

Cartel Regulation

The application of competition regulation
in 48 jurisdictions worldwide

2013

Contributing editor: D Martin Low QC



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Slovenia

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Odvetniki Šelih & partnerji, op, doo

Legislation and jurisdiction

1 Relevant legislation

What is the relevant legislation and who enforces it?

The relevant national legislation is the Slovenian Act on the Prevention of the Restriction of Competition (the Competition Act), which was published in the Official Gazette of the Republic of Slovenia No. 36/2008 and entered into force on 26 April 2008. The Competition Act underwent a few amendments in 2009 and 2011 and was last amended on 27 July 2012 (the last amendment was published in the Official Gazette of the Republic of Slovenia No. 57/2012 and entered into force on 28 July 2012).

The Competition Act is enforced by the Slovenian Competition Protection Office (the Office), formally a body within the Ministry of Economy (now the Ministry for Economic Development and Technology). The Office is also empowered to impose administrative fines due to violations of cartel law, and has to apply the relevant provisions of the Treaty on the Functioning of the European Union (TFEU) where conduct may affect trade between EU member states. Cartel-related criminal procedures are initiated by state prosecutors and adjudicated by the regular courts having jurisdiction over criminal matters.

2 Proposals for change

Have there been any recent changes or proposals for change to the regime?

The information commissioner recently filed a request for a constitutional review of article 29 of the Competition Act giving the Office investigatory powers, which allegedly is contrary to the constitutional right of protection of privacy of correspondence and other means of communication. If the respective article is found unconstitutional, the Office will no longer be able to lawfully obtain certain types of documents and other information, and this may rather severely limit its investigatory powers.

3 Substantive law

What is the substantive law on cartels in the jurisdiction?

The Slovenian substantive law mirrors articles 101(1) and 101(3) TFEU (ex articles 81(1) and 81(3) of the EC Treaty) on a national level. Article 6 of the Competition Act prohibits and annuls all agreements between undertakings, decisions by associations of undertakings and concerted practices (agreements) that have as their object or effect the prevention, restriction or distortion of competition in the Republic of Slovenia. Certain actions that are, in particular, deemed covered under the general prohibition are then non-exhaustively listed in the Competition Act. These include agreements that:

- directly or indirectly fix purchase or selling prices or other trading conditions;
- limit or control production, markets, technical development or investment;
- apply dissimilar conditions to equivalent transactions with other contractual partners, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other contractual partners of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of their contracts; and
- share the market or sources of supply.

The Penal Code (article 225) contains a criminal offence committed by a person who, in the performance of economic activity, violates the prohibition of restrictive agreements between undertakings, abuses a dominant position of one or several undertakings or creates a prohibited concentration of undertakings contrary to regulations governing competition protection, and thereby prevents, seriously impedes or distorts competition in Slovenia or in the EU market or a substantial part thereof, or materially affects trade between EU member states, which results in substantial monetary gain for such undertakings or substantial damages for other undertakings. Monetary gain and damages are considered 'substantial' when they exceed €50,000 (article 99(9) of the Penal Code).

In addition to Slovenian national law, provisions of the TFEU with respect to cartels, including articles 101 and 102 thereof, as well as the case law of the European courts and European Commission practice are directly applicable in Slovenia. The Office is required to apply these provisions where an agreement may affect trade between EU member states.

4 Industry-specific offences and defences or antitrust exemptions

Are there any industry-specific offences and defences or antitrust exemptions?

There are no industry-specific offences and defences under the Competition Act, but there is some other industry-specific legislation that could be of relevance in fields such as electronic communications, energy, media, banking, insurance, gaming, etc. There are also certain industry-specific EU block exemptions that apply as part of the national law under the Competition Act.

The following antitrust exemptions are in place on the basis of the Competition Act: agreements are not prohibited if they are exempt on the basis of block exemptions, the rule of reason or the de minimis exemption.

As far as block exemptions are concerned, the Slovenian government is empowered to adopt them, but has not yet done so. European block exemption regulations do, however, apply under the Competition Act as appropriate, as part of the national law, and also when there is no proven effect on trade between EU member states.

