Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – Slovenia

Jakob Šešok (Linklaters LLP) · Thursday, February 2nd, 2023

Year at a glance

2022 brought a major legislative overhaul, with the Slovenian parliament adopting a new Competition Act ("**Competition Act**"; sl. *Zakon o prepre?evanju omejevanja konkurence 2*). While turnover thresholds remained unchanged, the Competition Act introduced the much-awaited simplified notification procedure (akin to Short Form CO).

Despite the inflationary environment and raising interest rates, the Competition Protection Agency ("**CPA**") received a record number of merger filings. As in many other countries, antitrust developments could not escape the impact of the Russian invasion of Ukraine, and the CPA issued a rare derogation decision, allowing the nation's largest bank (NLB) to take over Sberbank's Slovenian subsidiary prior to receiving the merger clearance.

The CPA kept its ear to the ground and maintained active cartel enforcement, notably penalising food processing companies who it alleged had conspired on wheat prices, preferring smoke-filled rooms over wheat fields.

Legislative developments

On 29 September 2022, the Slovenian parliament adopted a new Competition Act, which entered into force on 26 January 2023. The main changes compared to the previous regime are:

- **Simplified merger procedure is here.** The previous Competition Act did not envisage a simplified procedure, with parties having to provide detailed market information even in no-issues cases. The newly adopted Competition Act introduced a simplified notification procedure, covering mergers where (i) there are no horizontal or vertical overlaps between the parties (nor are they present on closely related markets); (ii) where the parties combined market shares in a horizontal merger are below 15%; (iii) where the parties' individual or combined market shares in a vertical merger are below 25%; or (iv) the acquirer goes from having joint- to sole control over the target company. While market share criteria will be harder to satisfy compared to the EC Notice on Simplified Procedure (20% for horizontal relationships and 30% for vertical relationships), this is a welcome development that will ease the work of antitrust practitioners and reduce the burden on parties when preparing filings.

- **Broader investigatory powers.** Following the ECN+ Directive ("**ECN+**"), the Competition Act expanded the CPA's investigatory powers. Notably, the CPA can now request information and/or interview companies/executives/employees/other persons with relevant information even before it formally opens an investigation into anticompetitive practices. Failure to respond to the CPA's request can result in a monetary fine, however, due to the principle against self-incrimination, companies are not obliged to admit their wrongdoing.
- **All aboard the leniency train.** The Competition Act incentivizes leniency applications by introducing new confidentiality protections, which will limit access to leniency submissions. Importantly, plaintiffs in follow-on damages claims will not be able to access leniency submissions, thus allowing parties to "*speak freely*" in their applications. Additionally, under Slovenian law, anticompetitive infringements carry criminal charges (although these are rarely if ever, enforced in practice). Under the new rules, courts will be required to waive criminal sanctions for individuals involved in anti-competitive practices, provided they actively cooperate with the CPA and comply with certain other conditions.
- **Increased international cooperation.** Inspired by ECN+, the Competition Act introduced a number of rules that will boost cooperation between the CPA and other EU NCAs, including rules that will simplify the service of the CPA's decisions abroad.
- **Unified misdemeanour proceedings.** Under the previous regime – in a system unique to Slovenia – the CPA had to run two parallel proceedings: (i) one to determine that parties engaged in anticompetitive behaviour; and (ii) another to issue a fine for such behaviour. The Competition Act has tidied up this system, allowing the CPA to run one unified procedure. This will reduce the administrative burden on the CPA and allow it to probe anticompetitive behaviour more efficiently.

Merger control: the CPA goes behavioural

As with most other regulators, merger control was the CPA's busiest area. According to its online registry, the CPA received 47 merger filings in 2022, which is a new Slovenian record.

While several filings remain pending, the CPA unconditionally cleared most mergers, with the notable exceptions of *Pivovarna Laško Union / Davidov Hram* and *HSE / Energija Plus*, which were cleared with remedies.

Back in 2019, Germany, France and Poland called on the European Commission ("**EC**") to embrace behavioural remedies, particularly where competition conditions may change in the short term, as such remedies are more flexible than structural ones. Since then, the EC has kept its preference for clear-cut divestment remedies, whilst the CPA has shown a greater willingness to accept robust behavioural packages.

Vertical brewery case cleared with behavioural remedies

Pivovarna Laško Union ("**Union**"), a Heineken subsidiary and Slovenia's largest brewing company, acquired Davidov Hram ("**Target**"), a major wholesaler of alcohol, non-alcoholic beverages, and various foodstuffs.

While the entire clearance decision is not yet public, published remedies suggest that the CPA was

concerned that Union (brewery / upstream player) would discriminate against Target's downstream competitors engaged in beer distribution.

To alleviate the CPA's concerns, Union offered a comprehensive remedies package, committing to (i) supply Target's downstream competitors on FRAND terms; and (ii) to establish appropriate firewall mechanisms to prevent Target from obtaining competitively sensitive information of other downstream players. The remedies will last for seven years and include a robust monitoring mechanism.

