

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

**INVESTIGATIVE POWER IN PRACTICE - Breakout Session 3: Due Process in
relation to Evidence Gathering - Contribution from the Slovak Republic**

- Session IV -

30 November 2018

This contribution is submitted by the Slovak Republic under Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/invpw.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

JT03439945

Investigative Powers in Practice

Breakout Session 3 - Due Process in relation to Evidence Gathering

- Contribution from Slovak Republic -

1. Introduction

1. Power to conduct inspection is very important power for the national competition authority. Although, it may seem as a very effective tool, there are many challenges for the national competition authorities to overcome. Firstly, in today's pace of technology development it is a challenge to prove the suspected infringement. Timing is therefore crucial. Financial and personal sources are also key issue which is sometimes an obstacle for smaller authorities with smaller budget to overcome. Last but not least, justifying the intervention in the form of the inspection is mandatory in order to conduct the inspection as well as to be able to maintain collected information and evidence in the investigation file. Courts in the Slovak Republic reviewed the inspections as well as authorisation for the inspections of the Antimonopoly Office of the Slovak Republic (hereinafter only "AMO") many times and quite in detail. The following contribution points out some of the issues that were brought before courts.

2. General legal framework

2. AMO has power to conduct unannounced inspections pursuant to the Art. 22a para. 1 and 2 of the Act on Protection of Competition¹ on the basis of written authorisation (hereinafter referred to as the "authorisation") of the chairperson, or vice-chairperson of the AMO, to enter any premises and means of transport of the undertaking, which are related to the activities or conduct of the undertaking (i.e. business premises), in order to conduct an inspection.

3. Authorisation shall contain name, surname and position of the person issuing an authorisation, indication of the undertaking in premises and means of transport of which the inspection will be conducted, time period of the inspection, subject and purpose of the inspection, name and surname of the employee of the AMO authorised to conduct an inspection, instruction on rights and obligations of the undertaking whose premises and means of transport will be inspected, signature of the person issuing the authorisation, authorisation number and the AMO's stamp.

4. Pursuant to the Art. 22a para. 8 of the Act on Protection of Competition if a reasonable suspicion exists that the information or documents related to the activities or conduct of an undertaking based on which a restriction of competition may be proven, are

¹Act 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.

located in other than business premises, the AMO can conduct inspection only on the basis of previous court warrant. The Act No. 162/2015 Coll. Code on Judicial Proceedings in Administrative Cases (hereinafter only the “Procedural Code”) stipulates further conditions of the application/proposal for court ex ante approval of the inspection as well as the procedure.

5. Art. 22a of the Act on Protection of Competition further stipulates powers of the AMO, i.e. employees of the AMO conducting inspection, which are mainly power to seal documents or media on which information is recorded, to seal the premises and their equipment, also means of transport for the period and to the extent necessary for the inspection; power to take away documents and media on which information is recorded for the necessary time with the aim of making copies or gaining access to information if the AMO is unable, primarily for technical reasons, to gain access to information or make copies of documents during the inspection; power to ensure the entry to the undertaking’s premises and means of transport, to open closed premises and their equipment or otherwise provide access to documents and media on which information is recorded; AMO is entitled to invite other persons able to ensure overcoming the obstacle; power to ensure the access to all information which has been stored in any electronic form on data storage of the undertaking or which were created in any electronic form by the undertaking or which the undertaking may access in connection with its activity, including information which is stored in any electronic form on data storage of other entities and the undertaking may access them and use them for its activity; to ensure the access to these media AMO is entitled to invite other persons capable to ensure such access, but they are not entitled to access the information; also power to make copies of any information in documentary form, all computer data and information stored in any electronic form on data storage, of course, related to the subject-matter of the inspection.

6. The undertaking has a duty to allow the entry, cooperate with the employees of the AMO conducting inspection, to provide necessary collaboration and to allow proper conduction of the inspection; enable its employee to give explanation and to submit documents and information necessary for the AMO regardless the medium on which it is recorded; ensure the access to all documents, information and data in electronic form or ensure that the seal is intact in case the employees of the AMO apply power to seal premises or objects.

7. Employees of the AMO make minutes of the ongoing inspection on spot. Undertaking may submit comments or objections which are noted in the minutes. Pursuant to the Act on Protection of Competition, the inspection shall be deemed completed after signing the minutes.

