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ISSUES – Contribution from Slovenia****- Session IV -****10 December 2020**

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More documentation related to this discussion can be found at: [oe.cd/mktcomp](https://oe.cd/mktcomp).

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## *Using market studies to tackle emerging competition issues*

### **- Contribution from Slovenia-**

#### **1. Abstract**

1. The Slovenian Competition Protection Agency (CPA) has the implementation of market studies or certain types of agreements defined in the Prevention of the Restriction of Competition Act <sup>1</sup>(the Act). The CPA conducts research primarily with the aim of examining individual markets in which it has detected certain distortions that could indicate a malfunctioning market and consequently the possibility of restricting competition. The CPA may use the information obtained from the market research in proceedings under the provisions of the Act, since the purpose of the market study is not merely to obtain information on the functioning of a sector, but to seek the reasons for perceived distortions in its operation. If the causes of market failures lie (also) in inadequate legislation, the CPA may send the competent authorities an opinion on the measures necessary to eliminate or prevent the restriction of competition.

2. The CPA has carried out some sectoral surveys that have had or were expected to have an impact on the change of legislation. One of these was the completion a survey in 2017 related to unfair trade practices in the food supply chain under the Agriculture Act according to which the CPA has additional powers to monitor relations in the food supply chain. The results of the survey showed certain practices which did not reflect a fair business relationship between suppliers and buyers (retailers) of food products. The Ministry of Agriculture, Forestry and Food used the results of the CPA survey as one of the basics for amending the Agriculture Act in this section. Another survey carried out by the CPA in 2018 was the motor fuel market survey. The fuel market in Slovenia is somewhat specific. The survey showed that deregulation of the prices of basic motor fuels (petrol 95 and diesel) could lead to difficulties in competition in this market, mainly through a coordinated operation of two suppliers, jointly controlling around 80 % of the market (duopoly). The Government of the Republic of Slovenia deregulated the prices of motor fuels regardless of the CPA's concerns, which demonstrates that the CPA cannot influence decision makers, but can only make recommendations on legal changes.

3. The CPA notes that the advantages of market studies are mainly the possibility of a quality insight into the functioning of the market and an extension for possible action or introduction of procedures, but it can also give quality recommendations to decision-makers in the preparation of legislation. Market studies also represent important advocacy activities regarding competition protection. The disadvantages of market research may, however, be of a financial nature and, as a general rule, impose a heavy time burden, especially in the case of a lack of sufficient staff, which is the rule in small authorities.

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<sup>1</sup> Official Gazette of the Republic of Slovenia, Nos. 36/08, 40/09, 26/11, 87/11, 57/12, 39/13 – cf.US, 63/13 – ZS-K, 33/14, 76/15 and 23/17.

4. In conclusion, CPA presents an example of good practice of cooperation with the University of Ljubljana in the use of its open source portal for electronic data and information collection named “1KA”, which has led to a significant reduction in the work in the cases of a large number of recipients and respondents.

## 2. Market studies in general <sup>2</sup>

5. Market studies are of the utmost importance to ensure effective competition, as it is not always possible to identify which practices are contested and as such restrict competition, but various indicators such as price rigidity, non-entry of new competitors in the market and other circumstances, concludes that the market is not functioning, as it should. In such cases, the market study is the first tool to give a more detailed insight into the sector and its specifics or business relationships established in the market. The market study is therefore primarily aimed at collecting information and processing data to make the CPA more familiar with the functioning of the market it is investigating, enabling it to identify possible obstacles to effective competition.

6. Since a market study is challenging and extensive, deciding which sector or types of agreements depends primarily on the extent to which a sector or relationships are closed or restrictive. Market study can also reflect CPA priorities.

7. The Competition Act, adopted in 2008, introduced a slightly clearer regulation in the field of research. Previously, in the course of the operation of the Office for the Protection of Competition (till 2013) the Act only empowered the authority to monitor and analyse market conditions insofar as they were important for the development of fair and free competition, but it was more or less useless due to the lack of more precise procedural rules.

### 2.1. When the market study is to be carried out

8. The CPA conducts a survey when price rigidity or other circumstances indicate the likelihood of restriction or distortion of competition. The circumstances indicating that the market is not functioning as it should be are in particular: price rigidities, price increases, market fragmentation, absence of new competitors, immobility of consumers, limited choice, stagnation in the sector, etc. These circumstances generally show the likelihood of restricting or distorting competition, since the markets in which effective competition is established, should be highly dynamic and innovative. The investigation therefore seeks to identify the reasons for which competition is restricted, with the ultimate aim of eliminating them and thus (re)establishing competition.

