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Competition Law in Slovakia: A Practitioner's Viewpoint

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I. INTRODUCTION

The Slovak republic does not have a long tradition in competition regulation, a condition predominately caused by the communist history of the country. The first statutory act in the post-communism era protecting competition on the market was enacted in 1991 and was the first attempt to correct the market distorted by the former regime. Just a few years later, in 1994, a new act superseded the first one. Since the former Czechoslovakia had separated and two independent states—the Czech republic and the Slovak republic—were created in 1993, this new 1994 act was effective only for the Slovak republic.

The enactment of the new act was related, in particular, to the necessity of the harmonizing Slovak competition law with the *acquis communoutaire*, as the Slovak republic was trying to become a member of the European Union. In addition, the independence of the Slovak Antimonopoly Office ("the AMO") needed to be strengthened.

The third, and still effective, act on competition protection is Act No 136/2001 Coll., the Act on Protection of Competition, as amended ("the Act"). It became effective on May 1, 2002. Since then, it has been amended five times. These changes reflect, to a substantial degree, changes in EU law, in particular the enactment of Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and group exemptions from the prohibition of cartel agreements and merger regulation. In addition, the Act was adjusted after the switch to the euro currency in 2009.

In addition to the issuance of the Act, two decrees of the AMO have been issued. The Decree No. 269/2004 Coll., as amended, lays down details on the calculation of turnover and the Decree No. 204/2009 Coll. regulates details on the notification of mergers.

II. MOST RECENT AMENDMENTS OF THE ACT

There have been some recent substantial changes to the Act that can be categorized as follows: (i) change in the approach to merger notifications, (ii) substitution of the dominance test with the so-called SIEC test, and (iii) division of the administrative proceedings before the AMO into two phases. There have also been some other minor amendments of the Act.

A. Change in the Approach to Mergers

The latest amendment of the Act changed the turnover threshold of merging companies that must be achieved for mandatory notification to the AMO. The goal was to decrease the number of obligatory notifications, so that the AMO could focus exclusively on those mergers that represented a potential threat to the proper functioning of the market. In addition, stress is

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given on the local nexus. The AMO shall focus only on those mergers that have a real connection to the Slovak market.

According to the new rules, the companies subject to merger must have achieved, in the previous accounting period, a combined turnover in the Slovak republic amounting to at least EUR 46 million and at least two participants must have achieved turnover in the Slovak republic amounting to EUR 14 million each.

In the case of a merger of two independent companies, at least one participant must have achieved, in the previous accounting period, turnover in the Slovak republic amounting to EUR 14 million and at least one other participant must have achieved worldwide turnover amounting to at least EUR 46 million.

And, in the case of a merger by means of taking control over another undertaking or over part of that undertaking, the EUR 14 million turnover threshold in the Slovak republic must have been achieved by the acquired undertaking.

Previously, it had not mattered which of the undertakings had reached the turnover threshold in Slovakia, whether the acquired undertaking or the acquirer. On the other hand, the threshold was lowered from EUR 19,000,000 to the above-mentioned EUR 14 million.

This measure is supposed to help to lessen, to a significant degree, the demands on the AMO workforce. Up to now, the AMO often wasted resources on the cases where only the acquirer achieved the required threshold in the Slovak republic, whereas these cases often only had relevant influence on the market of a completely different state, namely the one where the acquired undertaking conducted its main activities.

B. Substitution of the Dominance Test With the SIEC Test

Until the latest amendment of the Act, the so-called dominance test was used by the AMO when assessing a merger. Pursuant to the dominance test, a merger that creates or strengthens the dominant position of the undertaking causing important hindrances to effective competition on the market shall be forbidden.

With the latest change, the so-called SIEC[2] test, which is also used on the European level, was adopted. Pursuant to the SIEC test, those mergers that would significantly impede effective competition on the relevant market, in particular as a result of the creation or strengthening of a dominant position, shall be prohibited.

As for the assessment criteria, the Slovak regulation is now fully harmonized with the European rules.

C. Division of Administrative Proceedings Before the AMO Into Two Phases

Another measure aiming at increasing efficiency is the division of administrative proceedings before the AMO. Pursuant to the new regulation, "simple cases" shall be cleared within the first phase. The first phase may last a maximum of 25 working days. There are no exact criteria, such as market shares, etc., to determine which case is simple. The Act implies that

[2] SIEC: Significantly impede effective competition.

this category includes those cases where there are no threats to effective competition and the relevant market can be defined without any complications. In these simple cases, proceedings will not continue into the second phase and the case will be cleared upon the finalization of the first phase.

The simple cases' decisions usually contain only simplified justifications regarding the participants to the merger, the sector involved, and/or the relevant market. In such cases, the participants neither get the chance to express their objections to the decision and its basis nor can they ask for completion prior to its issuance. Detailed justifications are used only if there is a special reason to do so, e.g. a new procedure was applied, etc.

Should the case not be cleared or ceased (e.g. for the reason that the merger in question did not reach the thresholds for mandatory notification) within the first phase, it proceeds into the second phase. Within phase two, the AMO is supposed to be much more active. It does not work predominantly with the documents and information provided by the participants in the framework of the notification, but rather tries to get full information by means of its own research or cooperation with other institutions and authorities.

However, in practice, the active research of AMO is often substituted by repeated AMO requests for the delivery of additional information and documents. In addition to the delivery of such additional pieces of information and documents, the participants to the merger are also supposed to prove them. For example, the participants may be asked to precisely define the relevant market, whereas such definition must be supported by an internationally recognized relevant market study. This may cause unexpected increases in merger costs.

