performance of state administration, municipalities and self-governing regions in the exercise of self-governance and transferred state administration and professional self-governance bodies in the exercise of transferred state administration and finally to other persons, to which the Act applies.

3. The Office shall submit the report on its activities to the Government of the Slovak Republic once a year and whenever the Government of the Slovak Republic requests to do so.

2. Institutional design

4. The AMO is headed by the Chairperson. The Chairperson is appointed and dismissed by the President of the Slovak Republic on the basis of a proposal from the Government of the Slovak Republic. The term of office of the Chairperson of the Office is five years.

5. Any citizen who is eligible for being elected to the National Council of the Slovak Republic may be appointed Chairperson of the Office. The same person may be appointed Chairperson of the Office for a maximum of two consecutive terms of office.

6. The performance of the post of Office Chairperson is incompatible with the performance of office and activities pursuant to special legislation¹. According to this legislation the Chairperson cannot to be an undertaking or participate in the management of companies and he is also not allowed to acquire property from state.

7. The function of the office of Chairperson shall terminate at the end of the term of Office, by resignation from Office, by being dismissed from office or in the event of death.

¹ Constitutional Act No. 357/2004 Coll. on Protection of Public Interest in the Performance of Posts of Public Officials.

8. One of the instruments relevant for independence of the head of the authority is the fact, that the appointment of Chairperson and its duration is not directly linked to the term of office proposing and appointing bodies, namely President of the Slovak Republic and the Government of the Slovak Republic.

9. The independency of the AMO is secured also by the manner how its Chairperson can be dismissed. This is possible only in situations anticipated in the Act. The President of the Slovak Republic shall dismiss the Chairperson of the Office if:

- he/she has been sentenced on the basis of a legally valid court ruling for an intentional criminal act or crime of negligence directly related to the function of Office;
- his/her legal capacity has been terminated on the basis of a legally valid court ruling;
- he/she has begun to execute a post or activity incompatible with the position of Chairperson of the Office;
- he/she has not executed Office for a period exceeding six consecutive months due to his/her own fault or if his/her health condition prevents him/her from doing so.

10. According to Slovak law dismissal is thus bound to combination of policy non-related reasons and the policy related ones (for instance if the Chairperson does not perform its duties for more than 6 months).

11. The Chairperson of the Office may resign from office by means of a written announcement to the President of the Slovak Republic. His/her term of Office will terminate upon the appointment of a new Chairperson of the Office.

12. In the case of his/her absence, or if the position of the Chairperson is not occupied the Office Deputy Chairperson substitutes for the Chairperson. Besides this the Deputy Chairperson executes the tasks the Chairperson entrusted him/her with.

13. The Deputy Chairperson shall be appointed and dismissed by the Chairperson of the Office.

14. The AMO has three specialized divisions in the field of competition – Division of Cartels, Division of Abuse of a Dominant Position and Vertical Agreements and Division of Concentrations headed by the directors. These three divisions are the first-instance bodies issuing decisions. The Deputy Chairperson signs the decisions. The decision of the first-instance body can be appealed to appellate body, which is the Council of the Antimonopoly Office of the Slovak Republic.

15. Division directors are appointed and dismissed by the Deputy Chairperson. They also have the main influence in hiring new employees to build their division team, however these process is also regulated by the Act NO 400/2009 Coll. on Civil Service, which provides possibilities of applying for the contract in the civil service and the process of competition for vacant position.

2.1 State aid

16. According to the Act No. 358/2015 Coll. on the Modification of Certain Relations in the Field of State Aid and De Minimis Aid and on amendments to some laws (Act on state aid), which entered into force on 1 January 2016 the competence of aid coordination was transferred from the Ministry of Finance of the Slovak Republic to the Antimonopoly Office of the Slovak Republic, both in relation to the state aid provider in the Slovak Republic and in relation to the European Union. AMO thus ensures the protection of competition rules of EU on state aid.

17. AMO as aid coordinator prepares binding opinion on the aid scheme, provides methodology, advises consultations on the state aid, it manages a central register on state aid.