### 2.2. Data acquisition

9. The research begins with a decision to initiate research based on perceived indications that could indicate a potential restriction of competition in a particular market. The CPA begins to collect data through data transmission requests. In doing so, it may address both an informal and a formal request for data transmission. The informal request is a less strict call for information (a letter) and is generally used in the case of addressing a very large number of addressees, with the CPA not expecting a 100% response from

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<sup>2</sup> Summarized by the Prevention of Restriction of Competition Act (ZPOMK-1) with commentary. Peter Grilc [et al.]. Ljubljana: GV Publishing House, 2009.

respondents. In the event of an insufficient number of responses, the CPA may still address a formal request to the addressees in the second round, warning them of an informal invitation.

10. In the case of a small number of CPA addressees, they shall address a formal request in the first round in the form of a decision.

11. In an informal and formal request for data transmission, the CPA shall specify:

- Legal basis (Article 26 in conjunction with Article 27 of the Competition Act);
- The purpose of the request (the reason for carrying out the survey which, in the CPA's view, does not operate as it should or which circumstances indicating a restriction of competition have arisen);
- The definition of the required data, information and/or documents relating to both the operation of the sector in general (e.g. how much turnover is generated by companies by performing certain business activities, what are typical contracts they conclude in the course of their activities, which are typical products they offer on the market, how they form the prices of individual services through which the sales channels of the products, etc.) and more specific relationships within the sector (e.g. the question of the maturity of individual contracts);
- Deadline for data transmission: the deadline is determined mainly according to the scope of the requested information and can be extended at the request of the addressee, which must be given before the deadline, if the reasons for the extension are justified;
- A warning of an impending fine of up to 50.000 EUR for providing incorrect, incomplete or misleading information or for not providing information within a specified period.

12. The CPA may, however, decide to carry out, in addition to or instead of requests for information, an investigation which will, as a general rule, be decided at a time when there is a risk of companies trying to conceal or destroy certain data or documents. Since, in order to carry out an investigation, the CPA needs a court order, for which a suspicion of restriction of competition must be justified in detail. The CPA has not carried out such a market investigation, which would require data protection.

### **2.3. Report on the results of the market study**

13. CPA reviews and analyzes the collected data. If they are not sufficient for an appropriate analysis, it shall send additional requests for data transmission, if necessary. Depending on the circumstances of each research, the CPA will then decide whether to publish the report on the results of the survey. The CPA may also invite interested third parties to comment. Despite the discretion to publish the report on the results of the survey, the CPA publishes reports on the basis of public interest and, at the same time, promotes its work on the protection of competition (advocacy). Upon publication, the CPA may also receive comments from interested parties, which will help the CPA to decide how to act on the information obtained. As a rule, summaries of market study's results are published also by the media, which closely monitor the work of the CPA.

## 2.4. Use of research results

14. The CPA may use the information obtained in the context of the research carried out in proceedings under the provisions of the Competition Act, since the purpose of the research is not merely to obtain information on the functioning of a sector, but to seek the reasons for perceived distortions in its operation. If the information obtained indicates that the provisions prohibiting restrictive agreements or abuses of a dominant position are likely to be infringed, the CPA may bring proceedings against individual undertakings. However, if the causes of market failures lie (also) in inadequate legislation, the CPA may send the competent authorities an opinion on the measures necessary to eliminate or prevent the restriction of competition.

## 3. Experiences, advantages and challenges of market studies

### 3.1. Impact of market studies on legislation

15. The CPA has conducted some sectoral surveys that were expected to have an impact on the change in legislation. The CPA also has the competence to monitor and regulate trade business practices in the food supply chain in accordance with the Agriculture Act, therefore it conducted in 2017 a survey of relations in the food supply chain, which led to amendments of the Agriculture Act in 2018. CPA addressed the questionnaire to 133 major food producers (farms), 59 cooperatives and 367 companies in the food processing industry, a total of 559 suppliers. The year before, in 2016, the CPA had also analyzed the 7 largest retailers as food buyers. The results of the study identified the usual or undisputed practices of stakeholders (referred as “green” in the report), conditionally unfair practices (“orange”) and unequivocally unfair practices (‘red’). After analyzing the results of the research, the competent Ministry of Agriculture, Forestry and Food, when revising the Agriculture Act, identified 23 prohibited business practices, such as reimbursement for services not performed or for services performed but not agreed in writing and clearly in advance between the parties; reimbursement for the classification, maintenance or expansion of the range or products; reimbursement for placing products on the selling shelves, unless the parties agree in writing to display the goods on specially exposed points of sale; charging for the promotion of goods, unless the parties agree in writing on the promotional services to be performed and the realization of which can be proven; reimbursement of costs for concluding the contract; contribution to the expansion of the store's sales network, the improvement or reorganization of existing points of sale, the expansion of storage capacity, the expansion of the distribution network and similar activities; payment for goods that were not sold during the campaign, at purchase price and the like.

