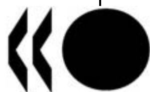
For Official Use **DAF/COMP/WP3/WD(2010)42**



Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **01-Jun-2010**

English - Or. English

DAF/COMP/WP3/WD(2010)42
For Official Use

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

-- Slovak Republic --

15 June 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

English - Or. English

JT03284500

Document complet disponible sur OLIS dans son format d'origine
Complete document available on OLIS in its original format

1. Decision - making process

1.1 General information

1. The Antimonopoly Office of the Slovak Republic (hereinafter only „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. 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.

2. The Act on Protection of Competition[1] and the Decrees[2] define the status of the Office, its powers and 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.

3. Slovak administrative enforcement procedure is defined as two instance procedure.

4. The Office has three executive divisions – first instance decision making bodies- dealing with the three main types of conduct defined in the Act on Protection of Competition (agreements restricting competition, abuse of dominant position, control of concentrations). These are responsible for investigation and for issuing the first-instance decisions, thus these divisions accumulate both investigatory and decision making powers.

5. A party to the proceedings has a right to lodge an appeal against the decision of the Office issued in the first-instance proceedings. The appeal is decided by the Council of the Office consisting of 7 members – the Chairman of the Office, the Deputy Chairman of the Office and 5 external experts – lawyers and economists. The Council of the Office will review the entire procedure of the first-instance body, complete evidence if necessary and issue a decision. 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 the party to the proceedings disagrees with the decision of the Council of the Office, they may file an action against it to the Regional Court Bratislava and subsequently to the Supreme Court of the Slovak Republic. Both of them are general courts not specialised in competition matters. The court may uphold the decision or annul it and return the case to new proceedings, or modify the sanction that was imposed.

---

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/files/30/2009/Act%20136-2001-novela-aj.rtf).

2 Decree No. 204 of the Antimonopoly Office of the Slovak Republic laying down details of particulars of a notification of concentration, Decree No. 269 of the Antimonopoly Office of the Slovak Republic laying down details of the calculation of turnover.

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

4 http://www.antimon.gov.sk/574/directives-and-guidelines.axd; http://www.antimon.gov.sk/165/smernice-a-usmernenia.axd.

7. Pursuant to Act on Protection of Competition the Office initiates administrative proceedings ex officio in antitrust cases. With regard to merger control, the notification of concentration opens the administrative proceedings.

1.2 What procedures does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation? Are independent teams used internally? Is there an independent review of the case by specialized economists? Are there other channels of input directly to the decision-makers? Are outside analysts or experts used to help decision-makers? What other techniques or practices has your agency adopted to promote sound decision-making?

8. Every case is investigated by the team of case handlers which process the case throughout the proceedings from the beginning of the proceedings (investigation) to the decision, i.e. opens proceedings, is involved in every investigatory measure, is involved in drafting of Statement of Objections, participates in hearing, drafting of the decision which is issued by their division. The decision on investigatory measures to be taken, procedural steps and the final decision itself is fully in competence of the director of the relevant division.

9. Since the first instance decision body, as mentioned above accumulates both investigatory and decision making powers, the Office has to ensure the objectivity of the decision making process. One of the guarantees is the already mentioned possibility of the appeal of the decision of the first instance body to the Council of the Office.

10. Last year, the Office has also introduced the multi-stage assessment of cases. Within the first phase the case handlers prepare the report in uniform structure which is discussed with the economic collegium in order to ensure the gradual enforcement of more economic approach. Within the second phase, the case handlers consult the case with the economic collegium and with the Legal Division prior issuing the decision. After completing the case the case handlers make short conclusions (lessons learned) together with economic collegium and with the Legal Division.

11. The economic collegium was established with the aim towards more effect based approach to avoid formalistic approach in the decisions. The multi-stage assessment of cases should ensure “second pair of eyes” during cases – and it is supposed to be one of the Office’s checks and balances.

12. Such system also ensures that the team of case handlers considers all relevant evidence and remains opened to considering different explanations for the conduct under investigation.

13. It might be worth mentioning with regard to the issue of decision-making process, that this issue was challenged before court, in particular the issue of concentration of powers in one division that investigates cases, decides and imposes the sanction. However, the court did not follow the opinion of the party. The decision-making process is established by law and the review of the independent court is considered as sufficient mechanism in line with the ECHR.

14. Since the decisions of the Council of the Office can be further appealed to the court, the procedure and investigatory measures taken are examined by the court. Within the judicial review court also examines whether the Office has heard the opinion and arguments of the party to the proceedings and the reasons why these were rejected. Office is therefore very careful already during the administrative proceedings and reacts to all of the objections of the parties as well as observes their rights, namely the right to be heard in this regard.

