Slovenia

Competition Law in Slovenia: Review of Underlying Law

The scope of Slovenian Competition Law has undergone several changes since the country's independence, especially following Slovenia's accession to the EU and the approximation of its Competition Law to EU legislation. The basis of Competition Law is found in the Slovenian Constitution, which provides for a free economic initiative while prohibiting unfair competition practices.

Slovenian Competition Law takes two forms. The suppression of unfair competition, which is regulated by the Protection of Competition Act (ZVK), and the prevention of restrictions on competition, which is regulated by the Prevention of Restriction of Competition Act (ZPOmK-1).

Unfair competition consists of actions on the market which are contrary to good business practices and which cause or may cause damage to other market participants (e.g. false advertising, error concealment, unauthorized use of trade names or trademarks). The second form of Competition Law prohibits certain practices that prevent, hinder, or distort competition on the market. Thus, ZPOmK-1 prohibits the restricting of competition through agreements, decisions by associations of undertakings and concerted practices, abuse of dominant position, and the concentration of undertakings. It should be mentioned that due to Slovenia`s EU membership, its Competition Law is also subject to EU Competition Law. Therefore, the regulations of ZPOmK-1 are with minimal differences the same as the EU counterparts.

The relevant decision-making bodies of Competition Law issues in Slovenia are the Slovenian Competition Protection Agency (the "Agency") and judicial authorities. The Agency exercises control over the application of the provisions of ZPOmK-1, monitors and analyses market conditions, conducts procedures and issues decisions in accordance with the law, and gives opinions to the National Assembly and the Government on issues within its competence. The Agency also reviews alleged restrictive agreements and alleged abuses of dominant positions. Based on its conclusions it then approves or prohibits them in accordance with applicable competition rules. It also applies the leniency program.

The Agency leads two procedures regarding the protection of competition in Slovenia. One is an administrative procedure, affecting the decision-making of the management of companies and the impacts of those decisions on competition, while the other is an offensive procedure in which the Agency decides on sanctions for infringements of Competition Law. In order to ensure greater transparency and publicity the amendment of ZPOmK-1 in 2009 called for the publication of the Agency's final decisions. As a result, the Agency now publishes its final decisions regarding administrative and other minor offence procedures on its website, as well as final orders that result from the procedures, without confidential information. As a result, Slovenia has joined the other competition authorities around the world which publish their decisions.

The Slovenian judicial authorities review the Agency's decisions in civil claims of invalidity and claims for damages resulting from intentional or negligent violations of the provisions of ZPOmK-1 and Articles 101 and 102 of the Treaty on the Functioning of the EU.

Civil claims for damages due to violations of competition rules in Slovenia are very rare, primarily because of the length of the procedures, the costs of litigation, difficulties in collecting evidence, and the inexperience of judges in the field. This last phenomenon derives from the fact that in the few cases that have been heard in court (especially in conjunction with Telekom d.d., which allegedly was a main offender of the provisions of Competition Law, particularly regarding the abuse of dominant position) the judges avoided trials. For example, in the T-2 vs. Telekom case that was initiated in the year 2007 and ended in January 2013, three judges were replaced. The same happened in the ABM vs. Telekom case. And – with regard to the long duration of civil proceedings – it should be noted that the ABM vs. Telekom case lasted for 10 and half years. ABM filed the lawsuit for damages in 2002 and the final decision was adopted in 2013 when the Higher Court in Ljubljana awarded damages to ABM in the amount of EUR 62,000 – a substantial decrease from the EUR 2.3 million award made by the District Court in Ljubljana. Therefore it is not surprising that in this area the jurisprudence is very sparse.

Restriction of competition is defined in Slovenian Law as a criminal offence. The Criminal Code (KZ-1) determines a penalty for imprisonment from six months to five years for whoever, in pursuing an economic activity contrary to regulations governing the protection of competition, violates the prohibition of restricting agreements between companies, abuses the dominant position of one or more companies, or creates a forbidden concentration of companies, and thus prevents or significantly impedes or distorts competition in Slovenia or the EU, or significantly influences trade between Member States, which results in a large property benefit for such a company or companies, or significant damage to another company.

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Czech Republic

Is Prior Judicial Consent Required for a Dawn Raid? Czech Legal Battle Now Pending Before European Court of Human Rights

It has been a long and arduous road for Delta Pekarny, one of the largest companies on the Czech bakery market. For more than ten years the company has sought to have its right to privacy protected as guaranteed by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention"). Now, after all domestic instances have been unsatisfactorily exhausted, Delta Pekarny's last hope lies in the hands of the European Court of Human Rights in Strasbourg ("European Court"), which admitted Delta's application and began to deal with the case in 2013. In turning to the European Court, Delta Pekarny seeks a declaration that its right to privacy in its place of residence was violated by the Czech state, or more precisely by the Czech Antimonopoly Office ("Office").