16. In 2018, the CPA also carried out a survey of the motor fuel market. This market is/was rather specific in Slovenia as motor fuel prices were fully regulated until 2016. Due to the high market concentration in trade in motor fuels, prices of petroleum products in Slovenia have been regulated since 1999 based on the Price Regulation act for petroleum products throughout the state's post-independence period (1991). According to the regulation, retail prices of petroleum products changed every 14 days on the basis of a model price calculation which takes into account trends in world prices of petroleum products on the stock exchange rate and developments in the EUR/USD exchange rate. The model price also determined the maximum margin of the companies engaged in the sale of petroleum products. In 2016, the Government of the Republic of Slovenia decided to liberalise regulated prices of petroleum products gradually. The retail price of 98 octane

plus gasoline (NMB 98/100) and heating oil have been formed freely on the market since 9 April 2016. Furthermore, since 9 November 2016 also prices of unleaded NMB 95 and diesel were freely formulated, but only on highways and motorways. Thus, only unleaded NMB 95 gasoline and diesel outside highways and motorways remained regulated with the maximum retail price. From the point of view of the structure of sales the prices of about 13% of all petroleum products sold were thus freely formulated, while the remaining 87 % remained under the regulation regime (margin). In 2018, the CPA also conducted a survey of the relevant market in the light of the assessment of the complete deregulation of the remaining regulated prices - NMB 95 and diesel and the expected effects on competition.

17. The motor fuel market is considered to be a market for homogeneous products, which is subject to stable and inelastic demand and is controlled by two major, both vertically related companies in Slovenia, with the largest company holding 61% and the second largest by 21% of all service stations. In total sales, the two companies together control about 87% of the market.

18. In the context of regulated prices (or margins) of motor fuels, the CPA did not detect elements whose aim or effect would be to prevent, restrict or distort competition on the territory of the Republic of Slovenia. Thus, it did not detect any suspicions of pricing or other business conditions related to the purchase or sale of motor fuels, market sharing among participants, or abuse of a dominant position by one or more companies.

19. However, the CPA has identified high entry barriers in the already highly concentrated motor fuel market, which is subject to a small number of players with high market shares, both in the wholesale and retail markets for motor fuels. Among the biggest barriers to entry is the legislation on the location of a petrol station, which averages 7 years. Due to entry barriers and a highly concentrated market, the CPA does not expect new competitors to enter it any time soon, as evidenced by the sale of one of the two discount motor fuel suppliers to the second largest competitor in 2016.

20. The market structure itself is problematic in terms of the existence of competition between undertakings, as it enables small number of participants to act in a coordinated way, even in the absence of various restrictive practices, namely 'silent collusion', where smaller competitors only follow larger ones. It must be stressed, that the market for motor fuels in general, where in the structure of the price the main cost component is the purchase price of the goods, in circumstances of lack of competition, the rockets and feathers effect may appear. That means the asymmetric adjustment of retail prices to changes in raw material prices is plausible. It has been demonstrated empirically that retail prices adapt rapidly and fully to the rise in raw material prices, while the response to the fall in raw material prices is slower and not entire. The CPA considered that under the conditions prevailing in the Slovenian motor fuels market, given the existing market structure (highly concentrated market with a small number of participants where two large vertically integrated companies together control a larger part of the market), with identified barriers to entry, free pricing, the same rockets and feathers effect could occur as is perceived in other countries in Europe. There would also be a risk of various cartel agreements, especially the so-called 'silent collusion'.

21. At the same time, CPA noticed that following the release or deregulation of prices of NMB 98/100 and KOEL in 2016, the biggest fuel distributors stopped publicly posting individual fuel prices on roadside displays at service stations, reducing the provision of public information on the prices of motor fuels. Therefore, in its findings, the CPA pointed out that, should the prices of motor fuels be released, a system should be set up to monitor and publicly announce the retail prices of all motor fuels, i.e. all petrol, diesel and motor gases (LPG, natural gas) at all providers and locations, thereby providing the conditions for transparent consumer information on the prices of motor fuels, allowing them to compare prices and thus to choose a more favorable supplier.

22. The government, without prejudice to the CPA's concerns, on 1 October 2020 completely deregulated the price regulation of motor fuels, including the NMB 95 and diesel throughout the territory, not only on the highway and motorway network, on the grounds that this could lead to the entry of new discount fuel providers, in particular at the parking areas of shopping centers. According to the government, the entry of new entrants would not lead to further increase in margins and thus an increase in the prices of petroleum products, since, within five years following the deregulation of the prices of all petroleum products, the margins would reach a margin comparable to that of other EU Member States. The CPA market study in this case had no influence on the decision of the decision makers.

