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**SANCTIONS IN ANTITRUST CASES**

**Contribution by the Slovak Republic**

-- Session IV --

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## SANCTIONS IN ANTITRUST CASES

### -- Slovak Republic --

#### 1. Determination of the basic fine

##### 1.1 *Nature of fines imposed by the Antimonopoly Office of the Slovak Republic*

1. The Antimonopoly Office of the Slovak Republic (hereinafter referred to as "the AMO") has power to impose fines for the infringements of competition law, which are of an administrative nature.

2. As regards infringements of "substantive competition rules", fines may be imposed solely on undertakings - i.e. either on legal or natural persons performing economic activities.

3. As from 2014, the AMO may impose fines on natural person for infringements of certain "procedural rules"- e.g. failure to comply with the request for information, failure to cooperate with the AMO during the inspections in private premises. The AMO does not have experience with application of these sanctions.

4. In the Slovak Republic, it is also possible to impose criminal sanctions on natural persons, but only in criminal proceedings which are in hands of criminal courts (this is completely separated from administrative proceedings).

##### 1.2 *Legal basis, methodology of calculation of fines*

5. The power of the AMO to impose fines for infringements of substantive competition rules is subject to conditions contained in provision § 38 of the Act no. 136/2001 Coll. on Protection of Competition as amended (hereinafter referred to as „the Act on Protection of Competition“).<sup>1</sup> The provisions of the Act on Protection of Competition set basic criteria which should be taken into account in the process of setting fines.<sup>2</sup>

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<sup>1</sup> i.e. § 38 (1) For a) the violation of the prohibition of the agreement restricting competition; b) the violation of the prohibition of abuse of a dominant position; c) failure to notify a concentration prior to exercising the rights and obligations resulting from a concentration; d) violation of the prohibition to exercise the rights and obligations resulting from a concentration unless the Office has granted an exemption pursuant to Article 10 (14), or e) failure to comply with a decision of the Office, the Office shall impose on an undertaking a fine of up to 10% of its turnover pursuant to Article 3 paragraph 5 for the preceding accounting period unless Article 38d provides otherwise.

<sup>2</sup> i.e. § 38 (3) When imposing a fine pursuant to the paragraph 1 and 2, the Office shall consider the gravity and duration of the violation. When assessing the gravity of the violation, the Office shall consider its nature, possibly impact on the market and the size of the relevant market. In addition to these criteria, the Office shall also consider other facts with respect to imposing a fine, especially a repeated violation, refusal to cooperate with the Office, position of a leader or initiator of the violation, or failure to fulfil an agreement restricting competition in practice.

6. Also general legal principles such as proportionality must be taken into consideration in the process of imposing fines. These principles arise from the case law, legal theory, etc. The AMO must take this principle into consideration during the whole process of imposition of fines.

7. The AMO applies also Guidelines on the procedure for setting the fines in cases of abuse of dominant position and agreements restricting competition (hereinafter referred to as "the Guidelines"). The purpose of the Guidelines is to provide an explanation of basic principles that are taken into account in the process of setting the fines for the infringement of substantive competition rules. The Guidelines do not apply to fines for the infringement of rules concerning merger control and procedural rules. The Guidelines provide methodology of setting fines, which is based on the criterion of relevant turnover.<sup>3</sup>

8. The Guidelines reflect the aim for convergence which was initiated by ECA ad hoc WG on fines in 2008 and also directly refer to the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

9. The Guidelines as such have not been subject to court review. However, it seems from the case law that the courts take into consideration the text of the Guidelines and directly refer to it, though they stress the importance of basic criteria of setting fines set by the Act on Protection of Competition, in the sense that Guidelines could not go beyond these criteria. The legality of the Guidelines has not been questioned by the Slovak courts.

10. Guidelines were adopted in 2008. There was different methodology of setting fines used before (the method of calculation of fines was based on differentiation of the infringements to three different categories – very serious, serious and minor infringements).

## **2. Adjustment of the basic fine**

### **2.1 Aggravating and mitigating circumstances**

11. The Act on Protection of Competition provides basic overview of aggravating and mitigating circumstances that could be taken into account in the process of setting fines. According to the provision § 38 (3) "...In addition to these criteria, the Office shall also consider other facts with respect to imposing a fine, especially a repeated violation, refusal to co-operate with the Office, position of a leader or initiator of the violation, or failure to fulfil an agreement restricting competition in practice."