The rule of reason exempts agreements that contribute to improving production or distribution of goods, or to promoting technical and economic progress while allowing consumers a fair share of the resulting benefit. To benefit from this exemption such agreements may not:

- impose on the undertakings concerned any restrictions that are not indispensable to the attainment of the above objectives; and
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

The *de minimis* exemption (article 7 of the Competition Act) is applicable to horizontal and mixed horizontal-vertical agreements between undertakings whose aggregate market share (including the market share of their group companies) in none of the affected markets in Slovenia exceeds 10 per cent. The relevant market share is reduced to 5 per cent if the competition in the affected market is reduced due to cumulative effects caused by the same or similar agreements of other undertakings. Hard-core restrictions (horizontal agreements aimed at fixing prices, restricting production or trade, or sharing markets or sources of supply) are not covered by the *de minimis* exemption.

5 Application of the law

Does the law apply to individuals or corporations or both?

The Competition Act applies to ‘undertakings’, which includes persons performing economic activity irrespective of their legal form and ownership affiliation, and thus includes both individuals and corporations if they perform economic activities.

If the Competition Act is violated by an undertaking, the Competition Act and the penal legislation (Penal Code and Criminal Liability of Legal Entities Act) contain sanctions for the respective undertaking, as well as sanctions for the responsible individuals within such undertaking.

6 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what legal basis does the authority claim jurisdiction?

The Competition Act regulates restrictive practices, concentrations of undertakings, regulatory restrictions of competition and measures to prevent restrictive practices and concentrations that significantly restrict effective competition and cause or might cause effects on the territory of the Republic of Slovenia. Thus agreements are prohibited under the Competition Act if they prevent, restrict or distort competition in Slovenia, irrespective of whether they have been entered into within or outside Slovenia. In addition, the Competition Act lays down the powers of the Office and procedure before the Office and on its basis the Office claims its jurisdiction.

Investigation

7 Steps in an investigation

What are the typical steps in an investigation?

The Office commences proceedings by issuing an order on the commencement of procedure, which may be issued following a complaint or *ex officio*. Before issuing such an order, the Office may collect market information and perform similar actions. Once the Office is informed of allegedly anti-competitive conduct, it may (even before issuing an order on the commencement of procedure) also address a request for information to every undertaking, shareholders, members of the management or supervisory bodies and employees of an undertaking. Such request may be made informally or by way

of a formal decision; a formal decision is required for the Office to impose fines on the addressees who fail to respond or submit the requested information.

Once the procedure formally starts with the order on the commencement of procedure, an abstract of such order is published on the Office’s website.

During the fact-finding process, the Office reviews documents provided by the undertakings concerned and other documents available to the Office. As a general rule, the Office decides without an oral hearing, but may also conduct an oral hearing in order to establish or clarify decisive facts. The Office is also empowered to perform investigations.

After the fact-finding process is complete, the Office prepares a summary of the relevant facts. If the summary indicates that a violation took place, such summary has to be served on the undertakings concerned, and they have the opportunity to respond.

The procedure is generally completed by the issuance of a decision establishing a violation or a decision terminating the procedure. If a decision establishing a violation is issued, it is afterwards followed by another decision of the Office determining the sanction.

8 Investigative powers of the authorities

What investigative powers do the authorities have?

An investigation is not a compulsory procedural act, but may be performed following the Office issuing an investigative order containing (article 28 of the Competition Act):

- the subject matter and purpose of the investigation;
- the date of the investigation commencement;
- the name of the authorised persons carrying out the investigation;
- the scope of authorisations of such persons pursuant to the Competition Act; and
- a warning of the fines that may be imposed due to refusal to cooperate in, or obstruction of, the investigation.

The investigative order shall be served on the undertaking subject to the investigation at the beginning of the investigation.

During the investigation, the authorised persons may carry out the following within the scope of their investigative order (article 29 of the Competition Act):

- enter (as a rule between 6am and 10pm) and search business premises, land and means of transport, and seal such business premises for the duration of the investigation;
- examine, seize, copy or obtain extracts of, as well as seal (for the duration of the investigation) and temporarily seize (for up to 20 working days), business books, contracts, documents, business correspondence, business records and other information relating to the undertaking’s business (irrespective of its form);
- temporarily seize items (for up to 20 working days);
- ask for oral or written explanations from any representative or employee of the undertaking subject to the investigation relating to facts or documents relating to the subject matter or purpose of the investigation;
- review documents in order to identify persons; and
- perform other actions that are in accordance with the subject matter of the investigation.

