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Zuzana Šabová[1]

I. INTRODUCTION

Competition law was introduced in Slovakia in the early 1990s as a part of the market mechanisms aimed at the transformation from a centrally planned to a market economy. In 2011, the Antimonopoly Office of Slovakia ("Office") celebrated its 20th anniversary. The role of the institution in the economic life of the country is indisputable. Looking at both its past and present activities, the effectiveness of competition law enforcement in Slovakia can be evaluated.

From the beginning of its existence Slovakian competition law followed the EU model, mainly due to the country's endeavor to join the European Union. This is visible from the wording of legislation and also from the decision-making practices of the Office.

The main effort was accomplished in 2001 when the new Competition Act was adopted. The Act contained substantial changes as to the formulation of anticompetitive practices and procedural rules. Regarding the institutional framework, this Act enabled the creation of an independent authority by setting the conditions for nominating the head of the authority, fixing 5-year terms of office, and determining precise reasons when the head of the authority can be dismissed. This step significantly contributed to the independence and stability of the institution and enabled it to formulate and implement competition policy with a long-term horizon.

Further amendments to the Act were introduced in 2004 when the country joined the European Union. To ensure the fulfillment of the EU requirements, mainly set by Regulation 1/2003,[2] it was necessary to enable an effective application of the EU law in Slovakia.

The latest changes in the law reflect needs resulting from the practices of the Office; in particular, those concerning the control of concentrations, which were dealt with by introducing the SIEC test,[3] and making procedures less burdensome and more flexible.

Clear tendencies towards the EU rules can be seen also in the decision-making practices of the Office as well as in the soft law. The Office strongly relies on the concepts and doctrines established at the EU level, but also from EU soft law, as can be seen in the Office's initiatives such as the leniency program and guidelines on setting fines, settlements, and commitment procedures, etc.

Public enforcement via the Office remains the main domain of competition law enforcement. To be exhaustive, a criminal offense connected to the antitrust prohibition

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[2] 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.

[3] Substantial Impediment of Effective Competition test identical to the one set by the EU Merger Regulation (COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

stipulated by the Penal Code should be mentioned; however, it has never been used and its relevance can be disputed. Private enforcement of competition law via claims for damages is more a theoretical concept and, although some attempts have been done in this regard, one can hardly consider it to be an effective tool with deterrent effects. Due to these reasons, the following text will focus on public enforcement only.

II. INSTITUTIONAL AND LEGAL FRAMEWORK

The Slovak competition law covers the antitrust prohibitions, i.e. agreements restricting competition, abuse of dominant position, and control of concentrations. The wording of the antitrust prohibitions is identical to Art. 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). Since 2012, control of concentrations has also been modeled after the EU system, and now, except for some procedural divergencies, the regimes are even more convergent.

The enforcement agency is the Office, which is the central state administrative body with its own budget and guarantees of independence set by the law. Its investigative procedures are of an administrative nature and only pecuniary sanctions can be imposed on undertakings. The Office is the only body entrusted with the application of competition rules in the Slovak Republic, i.e. the national competition law as well as the European competition rules.

The first-instance decision, both on anticompetitive behavior and sanctions, is issued by an executive division of the Office (monocratic system) and can be appealed to the Council of the Office (collective decision-making body consisting of 2 internal and 5 external experts). The Council of the Office reviews the entire procedure of the first-instance body, completes evidence if necessary, and may change, uphold, or annul the first-instance decision in full or stop the proceedings for procedural reasons stipulated in the Act.

The judicial review of the Office's decisions is ensured via the Regional Court of Bratislava and, subsequently, the Supreme Court of the Slovak Republic. Both are general courts not specialized in competition matters. The court may uphold the decision or annul it and return the case for new proceedings. In cases where it upholds the decision on subject matter, it may alter the fine imposed.

To increase the efficiency of procedures and investigation, a leniency program and commitment and settlement procedures were introduced; to a great extent, these follow the EU examples.

