Organisation for Economic Co-operation and Development

DAF/COMP/GF/WD(2017)20

Unclassified **English - Or. English**

29 November 2017

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

JUDICIAL PERSPECTIVES ON COMPETITION LAW

Contribution from the Slovak Republic

-- Session II --

7-8 December 2017

This contribution is submitted by the Slovak Republic under Session II of the Global Forum on Competition to be held on 7-8 December 2017.

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JT03423842

Judicial Perspectives on Competition Law

-- Slovak Republic --

1. General background information

1. Before sharing the experience of the Antimonopoly Office of the Slovak Republic (hereinafter referred to as "the Office") with regard to judicial review of competition cases and relations with court, it is necessary firstly to briefly describe the administrative process and judicial review process.

1.1. Administrative procedures regarding infringements of competition law

2. The Office is the national competition authority of the Slovak Republic. It is an independent central state administration body and is the only body entrusted with application of competition rules in the Slovak Republic, both national provisions as well as the European law, Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU"). The judicial review of decisions of the Office is ensured via general courts. In case of claiming damages for breach of competition rules a particular general court is competent.

3. The Act on Protection of Competition[1] and the Decrees[2] define the status of the Office, its powers, duties and proceedings. The procedures are subsidiary regulated by the general Administrative Code of Procedure[3] (hereinafter referred to as "Administrative Code"). The Office issues also guidelines[4] on different issues which further explain the procedure and practice of the Office.

4. The Office has power to investigate competition law infringements as well as power to issue decision and impose fines.

5. Slovak competition enforcement procedure is defined as two instance administrative procedure. First instance administrative decision is subject to administrative appeal to the Council of the Office consisting of 7 members – the Chairman of the Office and 6 external experts – lawyers and economists. The Council of the Office may change, uphold or annul the first-instance decision in full extent or stop the proceedings for procedural reasons stipulated by the Act on Protection of Competition.

6. If parties to the proceedings disagree with the decision of the Council of the Office, they may file an action against it to the court.

[1] Act No. 136/2001 on Protection of Competition and on Amendments and Supplements to Act of the Slovak National Council No. 347/1990 Coll. on Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic as amended.

http://www.antimon.gov.sk/act-on-protection-of-competition/.

[2] http://www.antimon.gov.sk/legal-norms-in-force/.

[3] Act No. 71/1967 Coll. on Administrative Proceedings (Rules of Administrative Procedure).

[4] http://www.antimon.gov.sk/usmernenia-a-pokyny-uradu-antitrust/.

1.2. Judicial proceedings. Organisation of courts.

7. Within the recodification of the civil process in 2015, the new Administrative Judicial Code (hereinafter referred to as "the Code") regulating the civil procedure with regard to the review of the decisions and proceedings in all administrative matters was passed and is in force since July 2016.

8. This Code introduced some changes to the review procedure, mainly regarding the proceedings, however the competence of the courts concerning review of the decisions of the Office did not change.

9. Regional Court in Bratislava (hereinafter referred to as "Regional Court") is the competent court to review the decisions of the Office. Regional Court may uphold the decision, annul it and return the case to new proceedings, or modify the sanction that was imposed. The Regional Court is the court with full jurisdiction. It may admit new evidence if it considers necessary.

10. Regional Court can grant a *stay of execution* of the decision (suspend its execution/enforcement) of the Office upon a request of an applicant until its final decision. If such stay of execution is granted, Regional Court has to decide the case within 6 months.

11. Pursuant to the new Code of Procedure[5] a cassation complaint may be filed against the decision of the Regional Court. Supreme Court of the Slovak Republic (hereinafter "Supreme Court") is the court of cassation. Supreme Court has no limitation period to decide a case.

12. Both of them are general courts not specialised in competition matters. Judges are members in either Civil, Commercial, Criminal or Administrative Collegium. Decisions and procedures of the Office are reviewed by the judges of the Administrative Collegium. Judges/panels of judges in Administrative Collegium review all the decisions, procedures and actions of all administrative institutions. Some of the agendas fall within one of the eight Regional Courts, such as competition agenda which is reviewed in Bratislava, or agenda of the industrial property rights (as regard the authority competent for this agenda) in Banská Bystrica (causal competence). However, these courts are along with the mentioned agenda also competent for the review of some other areas of administrative law such as environmental, social, tax, customs, traffic offences, administrative offences, building/planning permissions, healthcare administrative decisions, etc.