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<sup>3</sup> According to the Guidelines, In order to set the fine, AMO shall proceed as follows:

- a) Setting the basic fine amount as follows:
  - determining relevant turnover, i.e. turnover excluding taxes achieved by the undertaking by sales of goods and services related to the direct or indirect distortion or restriction of competition on the defined relevant geographic market
  - setting the fine amount based on the gravity of the violation as multiplication of relevant turnover and the percentage based on the gravity of the violation
  - adjustment depending on the duration of the violation of the Act - multiplication of the fine and number of years of violation occurrence
- b) adjustment of the basic amount of the fine on the basis of other factors affecting the fine amount
- c) subsequent verification whether imposed fine does not exceed 10% of total turnover - if so, fine adjustment to 10% of total turnover of undertaking shall be made, therefore fine = relevant turnover \* percentage based on the gravity \* number of years of violation +/- other relevant factors

12. The Guidelines further provide the demonstrative list of aggravating and mitigating circumstances (including circumstances that are not set in the Act on Protection of Competition) as well as their further explanation.

13. It is necessary to point out, that the list of aggravating and mitigating circumstances both in the Guidelines and in the Act on the Protection of Competition is not exhaustive.

14. According to the Guidelines, factors that shall result into the fine increase include in particular:

- repeated violation by the same undertaking
- undertaking was the instigator or acted as leader of violation
- undertaking took measures towards other undertaking in order to force it to violation
- undertaking willingly and knowingly complicated the case investigation, due to the violation undertaking gained quantifiable material benefit.

15. The AMO in its practice increased fine as a result of recidivism, and as a result of fact, that undertaking willingly and knowingly complicated the case investigation- abuse of dominant position (decisions of the AMO no. 2010/DZ/R/2/049 and 2009/DZ/2/1/040).

16. Regarding recidivism as an aggravating circumstance, according to the Guidelines, illegal conduct of the same type and Illegal conducts similar to the previous, particularly in terms of purpose, goal, effect or impact on the market are considered repeated violations by the AMO. To assess a particular illegal conduct as repeated it is not crucial that previous violation referred to other goods or services or has been implemented in the form of other merit (other practice), not even the fact that the violation occurred on another relevant geographic or product market. Discovery of repeated violation shall result in a substantial increase in the basic amount of the fine, due to the obvious fact that the previous fine was not sufficiently deterrent. The mere fact that the previous offense occurred longer time ago, shall not obstruct the assessment of the case as repeated violation. However, it could be taken into consideration by the AMO when determining particular percentage increase of basic amount of fine in relation to the repeated violation.

17. The factors that shall result into the fine decrease (mitigating factors) include in particular:

- passive attitude of the undertaking
- undertaking terminated the violation of competition rules after the AMO's intervention
- undertaking has not applied the agreement restricting competition in practice
- existence of undertaking's reasonable doubt, whether its conduct constitutes violation of competition rules
- co-operation of the undertaking with the AMO beyond the statutory obligations.

18. In its practice, the AMO considered as a mitigating circumstance for example the "novelty of a case" or "originality of a case" (for instance in case where a "new" definition of the relevant market was established that has not been used by the AMO before or in practice of the European Commission), in consequence of which the undertaking had reasonable doubts, whether its conduct constitutes violation of

competition rules – abuse of dominant position (decisions of the AMO no. 2010/DZ/R/2/049 and 2009/DZ/2/1/040).

19. The AMO generally did not accept adoption of compliance programme as mitigating circumstance. The AMO does not have recent practice in this regard, though.

## **2.2 *Parental liability and imposition of fines***

20. Concerning the liability, according to the Slovak legal framework, parents and their subsidiaries cannot be held jointly and severally liable for the antitrust violation committed by the subsidiary. However, the AMO generally follows the EU case law when it comes to the parental liability and economic succession but has to adjust this to the Slovak legal framework. When imposing the fine, the AMO takes into consideration the fact that companies belong to the same economic entity.