15. Outside analysts' or experts' views are used in the proceedings pursuant to Administrative Code when it is necessary for consideration of facts inevitable for the decision. These might be expert views from specific industries to consider particular questions.

16. With regard to economic analysis of the Office, these are provided by the economists of the Office (economic collegium). So far, the Office has not outsourced any economic work.

2. Confidentiality

2.1 General information

17. The information necessary for the purposes of the market investigation or administrative proceedings often contain information which the undertaking concerned strives to protect because of its possible business value.

18. There is no general definition of confidential information. In the Slovak legal system, business secret is protected and the definition is stipulated by the Commercial Code. According to this definition, the business secret encompasses all information of business, production or technical nature related to undertaking, having real or possible material or immaterial value, not generally available in the respective business circles, and which the undertaking wants to protect and whose protection is secured by the undertaking. All these conditions must be fulfilled in a cumulative way in order to enjoy the protection guaranteed by the Commercial Code. The business secret is an institute of private law and belongs to the proprietary rights. The protection pursuant the Commercial Code contains the right to require the transgressor to refrain from the illegal conduct and the right to compensation. If the infringement is of serious intensity, it can constitute a crime defined by the Penal Code.

19. The Office is entitled to ask undertakings to provide also information having the nature of business secret. The Act on Protection of Competition provides guarantees for the undertaking that its business secret will be protected by the Office against the other parties to the proceedings, third parties and the public. In addition, the Act on Protection of Competition enables to protect also confidential information. This category of information is not defined, however, all sensitive information other than business secret, disclosure of which would be able to harm the undertaking, will be characterised as confidential.

20. The Office protects information which confidentiality it has been asked to maintain. Confidentiality of such information shall, however, constitute no obstacle to its disclosure if this is necessary for a decision and if a party to the proceedings does not provide any other wording of the information and documents that does not contain business secrets or is not confidential. However, it is necessary to note, that the special legislation on free access to information does not provide the same standard of protection of the information in administrative file as the Act on Protection of Competition which, as mentioned further, causes practical problems.

21. The Administrative Code states that when granting access to a file an administrative body is obliged to take measures to ensure that a business secret is not violated.

22. In any stage of proceedings any person has right to ask the Office to provide information under the Act No. 211/2000 Coll. on Free Access to Information (“Information Act”). Under this law the Office is obliged to provide any information that it has at its disposal. But under the Information Act the Office shall protect business secret. The Information Act is generally applicable to all administrative bodies and ensures the constitutional right to information. The Office does not dispute the general aim of this Act, however, due to the nature of the proceedings before the Office it does not seem to be appropriate to give the public the general access to the file and it poses practical problems in ensuring the course of the

investigation. The Information Act recognizes the protection of business secret but not the protection of confidential information in general.

23. So far there was quite formal approach employed by the Office putting more stress on the protection of the business secret due to the abovementioned wording of the Administrative Code.

24. Recently, in order to reflect the issues occurred during the decisional practice of the Office, the objections raised by the undertakings and their legal representatives as well as the constantly increasing stress on standards of procedural rights emphasised also by the courts, the Office started to apply a more flexible and balanced approach. The Office revised the internal rules and adopted new measures which it believes could ensure both the procedural fairness and the protection of private interests and the public interest on revealing the violation of competition law. The way the Office intends to balance these opposing interests is modelled after the European commission's approach taking into account the particularities of the national substantive and procedural rules.

25. There is not much practical experience in this field so far and also no judgments of the relevant court concerning this matter. However, in this regard especially the judgments of the relevant courts are considered to be decisive in adjusting the approach of the Office.

2.2 How does your agency balance a defendants′ right to review and respond to evidence that will be used against it with the need to protect confidentiality?

26. If the confidential information constitutes the basis for the decision or is of inculpatory or exculpatory nature, the Office has to assess the conflict between the protection of the private claim on protection of business secrecy, the undertaking's right to fair proceedings and the public interest in bringing into light the infringement of competition law. This is done on a case-by-case basis. The following aspects are taken into consideration:

- the evidential significance of the information for proving the infringement
- the sensitivity of the information, it means to what extent the disclosure of the said information is able to harm the undertaking
- the seriousness of the infringement under investigation.

2.3 Are there special procedures available for disclosure necessary to protect rights of defence, e.g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses?