23. Market study can greatly help the CPA to shape the situation in individual markets and to formulate recommendations to decision makers, but it does not have the possibility of direct influence on decision-making.

### **3.2. Advantages and constraints of market studies**

24. The advantages of market research are, in particular, a comprehensive insight into the functioning of a particular market, the detection of distortions in the market and the connection for decisions on possible action, in particular the introduction of procedures. On the other hand, the CPA can make quality recommendations for decision-makers who draft legislation with a direct impact on the relevant market. Market studies also contribute to the advocacy of competition protection by making the results of the studies publicly available, so the media summarize them in their contributions, comment and often ask for additional information. This shifts the role of the competition protection regulator from curative to preventive activities, and awareness of the importance of the protection of competition increases significantly in the general public as a result of these activities, which could, at best, lead to self-regulation.

25. Weaknesses of market research are mainly reflected in time and human resources. They require analytical and technical knowledge and adequate time to prepare obtain and analyse information. It is particularly burdensome in time, as it is necessary to analyse a large number of data and determine the correlation between them. Market research, which includes the analysis of consumer behaviour, represents an additional financial burden, as it makes sense to hire an external contractor, specialized in conducting public opinion polls to conduct a consumer survey. Such providers have an effective approach to well-defined relevant target groups, with the collection of information on preferences being combined online, by telephone and, in individual cases, by field interviewers.

### 3.3. Suitability of market studies

26. CPA considers that a market study is the most appropriate tool in the case of perceived distortions on the market, but are somewhat less appropriate as part of the procedures themselves, since they are time and staff consuming. The parties involved in the process may also accuse the CPA of disproportionate treatment and procrastination, especially in the case of merger assessment (acquisition of non-merger specific information).

27. Market research also makes a significant contribution to advocating for the protection of competition in public and to affirming the work of competition protection authority, especially in countries where advocacy is not yet sufficiently developed. The state of understanding of the protection of competition in public is determined by each individual country from journalistic and social media, directly addressed requests, questions and comments of individuals received by the authority.

### 3.4. Improvements in the implementation of market studies

28. In order to carry out market research effectively, it is necessary to consider barriers and assess the possibilities of reducing or eliminating them. As already mentioned, the biggest limitations are in personnel and finances, which is usually difficult to upgrade due to legal and budgetary constraints. As these two factors are generally constant, it is necessary to look towards the possibilities of more efficient work with limited resources. An important limiting factor is time.

29. CPA may point out the cooperation with the University of Ljubljana - Faculty of Social Sciences and its Centre for Social Informatics, which developed the open source program named «1KA»<sup>3</sup>, as a good practice of shortening the time in conducting market studies. In the past, the CPA generally collected information in physical form, i.e. by sending large questionnaires in the form of requests for data transmission and, consequently, by analysing even more extensive responses, which in most cases had to be copied into databases, which then served as the basis for analysis. This work was very time-consuming for the CPA and often took several months. CPA found that the input of data by respondents directly online, taking into account security protocols, would directly create a rough database, the preparation of which would take much less time than compiling the database in the case of physical data acquisition. The University has partially adapted the 1KA system for the CPA, so that the CPA has a specific domain, logos and some minor adjustments in the design of questionnaires. Although 1KA is intended primarily for conducting wider population surveys, CPA uses it as a tool for data acquisition mostly from known addressees to whom it still addresses a request for data in physical form, with instructions on completing the questionnaire in an e-form. Respondents are also no longer obliged to provide answers in physical form. There is also a reduction in the workload of the main office (secretariat), which must record all received documents. The electronic collection of data and information is also favourable from the point of view of directing respondents when entering answers. There are possible conditional questions and sub-questions (“if” loop), clearly defined number entries, selection of responses from pre-prepared lists and similar, which also reduces the time for the respondents themselves.

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See <https://www.1ka.si/d/en>.<sup>3</sup>

30. The 1KA system in the basic version is free of charge for use but the costs of adjustment and annual maintenance are also financially advantageous for CPA due to its non-commercial nature. Furthermore, this is a good example of quality cooperation between various public sector institutions.

31. Of course, an electronic data and information collection system is not the ultimate solution. The CPA also attempted to gather information from the general public by collecting consumer preferences as part of a process to identify the relevant market, but the response was weak. The CPA received only between 200 and 300 responses, while e.g. public opinion analysis conducted by research companies use a database of approximately 1000 correct and complete answers of respondents in the required structure to ensure a sufficiently high probability, as required by the client (age, gender, revenue, geographical balance, etc.). Motivating the public to complete the questionnaires is very demanding and thus represents a major challenge for the CPA in the future use of this tool.