The leniency program was incorporated into the Act in 2001; however, the first practical case appeared in 2007 and was followed by two others in recent years. All these cases were more or less linked to the Commission's investigations and, to some extent, related to the pre-accession period. The Office has made efforts to increase the attractiveness of the program by removing the concerns of applicants relating to possible criminal proceedings as well as sanctions related to public procurement laws. Starting in 2010, changes in criminal and public procurement laws were enacted and, currently, successful applicants receive immunity under these regulations. Although it is not the prevailing investigative tool nowadays, the Office constantly strives to promote the program, and its increased use can be expected in the future.

The commitment procedure has been a part of the law since 2004 but, similarly to the leniency program, its use in practice has not been very frequent. Under this procedure, the Office can accept commitments proposed by the undertaking under investigation that meet the identified competition concerns. So far it has been used in the vertical agreement domain. In order to promote this tool, the Office prepared an explanatory guideline in 2011.

The settlement procedure enables the undertaking to benefit from a decreased fine if it accepts the objections raised by the Office. This tool is currently established only on a basis of soft law, but it is used rather often and the Office hopes to formalize the rules by legislation.

As an important part of competition rules enforcement, competition advocacy activities have to be mentioned as a very effective tool that raise the public awareness of the importance of competition law and policy. Especially in an environment where competition law does not have a long tradition, advocacy has played a crucial role in introducing and promoting the competition culture as an important part of the economic policy of the country.

The Office is entitled to comment on draft legislation and thus to stress the role of competition policy when other state policies are designed. In 2011, 36 comments were submitted; among the most important were those related to changes in public procurement law and the regulatory framework of electronic communication.

Furthermore, sector inquiries carried out by the Office are of great importance, especially in newly liberalized markets. They not only help to detect potential competition problems and market deformations, but also enable drafting optimal legislative and regulatory frameworks for the sector.

Finally, the Office has focused its activities on organizing workshops and conferences with different stakeholders, explaining the importance and needs of competition policy as well as the special features of competition law and its enforcement. This communication with stakeholders provides the Office with useful feedback on actual problems, market situations, and the legal environment.

Concerning international cooperation, the Office is a member of the ECN, OECD, ICN, and ECA and, besides bilateral regional co-operation, these forums are the main targets of its international activities.

III. RECENT DEVELOPMENTS

In recent years, the Office has focused its activities mainly on cartel investigations by using dawn raids as a frequent tool. Nevertheless, it lost several big cases before the court in 2009-2011, related, for instance, to bid-rigging in the construction sector and agreements in the banking sector. The essential divergence between the courts' and Office's opinions was the evidential threshold and procedural aspects. The courts, unlike the Office, tended to rely more on the criminal investigation as well as general administrative principles than on EU case law and doctrines. In 2011 the Supreme Court ruled that the Office abused its powers when conducting an inspection and thus it could not use the information collected during the inspection. All the major cases are still pending before the Supreme Court, including one reference to the ECJ for preliminary ruling under Art. 267 TFEU, so while waiting for the final outcomes the Office has

shifted its activities from purely fining procedures to commitment and settlement procedures and has also paid a lot of attention to advocacy activities.

Differing court stances with the Office could also be observed in the area of abuse of dominance. The Office did not succeed with three significant cases from the telecommunication sector, including those concerning the behavior of the traditional incumbent, which was related to the essential facility doctrine and one of them being the first case of margin squeeze abuse.

Finally, the lack of proper perception of EU law has led to two interventions by the European Commission. The first one concerned the legislation. According to the Commission the national law limited the powers of the Office to apply EU competition law in regulated sectors. After the receipt of the reasoned opinion[4] the Competition Act was amended. The second one took the form of *amicus curiae* intervention within the proceedings before the Supreme Court and concerned the notion of "undertaking;" in particular, the transfer of liability for a breach of competition law to the new entity (economic successor) after the perpetrator ceased to exist (economic continuity test).