In a world where complex mergers have become increasingly hard to clear – absent structural remedies, which often reduce parties' commercial appetite – this decision shows that behavioural remedies do not belong in history books. A long-term remedy package, coupled with an effective monitoring mechanism, should – particularly in traditional industries – be sufficient to alleviate competition concerns. Global antitrust regulators should reconsider their apparent aversion to structural remedies and rethink their "*behavioural remedies are too difficult to monitor*" mantra.

Energy merger cleared with behavioural remedies

Another notable case was *HSE / Energija Plus.* HSE and Energija Plus ("**Energija**") are active across the energy supply chain, from generation and wholesale to distribution and retail supply of electricity and gas.

HSE's acquisition would increase its pre-transaction leading position in the market for the generation and wholesale of electricity (upstream market). The combined entity would (i) hold an approx. 30% share in the market for the retail supply of electricity to households; and (ii) exceed a 40% share in the market for the retail supply of electricity to industrial customers (downstream markets).

To alleviate the CPA's input and customer foreclosure concerns, the parties committed to annually sell a pre-determined amount of Slovenian-produced electricity to downstream suppliers on FRAND terms. The CPA was satisfied that a seven-year remedies package was sufficient to prevent foreclosure and allow downstream suppliers to remain competitive.

This decision comes roughly two years after the EC cleared *PKN Orlen / Grupa Lotus*, which concerned oil and gas markets, subject to a mixed remedy package. This could be an early sign that antitrust regulators globally are becoming more open to behavioural/mixed remedies in the energy sector (particularly to alleviate vertical concerns).

Rare derogation decision

In February 2022, the EU adopted sanction measures, which forced Sberbank to exit the Common Market. Consequently, a solution had to be found to safeguard Sberbank's EU customers. As reported in last year's edition, prior (and unconnected) to the Russian invasion, Sberbank planned to sell its Slovenian subsidiary to another domestic bank (Gorenjska Bank). Following Russia's invasion, Gorenjska Bank withdrew from the transaction and a rapid solution had to be found. NLB, Slovenia's largest bank, stepped in and took over Sberbank Slovenia, renaming it 'N Bank'.

Due to the underlying liquidity risk, the Parties were required to close the deal overnight to protect customers and prevent systemic panic. The CPA issued a derogation decision, allowing the parties to close before receiving a merger clearance, and later followed up with an unconditional clearance. While NLB reinforced its number-one status in the country, Sberbank Slovenia was a relatively small player, and the transaction did not cause a significant increment in market shares.

Behavioural matters

The following two cartel cases deserve a mention.

Wheat cartel: price-fixing

The CPA found that several food companies informally met in 2020 to collude on purchasing prices of wheat. Interestingly, all parties have maintained their innocence, and none have cooperated with the CPA. It remains to be seen whether the parties will challenge the CPA's decision in Court.

Car dealer cartel: bid rigging

In the last days of 2021 (with the public announcement in February 2022), the CPA concluded that several Renault dealers rigged public tenders for car maintenance and spare parts. The cartel lasted for more than 10 years, and its participants allegedly (i) divided tenders amongst themselves, (ii) conspired on prices, (iii) and exchanged other competitively sensitive information. One of the parties submitted a leniency application and assisted the CPA in its investigation.

Judicial review: Duty to cooperate during a dawn raid explained

The Administrative Court ("**Court**") issued two decisions, clarifying the scope of the duty to cooperate during a dawn raid.

In a judgment handed down in January 2022 (UPRS I U 2353/2018-68), the Administrative Court considered a complaint against the CPA's decision, which determined that an undertaking infringed its duty to cooperate, as it did not point the CPA to an archive (on a different floor to where the dawn raid was taking place), which contained agreements material to an abuse of dominance probe. The Administrative Court explained that the duty to cooperate does not only require a company to refrain from interfering with the investigation (passive duty to cooperate, e.g., breaking a seal, shredding paper evidence). Instead, it also entails an active duty to cooperate, which requires a company to disclose materials, which are covered by the investigation warrant, and point the officials to the locations of any such materials. In the instant case, the CPA's warrant covered all contracts related to natural gas distribution. It was not until 26 hours into a three-day investigation, that the CPA found originals of such documents in a previously undisclosed location. The Court upheld the CPA's fine in its entirety, noting that when it comes to the gravity of an infringement, violations of active duty can carry the same weight as violations of the passive duty to cooperate.

In an unrelated case, decided in June 2022 (UPRS I U 238/2020-18), the Administrative Court

further reiterated that an active duty to cooperate applies only when the CPA clearly explains the object/purpose of the investigation. When interviewing employees that are not familiar with the purpose of the investigation, the CPA must ask precise and concrete questions, otherwise, it cannot sanction a company for providing false/incomplete answers. If an employee is (i) not present when the CPA clarifies the scope of an investigation warrant and (ii) the CPA fails to pose targeted questions, a company cannot be liable for employees' incomplete answers.

This entry was posted on Thursday, February 2nd, 2023 at 9:00 am and is filed under Competition Law 2022, Competition policy, Slovenia
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.