13. The courts have power to set their internal working agenda (usually on yearly basis) which among others establishes panels of judges and assignment of particular agendas to these panels. It is questionable whether it allows room for some specialisation of the judges since they still have to deal with several different law fields.

14. It is important to note that the competition agenda constitutes a very small percentage comparing to other fields such as social security agenda for instance. While there might be up to five competition cases open at the Supreme Court at the same time, there might be hundreds or thousands of social security cases. Thus, priority is quite clear.

15. Moreover, competition law cases are much more complex and time demanding. Administrative files submitted to court for review are much more voluminous. At the same time, a lot of them require economic expertise or background.

[5] Act. No 162/2015 Coll.

16. There are two main areas of the judicial review of the procedures of the Office. Regional Court mainly reviews

- actions against "other conduct" and
- actions against the decision of the Office.

17. Agenda of the actions against "other conduct" concerns cases where a natural or legal person claims their rights have been breached by unlawful conduct of the Office which is not in a form of decision. These are in practice mainly cases where an inspection was conducted and undertakings usually argue that reasonable suspicion to conduct inspections is deficient, authorisation of the inspection is defective, etc. Also actions against requests for information and other powers of the authority may be objected under the *action against other conduct*.

18. The review of the decisions covers the review of the decisions of the Office as well as the proceedings related thereto.

19. It is evident that the nature of these proceedings is different. Proceedings regarding claims against other conduct mostly concern due process and rights related to Art. 8 of the European Convention on Human Rights.

20. In the review proceedings of the final decisions of the Office all aspects of both economic and legal nature are usually subject matter of the proceedings.

21. Actions for damages for infringements of the competition law are another area where the competition law background is important. Enforcement of these damages for which there is a special competence of the District Court in Bratislava II, is still rather underdeveloped area in the Slovak Republic. However, it is expected that the transposition of the *Damages Directive*[6] into the Slovak legal order will enhance the effectiveness of this enforcement area.

2. Experience

2.1. Judicial review plays very important role in the competition law enforcement.

22. Judicial review plays very important role in the competition law enforcement. In many cases, parties to the administrative proceedings file actions against decisions of the authorities. Therefore, the decision of the court is the final decisive point in the matter. Until this final decision, the competition in the markets is not being restored.

23. Before 2004, decisions of the Office were reviewed by the Supreme Court only, and the prevailing majority of decisions were upheld. However, after the amendment to the Code of Civil Procedure, in October 2004, the Regional Court became the first instance court in competition (and other administrative cases), so the competition agenda was new agenda for this court. In 2004 and 2005 the Office also imposed a few heavier fines for the abuse of dominant position (app. 1 million euros, 28 million euros). The Regional Court annulled a few decisions of the Office in line. Since the Office did not have the right to appeal, the cases were returned back to the Office for further investigation. Most of the decisions of the Office were annulled on the procedural grounds for the reasons/issues that

[6] 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.

were not questioned by parties or court before. Since the decisions of the Office were annulled for procedural reasons and the appeal was not possible, the Office did not get opinion on the matter, i.e. legal and economic assessment of the case. Although, one has to admit that the decisions of the Office were not always flawless, if these are annulled on the reasons that were not subject to dispute before courts previously or upon the reasons that are diverting from the EU competition law and case law of the Court of Justice for instance, then the decisions of the national courts are unpredictable not only for the Office but for the parties to the proceedings as well, and the Office is not able to remedy the markets by a swift and effective intervention in the market.

24. Moreover, it was quite difficult for the Office to justify the application of some of the European competition law concepts in its proceedings, such as *economic continuity* concept[7], which were not common or even contrary to the Slovak traditional administrative law concepts.

25. Among legal tools, such as reference to the case law of the Court of Justice of the European Union, submitting proposals for questions for preliminary ruling to the Court of Justice of the European Union or proposal to request the opinion of the European Commission pursuant to art. 15 (3) of Regulation 1/2003[8], the Office identified also more general issues that could contribute to more effective enforcement.

26. The Office communicated the situation with the Ministry of Justice. Firstly, it was necessary for the Office to open the right to appeal also for the administrative authorities, such as Office. This was mainly due to the fact that the Regional Court had power to annul the decision also ex officio on the reasons which were not raised during administrative proceedings by the party or even in proceedings before court but were concerning the legality of the decision. Thus, the possible judgement of the court was not predictable for the Office, moreover, the Office could not react to such reasons for annulment and explain them before the final judgement of the court.