## **2.3 *Inability to pay***

21. When it comes to the inability to pay (ITP) applications, the AMO has only limited experience in this regard.

22. According to the Guidelines, the AMO may reduce the fine, when it is found that imposition of the full fine amount would directly result into elimination of undertaking from the market. The AMO has dealt with a few ITP applications, however undertakings in question did not provide any relevant evidence that would justify decrease of fine. For instance, the undertakings claimed the low profitability and the dependence on the financing from external sources which were not considered as sufficient reason for decreasing the fines.

## **3. *Practical issues in determining the amount of fines***

### **3.1 *Decisions taken by the AMO, court review***

23. The AMO decides on cases on the basis of a two instance system. The executive division (Division of the Abuse of Dominant Position and Vertical Agreements or Cartel Division) of the AMO decides on the case in the first instance. This decision may then be reviewed by the Council of the AMO upon an appeal. When the appeal is lodged, the decision of the 1st instance cannot become valid before the 2nd instance decision is adopted.

24. The Council of the AMO 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 of the AMO 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.

25. Filing of an appeal by one of the parties to the proceedings automatically brings the postponement of the validity and enforceability of the decision until the second instance decision. After the second instance decision is taken, the decision of the AMO becomes valid (decisions issued by the Council become legally valid after they are delivered to the parties to the proceedings) and enforceable and may be brought before the court. The court could postpone the enforceability of the decision upon the claim of the undertaking, on certain conditions (e.g. on the condition, that the immediate enforcement of the decision will cause serious economic, or financial harm, and the postponement of the enforceability is not in conflict with the public interest etc.).

26. In the process of judicial review (again, the process of judicial review consists of two instances), the court has full jurisdiction. It may complete proofs, and if it comes to the conclusion that imposed sanction is not adequate (basically, when the court is of an opinion, that the fine is not proportionate to the nature of the infringement or leads to the liquidation of the undertaking), it is entitled to change it.

27. The courts have recently reduced fines in two cases, the main reason was, that according to the courts, the fine imposed by the AMO did not reflect the nature and the gravity of the infringement.

28. As regards the imposition of fines, the courts often mentioned in their judgements the necessity of application of criminal law principles to the administrative proceedings. It might be difficult to apply certain principles from criminal law (such as absorption principle, for instance) on the methodology for setting fines that stems from economic reasoning. However, according to the recent decision of the Slovak Constitutional Court, not all criminal law principles can be applied to competition law proceedings (the court decided that for instance the "reformatio in peius" principle does not apply to competition law proceedings.)<sup>4</sup>

### 3.2 *Collection of fines*

29. The AMO is basically responsible for the collection of fines. Most of the companies pay the fine within the term stated in the decision. In case the undertaking does not comply with the obligation to pay the fine, the AMO has to enforce the decision. The collection of fines is more complex in cases, where the companies have seat outside the Slovak territory. The possibilities to collect fine are very limited in this case.

30. There were cases, when the AMO had difficulties to collect the fine because of the fact, the undertaking did not have assets in the Slovak Republic. In 2006, the AMO adopted a decision, in which it found six construction companies guilty of bid rigging activities concerning construction of Slovak highways (the article 101 of Treaty on the functioning of the European Union was applied in the case). The AMO imposed heavy fines of €45m in total on the companies for their participation in the cartel. Some of the companies were foreign companies based in other Member states (two Czech companies, one Portuguese company). The highest fine was imposed on the Portuguese company (about EUR 14 million (Euros) [13 880 900,22 Euros]). The Slovak Supreme Court has upheld the decision of the AMO in 2013.<sup>5</sup>

31. Some of the companies did not meet their obligation to pay the fine. The AMO faced the problem with the enforcement of its decision, i.e. with exacting the fines imposed from the foreign companies, (especially from the one based in Portugal and the Czech Republic), as there is no common European legislation (regarding competition law infringements) that would enable to enforce the decision directly in the Member state, where the company in question is settled, on the basis of the administrative decision issued in another Member state. There is also no international treaty covering such area of relations. It seems that unless these foreign companies have assets in Slovakia, the enforcement of the decision, i.e. payment of fine, is much more complicated. With regard to administrative fines, the formal process of recognition of such decision has to take place.

32. It is necessary to mention, that this is not an isolated case; foreign companies are often participating in competition proceedings in the Slovak Republic.

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<sup>4</sup> Decision no. I. US 505/2015-55.

