

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by Slovak Republic****4 June 2019**

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More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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Slovak Republic

1. General background information. Administrative procedures regarding infringements of competition law

1. The Antimonopoly Office of the Slovak Republic (hereinafter referred to as „the Office“) is an independent central body of the state administration of the Slovak Republic and it is the only body entrusted with application of the competition rules in the Slovak Republic, 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”).

2. The Act on Protection of Competition¹ and the Decrees² define the status of the Office, its powers, duties and proceedings. The procedures are subsidiary regulated by the general Administrative Code of Procedure³ (hereinafter referred to as “Administrative Code”). The Office issues also guidelines⁴ on different issues, which further explain the procedure and practice of the Office.

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

4. Criminal enforcement of anticompetitive practices is enshrined in Penal Code⁵. The Penal Code provides a definition of criminal act for the abuse of participation in competition. This criminal conduct according to the provisions of the Penal Code is referred to as the breach of the Act on the Protection of the Competition, which results in a considerable harm to the other competitor or threatens an operation or development of his entrepreneurial subject. The responsible/criminally sanctioned person might be only natural person.

5. However, it is important to note, that the proceedings and investigation of the Office according to the Act on Protection of Competition are purely of administrative nature. The sanctions imposed are also administrative while criminal act pursuant to the provisions of the Penal Code would be investigated by the police/prosecutor and the charges are brought before court in criminal proceedings. Possible punishment is the imprisonment for up to 3 years or a pecuniary sanction. We are not aware about any criminal investigation. Therefore, we further refer only to the administrative enforcement.

6. Slovak competition enforcement procedure is defined as two instance administrative procedure. First instance administrative decision passed by the relevant

¹ Act 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 Organization of Ministries and Other Central Bodies of State Administration of the Slovak Republic as amended as amended (further in the text as “the Act on the Protection of Competition”)

<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/>

⁵ Act. No. 300/2005 Coll. Penal Code

division is subject to administrative appeal to the Council of the Office consisting of seven members – the Chairman of the Office and six 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.

7. 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.

8. The judicial review of decisions of the Office is ensured via general courts.

1.1. Review by courts

9. In the past, the review process was regulated by the Code of the Civil Procedure⁶ pursuant to which (including some amendments overtime), the courts were assigned full jurisdiction with regard the review of administrative decisions. Courts were empowered to amend the decisions 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.

10. Within the recodification of the civil process in 2015, the new Code on Judicial Proceedings in Administrative Cases⁷ 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.

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

12. Regional Court in Bratislava (hereinafter referred to as “Regional Court”) is the competent court to review the decisions of the Office. Decisions with commitments or settlement decisions are not explicitly excluded from the review. 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 considered as necessary.

13. 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.

14. Pursuant to the new Procedural Code 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.

15. The Regional Court, as well as the Supreme Court, is a general court without the specialization 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

⁶ Act. No. 99/1963 Coll. Code of the Civil Procedure as amended

⁷ Act. No 162/2015 Coll. Code on Judicial Proceedings in Administrative Cases (further in the text only “Procedural Code”)

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.

16. 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.

17. 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.

18. 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.

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

- actions against “other intervention” pursuant to the Art. 252 of the Procedural Code and
- actions against the decision of the Office.

20. Agenda of the actions against “other interventions” concerns cases where a natural or legal person claims their rights have been breached by the intervention of the public authority⁸, in this case by the intervention 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 brought to court under the *action against other intervention of the public authority*. So far, we do not have experience that a party would file such action against statement of objections, however, we do not think it would be allowed under this instrument. Statement of objections would and should be reviewed within review proceedings of the final decision of the Office.

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

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

⁸ This action refers to any intervention of any public authority, not only the intervention of the Office

1.2. Reviewing economic evidence

23. 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. Regarding the judicial review it is presumed, that the decision of the Office subject to review is the final one⁹ and it should contain answers to all relevant objections of the undertakings concerned in the case. It has to be understandable, reviewable and legal. Therefore, it might by a reason why in most cases the Office has experienced so far, courts did not repeat the evidence in hearings.

24. Pursuant to Art. 119 of the Procedural Code, courts should rely on the facts established by the public authority, however, they may carry out the evidence necessary to examine the legality of the contested decision.