18. The Ministry of Finance was the coordinator of state aid before the reform, and it is also the provider of state aid since January 2016. Transition of responsibilities to AMO strengthened the independence of the state aid coordinator.

3. Autonomy

19. The AMO has decision-making autonomy. The government is not allowed to supervise or to impose strategic guidance on AMO. Decisions of the AMO could be reviewed just by court.

20. The AMO has two instance decision autonomy. First instance decisions are issued by one of the three above mentioned divisions. These decisions are prepared by division and the division director submits them to Deputy of Chairperson for his/her approval. First instance decisions are signed by Deputy of Chairperson.

21. The first-instance decision can be appealed to the Council of the Office as it has been already mentioned above. Council of the Office is collective body that consists of the Council Chairperson and six members of Council. The Chairperson of the Office is simultaneously the Council Chairperson. Member of Council shall be independent (an employee of the Office or a person in similar working relationship as the employee is not allowed to be a member of the Council), thus the members of the Council are external experts.

22. Council members are appointed and dismissed by the Government of the Slovak Republic following a proposal from the Chairperson of the Office. The term of Office of Council members is five years. At least two Council members must have a degree in law and at least two Council members must have a degree in economics. Beside end of term of Office, resignation and the event of death, could end the function of a Council member also in case of dismissal by the Government of the Slovak Republic following a proposal from the Chairperson of the Office. The member of the Council may be dismissed from the reasons settled by law².

23. The Council is independent and it has full jurisdiction – it is obliged to review first instance decision based on the appeal *in extenso* that is not only the legality of the decision but matter of facts as well. The Council can complete probation but in such a way that the principle of two-instance proceedings is not breached. The party to the proceedings has to have the possibility to appeal so the Council cannot decide on a matter that has not been subject matter of the first-instance proceedings. Decisions issued by the Council become legally valid after they are delivered to the parties to the proceedings. Council's decisions could be reviewed by the court.

24. The decisions of the Council can be reviewed by Regional Court in Bratislava. The lawsuit must be filed within two months of the delivery of the final Council decision. The Regional Court has full jurisdiction. It may complete proofs, and if it comes to the conclusion that imposed sanction is not adequate, it is entitled to change it. Both parties to the proceedings (undertaking and the AMO)

² The Government of the Slovak Republic shall recall a Member of the Council at a proposal from the Chairperson of the Office if: a) he/she has been sentenced by a final court ruling for an intentional criminal act or crime committed negligently that is directly related to the performance of office; b) his/her legal capacity has been terminated on the basis of a final court ruling; c) he/she has not performed office for a period exceeding four consecutive months.

consequently can appeal to³ Supreme Court if they are not satisfied with a first-instance court's decision. The Supreme Court reviews decisions of Regional Court from the point of view of legality.

25. In addition to decision-making activities of the AMO, the competition advocacy is a second important tool, which serves to support and develop the competitive environment. Among other activities within the competition advocacy, probably the most important is the interdepartmental comment procedure. The AMO actively participates in this process. It submits its standpoints on draft legal regulations, strategies, concepts, etc. in all fields of economy. Accordingly the AMO's task is to maintain communication with the relevant ministries, and if necessary, with the National Council of the Slovak Republic during the legislative process and, by issuing opinions, to assert elimination of possible restrictions to competition. In a case of fundamental comment of the AMO when it is not possible to reach agreement or compromise within the legislative process, the Government of the Slovak Republic decides.

26. AMO has the autonomy from government in setting its enforcement priorities, i.e. to choose which cases to investigate.

27. According to Slovak legislative system the Government is not empowered to decide which cases, market studies etc. the AMO should or should not investigate, or to overrule a decision (e.g. determine criteria according to which the competition agency may exceptionally authorise otherwise prohibited concentrations motivated with reference to “relevant general interests of national economy”).

28. AMO also independently recruits its own staff and it independently decides on the career progress of the Office's staff and on the termination of the working relationship. However, this is also limited and regulated by the Act on Civil Service which provides further conditions. For instance, any increase in number of employees is strictly regulated and is subject to approval.