8. Undertakings have right to challenge the authorisation for the inspection as well as the inspection itself at the court pursuant to the Art. 252 of the Procedural Code. The undertaking or natural person who think their rights were breached by the intervention of the public authority can file action for the protection against the intervention of the public authority, in this case the inspection of the AMO, within two months from the date the undertaking or the person has learned about the intervention or within two years from the date of this intervention².

9. Regional Court in Bratislava is the competent court concerning the actions filed against AMO, Supreme Court of the Slovak Republic (hereinafter only “Supreme Court”) decides on the complaint against the decision of the Regional Court in Bratislava.

² This action refers to any intervention of public authority not only to inspection of the AMO.

10. Similar legal remedy existed before the Procedural Code entered into force. Action for the protection against unlawful intervention of the public authority could have been filed within 30 days from the date the undertaking or the person has learned about the intervention or within one year from the date of this intervention directly to the Supreme Court pursuant to the Art. 250v of the Civil Code of Procedure (Act No. 99/1963 Coll. as amended). Further appeal was not possible. Supreme Court established some practice and case law. Almost all the cases where the action was filed within one month after the inspection of the AMO were decided by the Supreme Court in less than one year.

11. The experience of the AMO shows that almost every inspection conducted against undertakings in business premises is challenged at the court. It is important to note that the AMO has always informed undertakings about the existing remedy - the possibility to file action against this intervention to the court pursuant to the Civil Code of Procedure to the Supreme Court and later to the Regional Court in Bratislava pursuant to the Procedural Code.

3. Case law

12. Different issues and questions were subject to consideration and decision of the Supreme Court as well as before Regional Court in Bratislava³. All relate to the inspections of business premises. As mentioned above, the Act on Protection of Competition provides power to conduct inspection in business premises on the basis of the authorisation of a chairperson and vice-chairperson. Below is the selection of some cases and issues that were subject to assessment by Slovak courts. Please note, that applicants challenged more questions in cases mentioned, however, for the purpose of this topic and contribution only certain issues were selected and brief descriptions are given in order to understand the background of the cases.

3.1. Datalan against AMO

13. In case *Datalan against AMO*⁴ the Supreme Court has ruled on several questions. Action was brought by the undertaking to the Supreme Court within one month after the inspection⁵. Although, the final ruling was against the AMO, Supreme Court acknowledged, among others, the necessity for “continuous inspection”, i.e. necessity for further selection of the bulk data taken/copied during the inspection in the premises of the AMO, however the Supreme Court stressed the importance of the proportionality principle which must be strictly observed when AMO applies its powers.

³Slovak courts have already assessed the existence of a reasonable doubt in particular cases in relation to the legality of the authorisation for inspection and set the conditions that should be met to justify the intervention in form of inspection. The conditions of the legally privileged information are subject to some pending cases.

⁴ Case no. 5Sžnz/2/2015, judgement of the 25th of June, 2015

⁵ Undertaking filed its first action within 30 days after the inspection. Supreme Court dismissed the action on the procedural grounds, due to reason that the undertaking did not firstly submit the complaint to the AMO, i. e., did not use firstly other available remedies which was previously a condition pursuant to the provision of the Procedural Code. Constitutional Court later decided that the use of such instrument cannot be considered as effective one and that the action for the protection against this intervention of the public authority, i.e. inspection of the AMO can be filed directly to the Supreme Court without necessity to use the system of administrative complaints to the AMO.

14. In the case in question AMO employees conducting the inspection have on spot on the basis of key words pre-selected information from computers of the employees of the undertaking. This information, still quite voluminous, was copied and taken for its examination in the premises of the AMO. Data pre-selected by key words were not yet examined or reviewed whether they all fall within the scope of the inspection. By that time there was no ruling of the national court on the possibility or conditions of this power, i.e. it has never been denied. AMO conducted on spot selection of the electronic data or copied these and examined them later in the premises of the AMO depending on the circumstances of each inspection (depending on the technical equipment, organisation of the work of undertaking or technical and personal capacities of the AMO on spot).

15. Supreme Court approved the position of the AMO that the inability to further select and examine the collected information and data would affect further effectiveness of the AMO's investigation.

16. In the relevant case the Supreme Court was of the opinion that AMO failed to justify (the minutes of the inspection did not show that according to the court) whether the AMO was considering less intrusive option or that the AMO would in line with the proportionality principle justify the necessity of taking so much data instead of their examination on spot of the investigation. The minutes of the inspection did not show whether the inspectors of AMO applied this process because of the technical obstacles or any other obstacles. The inspection itself lasted only eight hours although written authorisation for the inspection authorised employees to conduct the inspection for five working days. The Supreme Court has also stated that it was evident that the AMO has lacked to consider proportionality in the course of the inspection.