It all started with a dawn raid carried out by the Office at Delta Pekarny's business premises on November 19, 2003. Without informing the company of any particular reasons for the inspection or presenting any evidence to justify the raid, the Office's inspectors entered the premises based only on a notice of administrative proceedings. In

the notice, the Office only pointed to Delta's "possible violation" of Section 3 (1) of the Czech Competition Act (an equivalent of Article 101 (1) of the Treaty on the Functioning of the EU), represented by alleged "conduct of the participants to the proceedings in mutual concert in determining the sales prices of bakery goods".

The notice, however, was not in the form of a formal decision and was not preceded by any other decision that could have been reviewed any time before or after by independent judicial authorities. Consequently, the inspection was initiated and carried out exclusively on the basis of the Office's notice, which only included a general reference to the statutory provision that Delta had allegedly violated.

Nevertheless, the inspectors demanded access to all Delta Pekarny's business records and e-mail correspondence, which they copied and most of which they took with them even though – as it later turned out – the documents were unrelated to the subject matter of the raid. As Delta Pekarny refused to grant the Office access to all of its employees' correspondence, including private correspondence, the Office imposed a penalty on Delta in the maximum amount permitted by Czech legal regulations at that time.

Following the inspection, Delta Pekarny actively sought redress against the Office's conduct. Eventually, the case was dealt with by Czech courts, including the Czech Supreme Administrative Court and the Czech Constitutional Court. During the proceedings, Delta claimed its rights had been violated, in particular, by referring to a previous decision of the European Court from April 12, 2002, Société Colas Est and Others v. France, in which the European Court concluded that prior judicial consent for the dawn raid on that company was necessary.

Delta Pekarny failed to gain the support of the Czech courts, which denied its claim for protection of privacy as guaranteed by Article 8 of the Convention and refused to apply the Societe Colas judgment to the case. Delta Pekarny is now seeking redress before the European Court, maintaining that the Office had no right to enter Delta Pekarny's premises and to demand, with the threat of a penalty, to inspect all its documents and correspondence without any justification and without prior review by an independent court that would have acted as an effective guarantee of Delta Pekarny's rights as prescribed by the Convention.

It is now up to the European Court to decide whether the Office's inspection, which did not have prior approval of an independent court but was formally carried out in compliance with Czech national laws, can be considered proper from the perspective of internationally protected human rights and thus necessary in a democratic society within the meaning of Article 8 (2) of the Convention.

The European Court's final decision in this matter might thus be of considerable importance to all business competitors from states that signed the Convention and whose national law does not require prior judicial consent for an inspection by the national competition authority, since victory for Delta Pekarny could be a significant precedent they can refer to if they happen to find themselves in a similar situation in the future.

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Poland

Competition Law Enforcement Versus Compliance

The Polish Competition Authority has prepared an ambitious legislative initiative that may significantly change the regulatory landscape in the area of competition law in Poland. But while the draft legislation was regarded as the magnum opus of the ex-president of the PCA, Malgorzata Krasnodebska-Tomkiel, it is too soon to judge whether the new head of the authority, Adam Jasser, will endorse the initiative in its proposed form.

The debate in Poland surrounding the new law is concentrates mainly on one provision: The PCA's right to impose fines on individuals for their involvement in anticompetitive agreements. Currently, such violations of competition law lead to fines on companies. Businesses under an umbrella of associations of companies and various interest groups, together with the community of legal counsel, have taken desperate actions to convince the PCA that the proposed instrument providing for fines on individuals lacks procedural safeguards and that its application jeopardizes the system of protecting individuals' rights in administrative proceedings.

While the topic of fines for individuals has – not surprisingly – dominated public debate, the new law will also bring other important enforcement instruments to better equip the PCA to defend against violations of competition law.

First of all, individuals (including ex-employees) will be able to apply for leniency. Currently, that right is available to undertakings only. In addition, under the new law, companies will have the option to engage in settlement procedures with the PCA which may lead to a 10% reduction in fines. This provision is well-known to businesses which have had competition law-related troubles with the European Commission. It will be interesting to see whether participants in proceedings carried out by the Polish enforcement agency will consider a 10% reduction to be a satisfactory concession. In addition, among the most significantly anticipated changes under the new regime is the "leniency plus" proposal that will incentivise leniency applicants to confess violations of competition law involving products other than those already investigated in a given proceeding.

On the merger law front, the new regime will, among others, introduce a two-phase review, where non-problematic transactions will be cleared within one month and those raising competition law concerns will undergo an in-depth review within an additional four months. It should be clarified, however, that the one and four month review periods are to some extent illusionary, as under both phases each information request letter will stop the clock. Interestingly, in the second phase, the PCA felt that there is a need to issue a formal position to a notifying undertaking informing it about identified concerns. This is the first time that the regulator has indirectly agreed to a certain level of transparency in its dealings with notifying undertakings. Therefore, the proposed provision should itself increase predictability in the PCA's decision-making process.

While the proposed changes vary in merits and will have a different impact on different companies, they will inevitably lead to market