25. In the view of the above-mentioned, the Regional Court can allow new evidence to be presented in the review proceedings. However, the administrative judiciary is largely based on a review of the legality of the already established factual and legal relationship, and therefore new evidence in the administrative judiciary could be, in our view, presented to a limited extent (when an undertaking could not present it due to objective reasons in the administrative proceedings). Thus, if the court carries out the evidence in the administrative proceedings, it should be non-extensive, in a sense, that it is not as comprehensive as the investigation, i. e. the process of evidence gathering carried out by the Office. Thus, the purpose of administrative justice is not to allow for extensive new evidence and subsequently to draw factual conclusions from it, since the purpose and substance of the administrative judiciary is to provide effective protection to the individual rights of natural and legal persons under Art. 46 para. 2 of the Constitution of the Slovak Republic, namely whether the competent authorities respected the relevant substantive and procedural laws when dealing with certain issues defined by the application.

26. Although the court may, in the course of legal proceedings, consider new evidence, it should be pointed out that the proceedings of the court to review the legality of an administrative decision should not serve as an extension or continuation of the administrative proceedings, respectively the court should not replace the activity/proceedings of an administrative authority, i. e. the Office.

27. Additionally, pursuant to Art. 123 of the Procedural Code the court has also the power to hear experts, however, we do not have the experience with the court bringing an expert on its own initiative.

28. In one dominant abuse case, 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 experts –economists. Court suggested 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 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.

29. 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. Therefore,

⁹ i. e. the decision of the Office in second instance- the decision of The Council of the Office

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 (however, we are aware that judges participated in several projects of special training in competition law). 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.

30. In general, we may say that we have noticed increasing trend of courts expecting that the arguments of the Office are supported with relevant evidence, e.g. with relevant economic analysis. In cases where any discrepancy arise, or somethings is imprecise, it is possible to see the tendency of the courts to return the case for further proceedings to the Office due to insufficiently established facts, rather than establishing experts.

1.3. Duration of the court cases

31. Before summarizing the average duration of the court proceedings concerning judicial review in competition case, it is important to repeat, that in the Slovak legal system, there are two main areas of judicial review - one concerning the actions against other interventions of the public authority and the other actions against the decision of the public authority.

32. The action against other intervention of the public authority could be filed pursuant to the Art. 252 of the Procedural Code by the undertaking, or natural person who think, that their rights have been breached by the intervention of the public authority 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 intervention. It can be stated, that in cases of timely filed actions against the other interventions of the public authority, in the case the Office, most of the cases were resolved in due time, within one year from the date of filed action.

33. Also, beneficial for the overall duration of the judicial review process is the instrument implemented in proceedings in administrative cases by the Procedural Code, when the 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.

34. Concerning the duration of the judicial review against the decision of the Office, the cases proceedings lasted on average 23 months – 1 year and 11 months in the court of first instance (Regional Court) and 22 months - 1 year and 10 months by the cassation court (Supreme Court). This data concerns the average duration of cases that were closed in 2018. With regard the actions against the interventions of the Office, mainly inspections, almost all cases were decided within 1 year, some within a few months. This refers to the review conducted by the Supreme Court (these proceedings used to be only one-instance proceedings).

2. Review of selected cases

35. The Office had a few cases in the past which were subject to judicial review and were more technical or complex and complicated. Especially judicial review of cases of abuse of dominant position are usually of longer duration. In the past, the Office experienced not only difficulties with explaining technicalities or economics behind the case but also with pursuing legal concepts typical for competition law and unknown to the traditional legal system of so called *administrative offences* to which the competition law infringements belong to within the national legal framework. Courts tend to concentrate on the procedural issues and in cases that were more complex, it happened that these were annulled due to insufficient justification, i.e. reasoning of the decision.

36. One of the cases we would like to point out concerns the issue of possibility to impose the sanction for the abuse of dominant position on the basis of general clause prohibiting the abuse of dominant position with regard the *nulla poena sine lege* principle. Legal provisions prohibiting abuse of dominant position in the Act on Protection of Competition are constructed as a general clause prohibiting abuse of dominant position with the list of examples of main types of conduct that are prohibited, such as

1. direct or indirect application of unfair prices or other unfair trading conditions;
2. limiting production, markets or technical development to the prejudice of consumers;
3. applying dissimilar conditions to equivalent or comparable transactions with other undertakings, which places or may place them at a competitive disadvantage; or
4. making the conclusion of contract subject to acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