<sup>5</sup> Meanwhile the decision of the Supreme Court of the Slovak Republic was dismissed by the Constitutional Court on the basis of the constitutional complaint. Thus the case is currently still open.

### **3.3 *Leniency programme and fines***

33. Leniency programme is one of the factors that interacts with the process of setting fines.

34. Leniency programme was introduced in the Slovak Republic in 2001. Since this time, the AMO noticed slight increase of the leniency applications (the AMO encourages the undertakings to use the programme). The heavier fines may lead to better use of the programme and ipso facto to the more effective disclosure of the most serious infringements.

35. On the other hand, the higher is the fine imposed, the more challenging may be to defend the fine in the course of the judicial review. Therefore, the most important is the fact whether the decisions of the AMO are upheld after the court re-view proceedings.

### **3.4 *Effectivity of fines***

36. As regards the amount of the fines imposed each year on undertakings, the AMO considers its system for imposing fines to be effective enough.

37. However national “procedural” rules and general legal principles concerning the attribution of liability may create obstacles to the application of the concept of undertaking as it is applied by the European Commission.

38. Resolving of problems with collection of fines imposed on parent companies outside the national territory as well as abolition of administrative barriers would generally enhance the enforcement of competition law.

## **4. Alternatives to fines**

### **4.1 *Sanctions that may be imposed on individuals***

39. According to the Slovak legal order, the AMO does not have power to impose sanctions on individuals, except the fines for the infringement of certain procedural rules, which is mentioned above.

40. Criminal sanctions as well as investigation preceding this type of sanctions are in competence of the police, state prosecutor and courts. Criminal proceedings are completely separated from administrative proceedings. Therefore, the AMO cannot provide relevant data as concerning investigations and possible punishments for crimes related to competition.

41. Slovak Criminal Code and Commercial Code both empower the courts to impose a ban from undertaking of certain activities or a ban from performing certain functions within the undertaking on individuals. Since the Criminal Code is in competence of criminal bodies, and relevant provisions of the Commercial Code came into force only recently, the AMO does not have information about the application of relevant provisions in relation to its administrative proceedings.

### **4.2 *Relation between private enforcement and fines***

42. Speaking about relation between private enforcement and sanctions for infringements of competition law, the experience with actions for damages caused by competition law infringements is rather limited in the Slovak Republic. There were very few private enforcement cases to draw conclusions.

The transposition of the European Directive on Actions for Damages<sup>6</sup> may however lead to increase of the damages actions in the Slovak Republic.

#### **4.3 *Ban from participating in public procurements***

43. As from April 2016, the AMO has the obligation to impose a ban from participation in future public procurements on companies that took part in bid rigging activities. Ban from participating in public procurement is an obligatory part of the decision on the agreement restricting competition in the form of the collusion in public procurement or similar (e.g. private) tender. The standard length of the ban is three years, but the law provides for two exceptions:

- the AMO does not impose such a ban on the successful leniency applicant;
- and the AMO imposes a ban of a shorter duration of 1 year on the undertaking that decided for settlement procedure.

44. The period starts to run from the so-called final decision. A final decision means either a decision of the AMO against which an action (appeal) is not brought or cannot be made or a decision against which an action is brought and this is subsequently rejected or the legal proceedings in the subjected matter is stopped.

45. Until April 2016, the ban from participation in public procurements for the undertaking involved in bid rigging activities stemmed directly from the Act on Public Procurement (the fact, that the undertaking was not involved in bid rigging activities was one of the conditions for participating in public procurements).

46. In general, the ban to participate in public procurements contributes in terms of deterrence, since it is able to deter the undertakings from engaging in illegal activities. A number of companies in certain sectors sell products mainly through the process of public procurement, thus the ban could therefore significantly influence their economic activity.

#### **4.4 *Combination of fines in the Slovak Republic – effectiveness***

47. The AMO considers the combination of sanctions that may be imposed for infringements of competition rules in the Slovak Republic to be effective enough. The effective functioning of criminal proceedings together with enhancing of private enforcement could lead to more effective enforcement of competition law. The most important and primary issue to increase the effectiveness and deterrence of fines remains however the consistent decision-making process of the AMO that is upheld by courts.

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<sup>6</sup> 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.