In the case of a justified suspicion that the business records, books or other documents are kept somewhere other than on the business premises of the undertaking subject to the investigation (eg, on other undertakings’ business premises or on the residential premises of members of management or supervisory bodies, employees or other workers), the authorised persons may search such premises upon receiving an advance approval of the competent judge.

The Office may request police assistance in certain cases. The Office may also ask a court or other body to deliver to it copies of

documents found during criminal or other proceedings that could be important to the Office's decision-making process, provided that this does not compromise the respective criminal or other proceedings.

In 2012 the information commissioner challenged certain investigatory powers of the Office before the Slovenian Constitutional Court on the basis of the constitutional right of protection of privacy of correspondence and other means of communication. Should the Constitutional Court agree with the views of the information commissioner, the investigatory powers of the Office may be severely limited (eg, the powers of the Office to review email correspondence).

The general rules of criminal law apply in relation to the prosecution of cartel-related criminal offences.

International cooperation

9 Inter-agency cooperation

Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

The Office cooperates with the European Commission, as well as with the competition offices of other EU member states. In addition to the Competition Act, Regulation No. 1/2003 represents the principal legal basis for such cooperation, as it regulates close cooperation – within the European Competition Network – of the European Commission and all competition authorities of EU member states when applying EU competition rules. This cooperation includes, in particular, the exchange of information, mutual consultation, coordination of investigations, inspections on behalf of another competition authority and discussion of a proposed course of action.

10 Interplay between jurisdictions

How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

If the Office carries out proceedings concerning violation of article 101 TFEU, it will simultaneously also carry out proceedings concerning violation of article 6 of the Competition Act. Should no effect on trade between EU member states be proven, proceedings only continue concerning violation of article 6 of the Competition Act (article 25 of the Competition Act).

The Office can no longer investigate a matter concerning violation of article 101 TFEU if the European Commission has already initiated its investigation of this matter or issued a decision in the matter. In such a case, the Office is obliged to issue a decision terminating the procedure (article 40, paragraph 2 of the Competition Act). If the matter concerning violation of article 101 TFEU is being investigated or has been decided upon by another EU member state's competition authority, the Office may also decide to terminate its procedure (article 40, paragraph 3 of the Competition Act).

The Office may perform investigations upon request by the European Commission or another EU member state competition authority, and actively assist officials and other persons authorised by the European Commission to carry out investigations pursuant to article 20 of Regulation No. 1/2003 (article 35 of the Competition Act). Pursuant to the Competition Act, the Office may also enable cooperation between its authorised persons and officials of other EU member state competition authorities, officials of the European Commission and other persons authorised by them in matters regulated by article 22 of Regulation No. 1/2003.

Article 13b of the Competition Act gives the Office the power to disclose information to the European Commission or other EU member states' competition authorities.

The Competition Act also expressly determines that parties may neither review nor copy internal documents of the Office in

the matter, which includes correspondence between the Office and the European Commission or other EU member states' competition authorities (article 18, paragraph 5).

11 Adjudication

How is a cartel matter adjudicated?

The Office issues a decision establishing a violation or a decision terminating the procedure. If a decision establishing a violation is issued, it is followed by another decision of the Office determining the sanction.

Decisions in cartel-related criminal procedures are issued by the competent district courts.

12 Appeal process

What is the appeal process?

Judicial protection is ensured against all decisions of the Office and, unless explicitly excluded, also against the orders of the Office. Requests for judicial protection are decided upon by the Supreme Court acting in a panel of three judges. The Supreme Court decides on the basis of documents in the file: facts and evidence that have not been brought forward in the procedure before the Office may not be brought forward in the judicial protection procedure. Decisions of the Supreme Court may not be further appealed, but it may be possible to initiate a procedure before the Constitutional Court on constitutional grounds.

Decisions on penalties under the Competition Act that are imposed by the Office may be appealed before the first-instance criminal court pursuant to the provisions of the Misdemeanour Offences Act, and further appeals may be possible.

Decisions in cartel-related criminal procedures may be appealed before the competent higher courts, and further appeals may be possible.