27. Further, following issues were identified as are important for effective court review process:

2.1.1. Education/Training of judges applying competition law

28. Competition law is a complex discipline requiring constant education/self-education, knowledge of markets and thus also for lawyers working in enforcement area or legal practice to get acquainted with certain economic aspects. Without prejudice, not questioning the competence of court, the Office supported the idea for possibilities and programme for further education in competition law for judges. Staff of the Office deals with competition law issues and sector specific issues on a daily basis. Further education and training of the staff is supported. Sharing experience and interaction with other

[7] Pursuant to Art. 15 (3) of Regulation 1/2003, the Commission has submitted so far 17 written observations; two of those were in proceedings before Slovak courts. The observations concerning the economic continuity were submitted in case of ŽS Cargo Slovakia, a.s. Please see Commission´s website http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html

[8] Pursuant to Art. 15 (3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty where the coherent application of Article 81 or Article 82 of the Treaty so requires (now art. 101 and 102 of TFEU), the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations.

competition authorities also stimulates and maintains the expertise of the staff. However, these are the tools that were not at the disposal for judges. The Office has communicated possibilities on trainings and seminars for judges in competition law to the competent authorities. The Office also welcomed the initiative of the European Commission opening tenders for further training of judges. Although some projects took place, it is important that these continue on regular basis.

29. It might be also important to note, that although the Office is confident in providing expertise and providing it on professional basis without concerns on possible crossing of lines towards judiciary in case it is asked to contribute within these kind of projects, we think the independent experts, especially expert judges, possibly from countries that have specialised courts or even from a Court of Justice of the EU are probably more suitable and acceptable.

2.1.2. Networking/Sharing experience

30. Speaking about relationship with courts, we are thus talking mainly about relationship with regard to the body that safeguards fundamental rights of persons in administrative proceedings within the review process. On the other hand, there are persons that are being harmed by anticompetitive conduct, i.e. other competitors, consumers and competition in general whose hopes for possibility of successful damages actions are lowered if the prohibition decision of the Office is overturned.

31. The Office is following new trends, case law, supports further education of its experts in competition law and learns from the exchange of information from its colleagues at different forums (such as OECD, ICN, ECN, ECA, etc.). We all try, especially within ECN to converge our procedures, assessment and discuss lot of issues so that we do not sanction conduct that would be allowed in other member state and undertaking do not meet with different rules across EU. Although, we put our efforts together with the aim for coherent approach, the last say is on the court.

32. As the competition law is rather complex legal discipline bound with economic assessment and legal provisions on anticompetitive infringements are not that clear as in some other areas as they have to be updated with fast developing sectors, and thus allow some discretion for the competition authorities and further interpretation of courts, it is not possible for the successful application of competition rules for judges to isolate from their international 'mates'. Otherwise, our efforts for convergence within certain networks and common approaches, especially regarding our jurisdiction, remain only ineffectively applied. Furthermore, ineffective application of competition rules has further effects. Not only markets are not remedied, but there are not sufficient incentives for the undertakings to apply for leniency, commitment procedure and the system of civil actions for damages for antitrust infringement lacks an "underpinning". Therefore, it is very important that the judges have support and opportunities in visiting meetings of associations for judges like The Association of European Competition Law Judges. Although, we are not fully aware about current possibilities of Slovak judges to participate in its meetings, we transform the information to relevant authorities every time we have knowledge of this meeting or any other meeting in similar forums.

2.1.3. Language barriers

33. It is common that every discipline has its terminology. The competition law terminology is not an exception, on contrary it has lot of special terms, while the number of new terms grows with the pace of the development in sectors; and some of them are

developing fast. Therefore, the language barrier can be sometimes of an obstacle. Most of the available literature is in other than Slovak language. Therefore, it could be considered when speaking of the effectiveness of the training as well as networking (as mentioned under letters a) and b) with other judges that it might depend also on removing of language barriers and providing interpretation in such meetings.