29. Competition act is setting rules to ensure that AMO top management or decision making body are not subject to instructions from any government or other public or private body, AMO dismissals of members of the CAs top management or decision-making body can only take place on objective grounds unrelated to its enforcement activities, it contains rules on conflict of interest for AMO top management or decision-making body, rules on accountability of the Office (e.g. requiring that AMO reports annually on its activities).

30. Besides these positive aspects we could notice in connection with budgetary policy the lack of guarantees ensuring that AMO is endowed with adequate and stable human and financial resources to perform its tasks.

4. Financial sources

31. The Government of the Slovak Republic shall determine the budget of the AMO and also the salary of the Chairperson of the Office pursuant to special legislation. The source of the budget is the national budget.

32. In order to be able to generate benefits to society, AMO needs to be adequately equipped for its tasks to be able to act under suitable conditions in an impartial and independent manner. It is important to enable the Office to take action in a relevant timeframe, intervening swiftly in urgent cases. It is obvious that such important powers for the enforcement of the competition rules cannot be used if there are no sufficient personal and financial sources at the disposal of the CA. For instance, the successful inspections have to be done in parallel. That means the CA has to have enough people to form inspection teams of at

³ By submitting a cassation complaint

least 3-4 people and to cover more undertakings at the same time. Considering the development in the IT, it needs to have sufficient investigative tools – this increases demand on financial sources. Considering the complexity of today cases and the need for economic analysis, the Office needs to dedicate a lot of personal sources and time parallel to different cases (antitrust and mergers at the same time), etc.

33. Sources are important for the independence of the authority. Competition is specific field that consists from combination matters of law and economics. This area is characterized by the need to attract the qualified staff. It is also important to note that with increasing trend in technology it is important to keep up with the technical equipment, skills and device.

34. Under our opinion requirement for de jure independence are satisfied, at least there never has been problem in the past or presence or doubts of de jure independence of the AMO. Concerning the sources of the AMO we could identify space for improvement in the area of personal and financial sources and technical equipment. The AMO mostly covers the basic competences and it is difficult to find sources for further development.

35. In comparison with some other authorities within the Slovak Republic our budget experienced the decreasing trend, despite the increasing number of cases. Although we understand the decrease where it is a question of a measure throughout the whole public sector with regard the regulation of public spending. On the other hand, the trends in competition policy, demand for quality economy analysis and technology effecting competition enforcement are developing much faster. Thus budget not reflecting this trend could affect the enforcement of competition law, as we have to focus on the most urgent/priority cases and problems, and we do not have sufficient capacity for the rest. It is also important to note that AMO is not passive and tries to solve the lack of technical sources or personal sources also through the cooperation with other authorities, such as Universities, public agencies. Via different cooperation agreements we try to cover the lack of resources by involving universities (academics) in analytical work or using technical device with state IT agency⁴. This could help, however, it cannot be considered as general solution and it cannot be done on regular basis due to sensitivity of the open investigations. Therefore, it is not a way to build a solid competition enforcement team but just a complementary measure.

5. Conclusion

36. In an effort to carry out its activities most effectively the AMO issued Prioritisation notice. This notice has given the AMO greater scope to set its priorities, enabling it to devote more resources to investigating cases and conducting inquiries in key sectors of the economy suffering from market distortions.

37. Despite the positive effect of this prioritisation policy on the Office's activity we still identify space for reinforcing the independence of the competition authority through providing it with sufficient financial and human resources. These sources could be used for strengthening the administrative capacity of the public service, its professionalism and the quality of policymaking.

38. The above conditions are key to ensuring that AMO will be able to provide the beneficial results for the economy and for consumers whilst actively pursuing efforts to enhance the effectiveness of its action and applying the high professional standards that is required. The AMO will further assess appropriate initiatives to best achieve these goals.

⁴ Please note that all this cooperation that we have initiated does not entail financial costs