This experience has shown that the coherent application of the EU rules requires the judges to be familiar with the established concepts of EU competition law. Given the lack of specialization of judges the Office has initiated an open and continuous dialog with courts to enhance competition law enforcement. Recently, conferences and workshops took place and discussions were launched to debate the particular features and actual problems of competition law. Thanks to these initiatives, progress in this regard can be expected.

The enforcement of competition law in regulated sectors, namely in the network industries, remains the priority of the Office. Given the complexity of the competition issues in this area the Office has focused its activities not only on fining procedures, but has also strived to solve the problems mainly through sector inquiries. From 2010 onwards, the gas and natural gas sectors, electricity sector, and railway sector were under examination. The final outcomes were publicly presented and discussed with the stakeholders concerned (regulatory bodies, regulated undertakings, experts etc.) and some were also submitted to the government as initiative materials. This tool seems to be very promising, especially in areas with special regimes like the above-mentioned sectors, where the effective solution of competition problems cannot be achieved solely by punishing a particular undertaking.

Currently, a shift from a traditionally formal to a more economic approach seems to be a major challenge for the Office. Clear tendencies can be seen both in the field of assessing vertical agreements (for instance a case concerning alleged RPM in the distribution of luxury cosmetics in 2011) and also in recent cases of abuse of dominant position (exclusionary behavior in the waste management sector, discrimination in the field of wholesale markets for oil and petrol, excessive fees for certain activities in the electricity sector). Although previous judgments—for instance, the judgment concerning alleged discrimination in the wholesale markets for oil and petrol—show a certain skepticism by the courts as to the use of economic analysis in the Office's arguments, the latest judgment related to the margin squeeze in the telecommunication sector

[4] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1182&format=HTML&aged=1&language=EN&guiLanguage=en

approves this trend as corresponding to EU practice. With the aim to ensure a coherent and expert approach a chief economist unit was formally established this year and its further enlargement is foreseen.

On the other hand, fighting cartels requires skilled staff and efficient technical equipment. After the loss of the significant cases before the court the Office recognized that further improvement and specialization in this regards was necessary. Beside the promotion of the leniency program, the Office also makes efforts to gain information that could help open the *ex officio* cases. From 2010 onwards, workshops on cartels in the field of public procurement (bid-rigging) with different types of contracting authorities, who can provide the Office with important signals on anticompetitive behavior, have been organized.

Concerning the control of concentration, in the recent period the Office has systematically endeavored to improve the regime. In terms of factual assessment, criteria and methods closer to EU concepts have been applied. In 2011 one significant decision on remedies in the cement production sector was issued with detailed reasoning. Regarding the procedural framework, a system of pre-notification contacts was introduced by a guideline and now helps the undertakings prepare the notification, thus contributing to the effectiveness of the formal procedure. It will be useful to evaluate the impact of the changes of the law that have been effective since 2012, which introduced also the SIEC test and further alignment with the EU merger control regime. The establishment of the chief economist unit will be indubitably beneficial also in this regard.

IV. CONCLUSIONS

The recent developments in competition law and policy in Slovakia follow the trends set at the EU level. Although these are primarily influenced by the formal mechanisms established by EU regulations, even in areas not subject to harmonization (as, for instance, fining policy or procedural aspects) obvious convergence with EU models can be observed. Even though much remains to be done in terms of a coherent application of EU law, lot of efforts have been made and competition advocacy seems to be useful tool to achieve progress in this regard.

The Office strives to become a modern and flexible institution and a full-fledged member of the ECN. However, with its limited budget of EUR 2.4 million and staff (only 36 non-administrative staff were working on competition in 2011) prioritization of its activities in all areas of competencies appears to be inevitable. From the enforcement perspective, focus on particular sectors via sector inquiries, as well as a deliberate orientation on fighting cartels, can be expected.