27. There are no special procedures established so far with regard to the disclosure of documents inevitable to exercise rights of defence (in the meaning of exculpatory evidence, where other manners of disclosure mentioned above are not possible, such as description of the relevant issue without direct disclosure of confidential information,). The Office holds the opinion that it is preferable to limit the disclosure to the legal representatives so as to guarantee the most possible protection against the other parties to the proceedings or third parties. However, the Office can not force by any means the undertakings to appoint a legal representative and also such cases, where the undertaking acts on its own during the proceedings, may occur. These cases will be dealt on a case-by-case basis so as to ensure the maximal possible protection of the confidential information on one hand and the observance of the rights of defence on the other one.

2.4 How is confidential information defined?

28. As described above, there are two categories of protected information, the business secret defined in the Commercial Code and confidential information recognized by the Act on Protection of Competition.

2.5 What rules apply to the protection of confidential information obtained from the parties by your agency? Is such information automatically considered to be confidential, or does the party have to identify it as such? If such information is to be disclosed to other parties or made public, does the party have a prior right to object to the disclosure?

29. The Office is entitled to ask for all information necessary for performing its duties under the Act on Protection of Competition. The Office is required to inform a party to the proceedings at the beginning of the proceedings that they may indicate which of the information or documents provided to the Office they consider being subject to business secret or which of the information or documents they consider confidential.

30. Firstly the Office examines whether the information designed as confidential/business secret really fulfils the characteristics of such information as defined in the Commercial Code. The party to the proceedings must substantiate in writing the confidentiality of information or documents or their designation as business secrets. If, on the basis of the preliminary assessment of the Office, the information really is of such nature that merits protection, the Office may ask the party to the proceedings to provide a different wording of information or documents that does not contain business secrets or does not have a confidential character (non-confidential version).

31. The business secret and confidential information are kept separately from the file accessible to the parties to the proceedings. If the access to these documents is required the Office will proceed as described above and balance the possible opposing interests.

32. If the Office comes to the conclusion that although the information contains business secret or is confidential, other interest prevails and it is necessary to give access to the information, the Office informs the undertaking concerned and asks for disclosure of the document, a more meaningful non-confidential version or granting access only to the legal representative without the possibility of making copies of the document.

2.6 How does your agency balance the benefits of public disclosure of ongoing investigation with the need to respect confidentiality of target proceedings and possible effects on their reputation?

33. The Office is obliged under the Act on Protection of Competition to publish information on all initiated proceedings. This obligation relies on general information on the proceedings and the parties concerned without the need to deal with detailed aspects of the case. In general the Office does not consider the public disclosure of the particularities of the investigation to be beneficial for the course of the proceedings. On the other hand, as described in the introduction, there is the Information Act which enables any person without the need to demonstrate any legal interest to get access to all information which the Office has at its disposal, i.e. all information contained in the file except for some exceptions (business secrets, personal information etc.). It has already happened that some undertakings subject to investigation claimed their reputation being distorted due to the information on the proceedings published or disclosed, but the Office referred to its duties under the Act of Protection of Competition. There have been no legal proceedings concerning such claims so far.

2.7 What are the penalties for negligent /intentional violation of confidentiality rules?

34. Office employees are required to maintain confidentiality of information subject to business secret or designated as confidential, of which they become aware during the course of the proceedings, subject to some exceptions stated by the Act on Protection of Competition or other legislation (criminal prosecution etc.). Violation of this duty may be subject to penalties under labour law.

35. On the basis of the provisions on business secret contained in Commercial Code the undertaking whose business secret has been endangered or violated, may require the transgressor to refrain from the illegal conduct and has the right of compensation. The assessment is subject to private litigation before the court. Afterwards, if the Office is obliged to pay compensation it is required to ask for recompensation from the particular employee/employees responsible for the damage.

36. Under the Criminal Code the one who intentionally violates the business secret is subject to custodial sentence.

3. Requests for information to targets of investigation

3.1 General information

37. The Office is entitled to ask for all information it considers to be necessary for the performance of its tasks stated by the Act on Protection of Competition. Undertakings are required to submit to the Office the requested information and documents, allow an examination of this information or these documents, cooperate with the Office in their examination, and to allow employees of the Office, employees of another national competition authority, and employees of and persons authorized by the European Commission to enter all buildings, premises and means of transport of the undertakings.

38. Information or documents obtained by the Office may only be used for the purpose of the proceedings according to the Act, unless special legislation provides otherwise.

39. The procedure concerning requests for information does not differ depending on whether the requested body is party to the proceedings or other undertaking.

40. Undertakings not complying with the obligation to supply the requested information are subject to fines under the Act on Protection of Competition.