17. As the Supreme Court has also stated that the authorisation for the inspection in this case was too broad and the AMO has failed to prove it had information justifying the reasonable doubt and the scope of the inspection as described in the authorisation which had influenced the overall reasoning of the Supreme Court and its examination of the process applied by AMO in the particular case.

18. Although, the AMO had different opinion on certain issues, overall, the judgement of the Supreme Court also approves possibility for continuous examination and selection of the data collected during inspection in its premises.

19. AMO has always observed proportionality in its investigations and proceedings, at the same time also always tried to note all possible details in the minutes of the inspection which are made on spot and which seem to be crucial document for the court to evaluate past events that happen during inspection. After the *Datalan* judgement we continued to improve this practice further. Since the judgement delivered in this case covers many aspects, AMO analysed all the processes regarding inspection with the aim of their further improvement.

3.2. Judicial review of the AMO decision imposing fine for non-cooperation

20. In other case, Regional Court in Bratislava reviewed the decision of the AMO where the sanction of 822 984 euros (0, 06% of the turnover of the undertaking) was imposed for failure to fully submit to the inspection and cooperate with the AMO⁶.

21. In this case, the AMO requested the undertaking to block two email accounts of the employees of the undertaking during the inspection in order to facilitate their investigation and in order to prevent the destruction of the information in their emails accounts after the inspection started. Later, during the same day of the inspection, it turned out that the email accounts were not blocked as requested and that the access to the email accounts was possible for certain period of time.

22. AMO considered this failure to fulfil its request to block email accounts as a breach of the undertakings duty to cooperate and to fully submit to inspection. The infringement happened at the time of the validity of the previous legal framework regulating the inspection⁷ which set similar duties for the undertakings that are subject to inspections as today's legal framework.

23. Undertaking submitted many arguments before court. It challenged not only the legal assessment of the "event" in question but also the legality of the authorisation and legality of the inspection as such.

24. Undertaking has not use its right to file action against the inspection itself or the authorisation in this case. It only challenged the inspection and its authorisation within the action against the decision of the AMO imposing fine for the breach of the duty to cooperate and the sanction imposed by this decision.

25. With regard the legal assessment of the event as the breach of duty to cooperate, the undertaking argued that the AMO did not investigate whether there was real access to these email accounts and whether data was destructed, deleted or manipulated. The undertaking also argued that the time during which the email accounts were not blocked through the older domain via which access was still available to the email accounts, was limited and only technically skilled person would be able to access it.

26. Nevertheless, the Regional Court in Bratislava upheld the decision of the AMO and dismissed the action of the undertaking against it. It upheld the authorisation as well as the legal assessment of the conduct of the undertaking during inspection as the breach of duty to cooperate.

⁶ Decision No 2015/SP/2/1/012, 20th April 2015 and decision No. 2016/SP/R/2/002, 4th February 2016; for the purpose of this contribution only some issues of the case are mentioned, although more questions were subject to assessment.

⁷ Pursuant to the legal framework that was in force until 30th of June, 2014, undertakings were required to submit to the AMO the requested information and documents, allow an examination of this information or these documents, cooperate with the AMO in their examination and to allow employees of the AMO, employees of another national competition authority, and employees of and persons authorized by the Commission to enter all buildings, premises and means of transport of the undertakings. Today's framework is more detailed but stipulating similar duties for the undertakings that are subject to inspection in business premises.

27. Undertaking filed a cassation complaint to the Supreme Court therefore the case is still pending.

3.3. AT Computer v. AMO

28. In the judgement in the case *AT Computer v AMO*⁸, the Supreme Court, within 5 months after delivery of the action of the undertaking, upheld the power of the AMO to ask questions and request explanations during inspection and gave further interpretation of this power.

29. The Supreme Court made it clear that the AMO has the power to require explanations during inspections but within application of this power during the inspections it is not possible to ask questions addressing/requesting the explanation of the conduct of the undertaking in the context of the infringement by interviewing representatives of the undertaking and employees of the undertaking and thus collect materials relevant for the decision. The AMO is empowered to ask questions necessary to facilitate the performance of the inspection.