37. This list of abusive practices is non-exhaustive one.

38. As the Office is empowered as the national competition authority pursuant to 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 (hereinafter referred to as “Regulation 1/2003”) (nowadays 101 and 102 TFEU) to apply articles 101 and 102 TFEU, which prohibit agreements restricting competition as well as abuse of dominant position. National provisions are constructed in the same way as the EU law. In the case of E-k, the Office has sanctioned undertaking for the abuse of dominant position¹⁰. Since it was not possible to assign the conduct in question to the specific type of the abuse of dominant position listed in the art. 102 TFEU, letter a) to d) or national counterparts, the Office prohibited the conduct and imposed the sanction on the basis of general prohibition of the abuse, however, the description of the conduct was of course given.

39. The first instance court, Regional Court, annulled the decision of the Office. The court was of the opinion¹¹ that the sanctioning of the undertaking is in line with the *nulla poena sine lege principle* possible only when the prohibited conduct is defined by the law.

¹⁰ Decision No. 2010/DZ/R/2/049, the name of the undertaking was anonymized

¹¹ This was not the only issue in the case as well as subject of the European Commission’s observations but for the purpose of this submission, we do not go further into the details of the case.

In the absence of such definition/stipulation and in the absence of case law defining such behavior as prohibited, it is not possible to impose the sanction for such behavior, although it is possible to state that such behavior is illegal. The Office appealed this judgement. European Commission has intervened in the case as *amicus curiae* pursuant to the art. 15 (3) of Regulation 1/2003 which provides the possibility of the European Commission to submit written observations to courts of the Member States and to make oral observations where coherent application of the art. 101 or 102 TFEU so requires. In its written observations¹² European Commission argued that it was settled case-law that the list of abusive practices set out in the second paragraph of Article 102 TFEU is not exhaustive and that, therefore, bundling or tying may also infringe Article 102 TFEU where it does not correspond to the example given in Article 102(d) TFEU. Accordingly, it was appropriate for the NCA to rely in the prohibition decision on Article 102 TFEU in its entirety and not exclusively on Article 102(d) TFEU. Finally, once an infringement of Article 102 TFEU is established, the NCA must have the power to impose fines. Supreme Court deciding on the appeal overturned the judgement of the Regional Court and accepted possibility to sanction anticompetitive abusive behavior pursuant to the general clause prohibiting abuse of dominant position.

40. In other abuse of dominant position case, European Commission submitted observations in the appeal proceedings before the Supreme Court with regard the issue of effectiveness fines. The Office imposed sanction on the economic successor of the undertaking which had abused its dominant position¹³. Economic successor continued in the economic activities of its predecessor (it took over the stuff, assets and activities) and for certain period also in the anticompetitive behavior. The Office applied jurisprudence of the Court of Justice of the European Union concerning the notion of undertaking and liability for the anti-competitive conduct. Pursuant to the case law of the Court of Justice in cases where the undertaking who participated in the infringement ceased to exist, it is possible to assign liability for a penalty to its economic successor, i. e. undertaking which continues in the economic activities (concerning the infringement) of the predecessor.

41. This concept was not known/common to the traditional Slovak legal system of administrative offences. Pursuant to the national legal system, the Office should have stated the proceedings if the infringer ceased to exist. It wouldn't have been possible to impose a sanction on the legal/economic successor.

42. Regional Court upheld the decision of the Office on the merits but reduced the fine which was imposed by the Office from 2, 5 mil euros to 300 000 euros. Regional Court in Bratislava was of the opinion that the fact that the economic successor was not infringing the law for the whole duration of the infringement, it should be taken into account as a mitigating circumstance. Regional Court acknowledge the succession and the infringement but was of the opinion that the imposed fine was too high and reduced it by 88% on the ground, inter alia, that the repressive function of the fine with regard to the economic successor was questionable because the infringement was committed by the predecessor. Court pointed out that fines have two functions - repressive and preventive, in the case where the undertaking did not infringe the law, one of the functions is not in place.

43. The Commission emphasized in its observations that economic continuity is a concept of EU competition law which should be applied in a consistent manner throughout

¹² http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html

¹³ Decision No. 2006/DZ/R2/144, 22.12. 2006

the EU. The aim of this concept is to avoid the effectiveness of EU competition rules being compromised by changes in the legal structure of undertakings. The application of this concept implies not only that the successor company is to be held responsible for the infringement but also that the successor company is liable for the penalty which would be otherwise imposed on its predecessor. Whereas there might be some differences in the possible fines of the predecessor and of the successor, the fact that the successor has to bear a fine for the infringement committed by the predecessor is not a factor that can be regarded as a mitigating circumstance in itself. Any reduction of the fine imposed on the successor company solely on the ground that the infringement was committed by its predecessor would be contrary to the concept of economic continuity under EU law.