41. The Office has power to impose sanction for procedural violation in separate proceedings of up to 1% of total turnover of undertaking ("stand- alone") or to consider obstruction in proceedings as an aggravating circumstance, i.e. increase the fine that is being imposed.

42. Before June 2009, the legislative maximum of fine for procedural breaches was of up to 5 mil SKK, which was about 166 000 EUR. Since amendment to Act on Protection of Competition in June 2009, the legislative maximum is 1% of the total turnover of the undertaking.

43. However, concerning requests for information in sector inquiries, the Office does not request information under the sanction of non-cooperation.

3.2 Does your agency have procedures to review information requests with the party?

44. No formal procedures exist. However, if a request for information is sent to the undertaking, the undertaking may contact the respective case-handler or director of the division and ask for clarification,

additional explanation etc. if necessary and thus avoid the risk of submitting incomplete or incorrect information.

3.3 Is the party informed of the theory of the case and reasons for requesting the information?

45. Yes, in the introduction of the information request the Office describes in general the purpose and subject-matter of the investigation. The description of the case depends on the stage of the investigation/proceedings at which the information is requested.

3.4 Can the party ask for reconsideration of the information requested and /or deadlines, or appeal to a reviewing office within agency?

46. Once the request for information is sent to the undertaking (irrespective of whether it is a party to the proceedings or other undertaking) the Office stipulates also the period within which the information has to be supplied. As stated above, the undertaking may contact the respective case-handler or division and ask for clarification, additional explanation etc. if necessary and so avoid the risk of submitting incomplete or incorrect information. This can be done formally in writing or also in an informal way. If the undertaking is not able to submit the information within the stipulated period, it can formally ask for prolongation of the period but has to substantiate it. Such request is handled by the division of the Office carrying out the investigation/proceedings in question.

47. In terms of formal proceedings on imposition of fines for procedural breaches, the procedure is identical to those concerning the substantial breaches, i.e. the first-instance decision is issued by the respective division of the Office and can be appealed to the Council of the Office. Afterwards, the decisions can be subject to judicial review.

3.5 Do procedures and practices differ if the addressee of the request for information is not a party to the proceeding?

48. No, the procedures are identical for parties to the proceedings and other requested undertakings. As regards fines for submitting incomplete, incorrect or misleading information, these can be imposed in separate proceedings on parties to the proceedings and also on undertaking which are not parties to the proceedings. In addition, concerning the party to the proceedings, the Office can consider obstruction in proceedings as an aggravating circumstance, i.e. increase the fine that is being imposed for substantial breaches.

4. Agreed Resolutions of Enforcement Proceedings

At what stage or stages of an investigation and/or litigation can the parties resolve an enforcement matter by means of a mutually agreed disposition with your agency? Are there restrictions on the types of cases that can be settled in this manner? Does your agency actively seek to settle cases?

49. Pursuant to Act on Protection of Competition, once the Office establishes that the Act on Protection of Competition was infringed, it must impose the sanction on undertaking.

50. However, the Act on Protection of Competition provides also for possibility for commitment decisions where the finding of the infringement is absent and the sanction is not imposed.

4.1 Commitment decisions

51. Art. 8a of Act on Protection of Competition introduces the possibility for undertakings to submit voluntarily commitments that are intended to address the competition concerns identified by the Office. Pursuant to Art. 8a of Act on Protection of Competition the Office may end proceedings started for the possible violation of antitrust rules (agreements restricting competition and abuse of dominant position) by means of a decision imposing on an undertaking the requirement to fulfil the commitments submitted by the undertaking to the Office for the purpose of elimination of possible restriction of competition. The Office may issue this decision for a specific time period. The main advantage for undertakings in this regard is the absence of finding the infringement and thus the absence of fine. Since the commitments are proposed by the undertaking and accepted by the Office, the proceedings are shorter and the remedies are quickly implemented in the market to the benefit of the competition and consumers.

52. The Act on Protection of Competition does not set any time limit as to when the commitments should be proposed; therefore the undertakings may contact the Office at any stage of the proceedings. The Office encourages that the undertakings communicate their will to discuss the possibilities of the commitment procedure at the earliest stage of the proceedings. On the other hand, the undertaking should propose the commitments until the date of the issuance of the decision at the latest, this means they should react to the Statement of Objections.

53. The Office may modify or reverse a commitment decision on its own incentive if:

- the conditions that were decisive for issuing the decision substantially changed after the issuance of the decision;
- the undertaking fails to fulfil the commitments imposed by the Office's decision; or
- information provided by the undertaking, which was decisive for issuing the decision, was incomplete or false.