13 Burden of proof

With which party is the burden of proof?

The burden of proof generally rests with the party claiming a violation of the competition rules (usually the Office in administrative proceedings and the public prosecutors in criminal proceedings).

If the benefit of the exception rules is invoked (eg, rule of reason), the undertakings invoking the benefit must bear the related burden of proof.

Sanctions

14 Criminal sanctions

What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions? Do individuals face imprisonment for cartel conduct?

If the respective cartel activity is qualified as a criminal offence, the following sanctions may be imposed on a legal person under the Penal Code and the Criminal Liability of Legal Entities Act:

- a fine from €50,000 to €1 million, or alternatively up to a maximum of 200 times the amount of damage caused or illegal gain obtained through the criminal offence;
- expropriation of property (may be applied instead of a fine if certain conditions are met or as an accessory sentence in case of winding-up of the legal person);
- winding-up of the legal person (may be applied instead of a fine if certain conditions are met); or
- prohibition of trading in financial instruments on a regulated market from one to eight years (as an accessory sentence).

The most severe possible sanction for individuals is imprisonment ranging from six months up to five years. A monetary fine may be imposed instead of imprisonment. There are several possible accessory sentences and safety measures in addition to imprisonment or monetary fine, the most relevant being a prohibition from performing an occupation for between no less than one year and no more than five years.

15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The maximum penalty under the Competition Act for a legal person, an individual acting as a sole proprietor or an individual acting as a self-employed person for cartel activity (violation of article 6 of the Competition Act, or article 101 TFEU), or acting contrary to certain enforceable decisions of the Office, amounts to 10 per cent of the turnover realised by the respective person in the previous financial year.

Individuals responsible for anti-competitive behaviour within legal entities, sole proprietors or self-employed persons may be fined under the Competition Act in an amount between €5,000 and €30,000.

16 Civil and administrative sanctions

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

The general rule of the Slovenian penal theory is that a perpetrator's responsibility for a more serious type of criminal conduct excludes its responsibility for a less serious type of criminal conduct. If a person is convicted for a criminal offence, it may generally not be fined for a misdemeanour offence later concerning the same conduct. If a person is fined for a misdemeanour offence, it may generally also be convicted for a criminal offence later concerning the same conduct, but the fine imposed for a misdemeanour offence is calculated into the sanction for the criminal offence. If there are grounds for suspicion that a certain activity also represents a criminal offence, the procedure concerning a misdemeanour offence shall not be conducted until the procedure concerning the criminal offence is completed.

These general rules have not yet been tested in courts in competition matters. However, the Office has in the past announced in the media that it proceeded to state prosecutor's documentation related to a cartel that the Office investigated and sanctioned.

17 Private damage claims and class actions

Are private damage claims or class actions possible?

Private damage claims are possible. Persons who have suffered loss as a result of any cartel activity prohibited under the Competition Act or the EC Treaty may claim compensation in accordance with the general tort rules. Compensation can be claimed in court regardless of whether the Office has already adopted a decision in respect of the prohibited cartel activity. The courts are, however, bound by final decisions of the Office or of the European Commission finding infringements.

Class actions are not possible, as each plaintiff is required to demonstrate an interest in claiming compensation. There are, however, certain possibilities of combining or joining claims:

- several damage claims may be consolidated in a single summons by persons claiming to have suffered injury as a result of the same infringement;
- proceedings may be joined after the filing of claims; or

- if several actions are filed at the court and these actions have the same or similar factual basis as well as the same legal basis, the court may, after receiving the defence, carry out a 'model procedure' in one action and at the same time suspend all other procedures until the 'model procedure' is completed.

In all such cases, the claims remain separate, so that each plaintiff may freely make decisions regarding its claims, and the court may find some claims grounded and others not.

It is also possible to assign claims for monetary damages, so that several damaged parties assign their claims to a single plaintiff.

18 Recent fines and penalties

What recent fines or other penalties are noteworthy?

The Office is only allowed to impose the current level of fines since the entry into force of the Competition Act in 2008, and the maximum fines were considerably lower under the previously applicable legislation governing cartels. The Office only publishes final sentencing decisions, and no sentencing decisions under the Competition Act have been published so far.