30. Moreover, the applicant also argued that the AMO had access to the server of the entire holding of the company and the private data in the computer of the employee and had thus access to information outside the scope of the inspection authorisation which was argued to be illegal intervention and breach of their rights. Supreme Court acknowledged that it is not possible not to have look into the private correspondence (while on spot examining communication and information within the working email and working computer of the employee) or to other information network; provided this (unrelated) information was not further processed, taken or subject to other form of disposition, it cannot be held as illegal intervention into the undertaking's rights.

31. Before the delivery of the judgment, Supreme Court held also hearing of the witnesses which were proposed by the parties to verify the events during the inspection caught by the minutes of the AMO.

4. Conclusion and unresolved issues

32. Considering so far experience, we may say, that judicial ex post review of the inspections by the Supreme Court has been proved to be effective procedural tool of judicial control⁹. All the cases that were subject to review by the Supreme Court were decided within one year from the date of the delivery of the action of the applicant¹⁰.

33. New Procedural Code also introduced a timeframe within which the court should decide. When filing an action against the AMO inspection, the applicant may request that the court approves the suspensive effect of this action. In such case, if a suspensive effect

⁸Judgement of the Supreme Court in case No. 4Sžz/1/2013, of 17th of October, 2013

⁹Although, there were discussions about the fact that the AMO shall conduct inspections only on the basis of the prior authorisation of the court and also one judgement of the court giving this opinion, further decision-making process of the courts does not show that the established practice and the legislation (of more than 12 years) should be interpreted otherwise.

¹⁰The only cases that are still pending are those that fell into the period where new Procedural Code came into force introducing competence of the lower, Regional Court in Bratislava and introducing possibility of a remedy to the Supreme Court.

is granted, the AMO cannot continue in its further investigation and the court has to decide within six months.

34. We may also say that almost every inspection that is conducted is challenged before courts. AMO has adjusted its internal practice according to courts interpretations and strictly follows the rights of undertakings and monitors also the jurisprudence of the European Court of Human Rights. Very detailed internal preparations precede every inspection. AMO has developed also cooperation with other institutions in order to have sufficient technical as well as staff support at the disposal to be able to face big, well established companies. It is therefore very important, that the decisions of the courts are predictable and that the interpretation of the courts leaves scope for the AMO for effective use of power to conduct inspections.

35. What has been not clearly decided yet by courts is the relation of the remedies that undertakings have at their disposal to challenge the inspection pursue the Procedural Code. Theoretically, the undertaking may challenge the inspection by three legal remedies.

36. Firstly, by the above mentioned action for the protection against the intervention which shall be filed within two months (or two years at the latest).

37. Secondly, the undertaking may challenge inspection within the decision of the AMO imposing fine on undertaking for the breach of its duties during inspection if this happens.

38. Thirdly, the undertaking may question the conducted inspection and collected evidence within the judicial review of the final decision of the AMO by the court.

39. It can happen (and it also happened) in practice that the undertaking files individual action for the protection against intervention (against the inspection). If the result of this proceedings allows it, AMO continues in its investigations and delivers final infringement decision. Undertaking may, potentially challenge the inspection again. However, for the effectiveness of the proceedings of the AMO it is important, that the judgement delivered on the review of the inspection is later binding for the court reviewing the infringement decision of the AMO as *res iudicata*. Potentially, new issues could be challenged that couldn't be in previous proceedings, but what has been decided should be binding for further reviews.

40. Another issue is the nature of this specific individual legal instrument- action against intervention (inspection action). As mentioned above, the AMO, instructs undertakings that there is possibility to claim the inspection by this legal instrument. Although many challenge the inspection, some don't. Later, within the review of the final infringement decision of the AMO, the inspection as well as the authorisation for the inspection is challenged. It is not clear whether it should be mandatory to pursue the protection of one's rights and duties immediately after the intervention, i.e. inspection or is it justified to respect the choice of legal remedies of the claimant and review this whenever it is submitted.

41. It could be argued that, at least, when it comes to the review of the authorisation for inspection that this should be challenged immediately after inspection if one thinks his or her rights have been breached. In line with the "*vigilantibus iura scripta sunt*", one should observe and protect its rights. Claiming years after the inspection that the authorisation was illegal is not effective way to protect the rights. It is also important for the AMO that it does not lead investigations and proceedings where the final infringement decision could be dismissed just on the basis of insufficient authorisation for the inspection.