The second phase may take up to 90 working days. It begins upon the delivery of the official announcement of the second phase opening to the participants. Both time limits—25- (first phase) as well as 90- (second phase) working days—can be repeatedly prolonged, however, by 30 working days at the maximum. Prolongation requires either a request or, at least, the consent of the participant.

Other scenarios that can postpose deadlines include:

1. The participants have already submitted notification, including the underlying documentation, whereby the time limit has begun to run. However, during the administrative procedure the AMO finds out that the notification concerning influenced markets is not complete. In such a case, the time limit starts over upon delivery of the completed information.
2. The AMO finds out during the administrative procedure that the information and documents already delivered are not complete and asks the participants for rectification. Until the participants deliver the requested pieces of information/documents, the time limit is interrupted and does not run.

III. RECENT TRENDS IN SLOVAK COMPETITION LAW AND AMO PRACTICE

A few months ago, elections in the Slovak republic caused a substantial change in the composition of the Slovak government and parliament. However, this fact does not seem to have had any substantial impact on competition policy. It seems that the AMO remains the most important body and policy maker in this area.

A. Theory of Harm in the Abuse of Dominant Position Cases

The AMO is developing a tendency to assess cases involving the abuse of dominant position on the basis of the theory of harm. This means that, in each such case, the AMO inquires whether and how the alleged abuse could have negatively affected consumers.

B. Leniency Program

Leniency programs do not have a long tradition in the Slovak republic. Although the possibility to apply for leniency was introduced into the Slovak legal system much earlier, the concept of leniency was, for the first time, applied in 2007 in the case of an agreement between the producers of gas-insulated switching devices. Based on natural Slovak characteristics (antipathy towards authorities, antipathy to whistle-blowing, tendency to revenge), it can be assumed that it will take time until this program reaches massive usage.

Although the leniency program is not broadly used yet, there are already some tensions between three interests, which can be detected in the practice of the AMO:

1. There is the interest of the leniency program applicant to have its business and other secrets protected, as well as its interests to be protected against possible claims for damages or even a criminal prosecution.
2. There is the right of the alleged cartel participants to defense, which implies also the right to be informed about all accusations. This, in turn, implies the right to have access to the leniency documents containing such kind of information.
3. There is the interest of third parties, who could have been damaged by the anticompetitive behavior, to claim damages. Without full-fledged access to the leniency documents, the evidence, as well as the calculation of damages, would be substantially hindered.

Due to a missing regulation that would solve this three-fold tension, AMO practice is of immense importance. It should be noted that private enforcement still plays a very insignificant role in Slovak competition policy, which is still based almost entirely on public enforcement.

Although there have been only a small number of cases to date, which hampers developing a clear understanding of the AMO's approach, it seems that the AMO's priority is to protect the leniency program applicant. As the AMO itself argues—it would run against the genuine meaning of the leniency program if the applicant faced claims for damages, or even criminal prosecution, when the other participants in the anticompetitive behavior would be in a much better position given no direct confession of misbehavior from their side.

As to the rights of the other participants in the alleged cartels to defend themselves, although the AMO respects this right it allows for the disclosure of the leniency documents only under certain restricted conditions. For example, access to the leniency documents is granted only shortly before the final decision is issued. However, sometimes the participants conclude an agreement with the AMO stating that only their external lawyers will get access to the leniency documents or that the documents will be accessible only in the data room, without any possibility of making duplicates. Confidentiality agreements are also very common.

This dilemma could be solved by a decision of Slovak courts, which have not yet had a chance to express their opinion regarding this matter. However, there is currently a pending

proceeding that might bring some light to this issue. In addition, the AMO is considering both the possibility of issuing a soft-law document, which would set clear limits with regard to the disclosure of leniency documents, or even initiating another amendment to the Act devoted to this matter.

C. Competition Advocacy

Another remarkable development is the AMO's attempts to broadcast the idea of competition law and policy among the business community, as well as among the general public. Due to the communist history, the significance of healthy competition is not yet completely understood and appreciated.

The AMO has decided to take over the role of educator and tries to communicate with the broad public via different means. It organizes (free) seminars aimed not only at sharing its own ideas, comments, and interpretations, but designing these to also serve as an open forum for involved parties—including competition law practitioners—to express their own standpoints, including (constructive) criticism.

As one of the most important topics within Slovak competition policy are cartels in the public procurement process (bid-rigging), the AMO has made some extra effort in this area. In addition to the issuance of a soft-law publication devoted to this matter, it has also organized a specialized workshop on cartel agreements in public procurement intended for representatives of state institutions and self-governing regions.

It should also be mentioned that the AMO regularly informs about recent developments and cases via its own website, and often invites specialists—in particular practitioners—to deliver comments on its planned activities. For example, in 2011 the AMO opened public consultations on the concept of commitments. The outcome was an issuance of a binding document published on the website of the AMO, the aim of which is to help and give direction to involved undertakings regarding submitting commitments. Almost the exact same scenario happened with considering the so-called concept of settlement as an alternative solution to anticompetitive cases.

The AMO also periodically publishes its own journal, *Competition Bulletin*, which gives an overview on not only the decisions and activities of the AMO, but also those of the European Commission and foreign antitrust authorities.

D. Sector Inquiries

Last, but not least, as a heritage of the former regime there are still many sectors of the national economy which have been state-run for many years, and which are currently undergoing the process of liberalization (unbundling). In order to speed up this process, the AMO conducts sector inquiries to detect and correct potential anticompetitive restrictions. Recently a sector inquiry in the railway transport was completed.