44. The Office filed appeal against the judgment of the Regional Court. European Commission submitted its written observation in the appeal proceedings and expressed its concern that in the case at hand a distinction was made between the repressive function and the preventive function of the fine. By focusing on the repressive function of the fine in a case of economic continuity, where the successor company is fined for the behaviour of its predecessor, a wrong signal could be given to the economic successor and to undertakings in general by encouraging them to change their identity through restructurings, sales or other legal or organisational changes in order to avoid at least a part of the fine. To guarantee the effectiveness of a penalty both functions of the fine should be observed.

45. Supreme Court overturned the judgement of the Regional Court and upheld the fine in the amount that was imposed by the Office. However, the undertaking brought the case to the Constitutional Court of the Slovak Republic and argued that the panel of judges that decided its case at the Supreme Court was not the one that should have been assigned to this case. At that time there were some re-organizational changes at the Supreme Court and of some of the panels of judges of the Supreme Court were changed. Undertaking succeeded, case went back to the Supreme Court, where a different panel of judges upheld the former Regional Court judgement, Supreme Court stated that it acknowledges the economic succession as it stems from the jurisprudence of the Court of Justice but there were other issues in the case due to which the sanction should be lowered. Thus, the final judgement confirmed the reduced sanction by 88%.

46. Slovak court has used the possibility to submit the preliminary question to the Court of Justice pursuant to the Art. 267 of TFEU regarding review of the decisions of the Office only once. It was in Case C-68/12 (in Slovenská sporiteľňa a.s.) If the Supreme Court hadn't submitted the questions to the Court of Justice, probably the case wouldn't have been overturned and finally confirming the decision Office.

47. Given examples show that sometimes it is crucial for the court to have independent view from the Court of Justice or the Commission.

48. The Office experienced also some other cases where it was difficult to explain to court certain nature of the infringement and the economic background. It is also more difficult when the Office has to rely on the indirect evidence where the communication among undertakings is not found or is not so clear, however, there is other, very clear economic evidence.

49. On the other hand, the Office was able to justify and pursue several complex cases with indirect evidence, especially in cases of agreements restricting competition

3. Conclusions

50. We may say, that Slovak courts have acknowledged that competition law may concern certain specific concepts and background and jurisprudence of the Court of Justice give some guidance in taking the right approach to some cases. If the judgement in a similar case exists, the reference to the existing case law is of course advantageous in making arguments for both parties. However, especially in cases with economic approach and evidence, there is not only one definite approach in cases and there are usually lot of specifics, such as margin squeeze, refusal to supply etc., and therefore different approach taken in other case might be justified, it doesn't automatically mean that it is not in line with competition law and it can still prove the infringement. This is of course sometimes difficult to explain and justify. Thus, it is important that courts follow the jurisprudence of Court of Justice and are aware of specifics related to competition law to be able to consider and evaluate approach and methodology in specific case.

51. With regard to the judicial review system as such, in general, the system (meaning the procedural rules) proved to be well designed. It is up to courts to apply these rules in effective manner. Especially with regard the review of the inspections which are always "on radar", Supreme Court was very effective in terms of timing and duration of the proceedings. Since July 2016, competence to hear the cases against the inspections (actions against other conduct which covers also possible requests for information and review of other investigatory powers of the authority) was assigned to Regional Court. Instead of panel of three judges, since July 2016, only one judge hears these cases. Unfortunately, these judges do not have previous experience in this regard, as these are not the same judges who review decisions of the Office, although they are part of the same court – Regional Court in Bratislava. So far, we do not have much experience to report regarding this change.

52. As mentioned above, only the Regional Court 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 judges have possibility to participate in trainings, further education or discussions on competition law issues. It would be probably very beneficial to have specialized courts for the cases which started against the Office and probably for private enforcement cases as well or other regulatory areas. However, Slovak Republic is small jurisdiction and therefore, the competition law cases participate by very low number/percentage on the overall number of review cases of decisions of administrative authorities. Therefore, further specialization under current system is rather limited.