2.1.4. Specialisation

34. As mentioned above, only the Regional Court in Bratislava as one of the eight regional courts is competent to review the competition law cases. Concerning the private enforcement, District Court Bratislava II (in Commercial Collegium, having Regional Court in Bratislava as appeal court, Commercial Collegium) is competent to hear private enforcement cases. As already noted, the courts have also power to set their internal working agenda (usually on yearly basis) which among others establishes panels of judges and assignment of particular agendas to these panels. It is questionable whether it allows room for specialisation of the judges since they still have to deal with several different law fields. The Office has raised the issue of their possible specialisation in expert discussions. Considering the volume of competition cases compared to other agendas, it is also understandable that under the current system establishment of purely competition law panels of judges would probably be difficult to justify. However, it is very important that the trainings become part of their regular agenda. Mentioning reasons under letter c), as well as considering the number of the judges in all these collegiums, it is better if trainings are organised in the Slovak Republic, this region, specifically targeted for this audience.

2.2. Presenting/Reviewing economic evidence in court

35. Regarding the judicial review it is presumed that the decision of the Office subject to review is the final one and it should concern answers to all relevant objections of the undertakings in the case. It has to be understandable, reviewable and legal. Therefore, it might be the reason why in most cases we have experienced so far, courts do not repeat the evidence in hearings. However, the court has the power to repeat the evidence, consider new evidence if it finds it necessary, etc. The court also has power to hear experts. Special techniques for hearing experts such as “hot tub” procedure are not regulated by the Civil Codes.

36. In one dominant abuse case, the Supreme Court in appeal proceedings against the judgement of the Regional Court which annulled decision of the Office on the grounds of lack of competence of the Office to act in telecom case, the Supreme Court presented the view of how they wish to run the proceedings and that they wish to hear the expert economists and that each party (the Office and applicant) shall appoint their experts which should be present in court hearings. However, since the first question for the court to decide was the competence of the Office to investigate specific telecom case, this issue was resolved first positively for the Office, which meant that the case was returned back to the Regional Court and there was no further need to hear the experts.

37. In general, we may say that we have noticed increasing trend of courts expecting that the arguments of the Office are supported with relevant economic analysis. At the same time, that these are understandable and delivered in the final decision.

38. It is important to note, that to pose questions for economists on some particular issues and to be able to understand, one has to have a background from the topic. It is a challenge for the Office to find and to maintain expertise staff able to conduct economic analysis in complex cases. Only some universities in the Slovak Republic provide education in the field of econometric analysis. Usually, further education of these economists is still needed. Therefore, naturally, we do not expect that judges can review such cases without targeted preparation/training. We are not aware if special training of this kind is being provided to the judges in the Slovak Republic. This means, it is for the judges to study complex issues themselves. Although, courts may appoint own experts as well, and the question of the review is different than the task to "build" the case, concerns may arise that it could create an obstacle for effective judicial review and understanding of the assessment made in particular case by the Office as well as the reasons for this assessment. Although, most percentage of cases that are nowadays subject to review before courts are cartels which do not concern such complex economic and econometric analysis, it could be an issue in abuse of dominant position cases or merger cases. Especially, if courts are going to hear complex cases for calculation of damages caused by the antitrust infringements.

39. It is also inevitable for the Office as well as for market participants that if the court judgement is delivered it can serve as a guidance for possible future cases.

2.3. Relations with courts

40. The Office respects the judgements delivered to it by courts. We might have different opinion on some issues but we try to work also on our internal procedures so they are adjusted to the view of the court expressed in reasoning of judgements especially on procedural issues for the future (here, we mean the issues that go beyond the binding part of the judgement of the court).

41. We believe that closer cooperation or interaction with courts would be of benefit. The Office always tries to involve judges in the discussion. We acknowledge that judges have to stay independent and one-way cooperation could create effect of possible disruption of balance. Therefore, we always appreciate when a judge is willing to be part of the panel in the conference we organise yearly. In general, we cannot report very high interest to participate in our conferences from the judicial community or from assistants of judges. Hence, we were very pleased when a former judge accepted our invitation to speak in the panel at our annual conference we organised this year in October, which was appreciated also by the audience – law firm representatives, in - house lawyers, representatives of undertakings, other NCAs, economists, academics, etc.

42. It is unusual for the courts to further report on their own judgements in the Slovak Republic. Nevertheless, we may report on the experience when court decided to hold a "debriefing" regarding its judgement. Sometimes, hearing judges speaking about their judgements allows better understanding of its content. That was also a positive experience, although it is not usual for such "debriefings" to take place.

43. We believe, that there are topics that can be discussed openly by judges without prejudice to future or past cases. This would enhance the effectiveness of overall enforcement.