4.2 Settlement procedure

54. Although, the procedural legal framework lacks specific provisions on settlement procedures, the Office, approached by the undertakings with requests for settlement, has implemented this institute in practice, and has applied it so far in cases of vertical agreements restricting competition.

55. However, possible legislative amendment that would allow establishing similar direct settlement regime to the European Commission’s proceedings[5] is being contemplated by the Office.

5. Judicial Review and Interim Relief

At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred? What level of deference does the judicial body grant to the agency’s decision? If the agency’s decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on that sanction or remedy? Can the judicial body

[5] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (Text with EEA relevance), Official Journal C 167, 2.7.2008, p. 1–6.

grant interim relief? What is the timing of the review by the judicial body, and are there procedures for expedited review of time-sensitive business transactions or conduct?

5.1 General information about the legal framework

56. The decision of the Council of the Office is the final and enforceable decision of the Office. An action against the decision of the Office can be filed to the Regional Court in Bratislava. The court *can grant a stay of execution of the decision* of the Office upon a request of applicant until the final decision of the court.

57. The court has power to dismiss the action and uphold the decision of the Office, to annul the decision of the Office or modify the sanction that was imposed by the Office.

58. The decision of the Regional Court in Bratislava can be further appealed to the Supreme Court of the Slovak Republic. The appellant may appeal always against the decision of the Regional Court when it does not meet all his complaints, the Office's right to appeal is limited, depending on the reasons for which the contested decision was annulled.

59. The judgment of the Supreme Court is the final decision.

5.2 Jurisdiction of the court. Deference to the agency's decision. Possibility to hold the trial de novo

60. In the past, the Code of the Civil Procedure as well as the case law established that the courts, reviewing administrative decisions of the public authorities have only the competence to review the legality of the decision and cannot challenge the decision on facts, i.e. the full jurisdiction was not applied. Therefore, it was repeatedly held by courts that the only public authority that can make conclusions whether *the violation of competition law has occurred* is the Office.

61. However, after some amendments to the Code of Civil Procedure, the courts were empowered to amend the decision of public authorities, in the case of the Office – the court was empowered to reduce the sanction that was imposed. The court was also empowered to propose and weigh new evidence in this regard and therefore the new approach started to be applied by courts, giving different opinions on the question of full jurisdiction. In some cases the decision of the Office was challenged on facts and law, as the court held the opinion that it has the full jurisdiction. Although, this opinion was overruled lately in one case by Supreme Court, this question is still being discussed.

62. If the court annuls the decision of the Office, it returns the decision of the Office for further proceedings. The legal opinion of the court should be reflected in further proceedings. Thus, the Office has the duty to continue in proceedings, however this can also mean that the Office might stop the proceedings for lack of evidence, etc., depending on the reasons that were given by court for the annulment.

63. In most cases, the court usually annuls the decision of the Office for procedural reasons, although these sometimes have also the fact – finding background – in other words, also the decision on merits was challenged. So far, there hasn't been a case where the Office would stop the proceedings after the case was returned by court back to the Office. Although, in one case (against Slovak Bar Association[6]) the Office continued proceedings only partially, i.e. the Office did not continue proceedings on question where court expressed different opinion and did not see the breach of competition rules – had different legal opinion, but agreed with the rest of the decision (three types of restriction were covered by one decision). Since the

6 2S 380/2006-100, 2 Sžh 3/2007.

court cannot uphold or annul the decision of the Office only partially, the whole case was returned to the Office. The decisions of the Office were annulled in most cases for procedural reasons; however there has never been a case where the decision of the Office would be annulled because the rights of the parties to the proceedings were not observed. The procedural reasons for the annulment of the decision of the Office were mostly the insufficiently reasoned decision, inarticulacy of the decision and the operative part of the decision, insufficient indication of the place time and manner of the conduct in question in the operative part of the decision, etc.

5.3 Timing of the review

64. Concerning the *timing* of the review, the courts are not limited in time on their judicial review of the decisions of public authorities due to independency of the courts.

65. Review proceedings before courts in competition matters last from 1 year up to 5 years.

66. This is on the one hand understandable as the court reviewing the decisions of the Office is the court of general jurisdiction for the review of all decisions of all administrative/public authorities which means deciding cases in the environmental law, social security, tax law, etc. On the other hand, if the judicial review proceedings take too long, the interventions of the Office do not promptly reflex the situation in market, which has negative social and economic effects - market lacks the remedy. The remedies are however needed especially in lately liberalized markets such as telecommunications, energy, etc.