The highest fine to our knowledge imposed by the Office under the Competition Act was almost €8.5 million, aggregately imposed on five electricity distributors for a concerted price increase in 2008. However, following the request for the protection of legality filed by the electricity distributors, the District Court in Ljubljana in 2010 decreased the aggregate amount of fines to €625,000 in accordance with the Prevention of Restriction of Competition Act (Official Gazette No. 56/1999, as amended; the Act ceased to apply with the entry into force of the Competition Act) which applied in the time of the infringement and determined the level of fines in the range from €125,000 to €375,000.

The maximum fine in percentages was likely imposed in 2010: the Office imposed a fine on six Slovenian ski lift operators, the Slovenian Association of Ski Lift Operators, and their responsible individuals that allegedly amounted to 5.5 per cent of each individual ski lift operator's ticket sales. The respective Office's decision on the fines is still pending on appeal.

The Office recently imposed a fine in the amount of €105,000 on one of the Slovenian production companies for obstructing the investigators. The highest fine that may be imposed on undertakings obstructing the investigation amounts to 1 per cent of the turnover realised in the previous financial year.

To our knowledge, no criminal sanctions have been imposed in Slovenia for cartel activity prohibited by the Penal Code.

Sentencing

19 Sentencing guidelines

Do sentencing guidelines exist?

No special sentencing guidelines exist. The Office is entitled to impose a fine up to the maximum set forth by the Competition Act, thereby considering the general principles and rules on fines as contained in the Misdemeanour Offences Act.

Criminal sanctions are also imposed considering the general principles and rules on sanctions in the penal legislation (Penal Code and Criminal Liability of Legal Entities Act).

20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

Not applicable.

21 Leniency and immunity programmes

Is there a leniency or immunity programme?

A leniency programme was enabled by the 2009 amendment of the Competition Act and implemented by the Decree on the procedure for granting immunity from fines and reduction of fines in cartel cases (Official Gazette of the Republic of Slovenia No. 112/09; the Decree) that entered into force on 1 January 2010.

22 Elements of a leniency or immunity programme

What are the basic elements of a leniency or immunity programme?

If an undertaking participating in the cartel applies for leniency, the Office may decide not to impose a fine on it if the following conditions are fulfilled:

- it must not have forced other participants in the cartel to participate or to continue to be participants thereof;
- it must be the first to submit evidence that enables the investigation of the Office;
- it must completely disclose its own participation in the cartel;
- it must cooperate with the Office during the whole investigation; and
- it must cease participation in the cartel, unless the Office requires it to continue participating in the interests of the investigation.

If an undertaking participating in the cartel fails to fulfil any of the above stated conditions, it may still be granted a reduction of fines provided that it applies for leniency and:

- it submits evidence disclosing its own participation, which represents a significant added value to the evidence already obtained by the Office;
- it cooperates with the Office during the whole investigation; and
- it ceases participation in the cartel unless the Office requires it to continue participating in the interests of the investigation.

The first leniency applicant fulfilling these conditions may be granted a reduction of fines by 30 to 50 per cent; the second applicant may be granted a reduction of fines by 20 to 30 per cent; and all subsequent leniency applicants may be granted a reduction of fines by up to 20 per cent. In any event, fines may not be reduced below the minimum set in the Competition Act.

It should be noted that leniency benefits as described above and in other responses below can only be granted in the procedure before the Office and only extend to administrative fines.

In the case of a cartel that constitutes a criminal offence, the offender participating in the cartel may be exempt from the punishment on the basis of the Criminal Act provided that it announced the violation prior to its discovery or before learning of the identification of violation; has been involved in the investigation and elimination of consequences; and did not force others to participate in the cartel or continue to participate in the cartel.

23 First in

What is the importance of being 'first in' to cooperate?

Only the first leniency applicant is entitled to be granted full immunity (no fine at all).

24 Going in second

What is the importance of going in second? Is there an 'immunity plus' or 'amnesty plus' option?

The person going in second may have its fine reduced by 30 to 50 per cent, and consequent leniency applicants may only benefit from a lower reduction.

'Immunity plus' and 'amnesty plus' options do not exist.

25 Approaching the authorities

What is the best time to approach the authorities when seeking leniency or immunity? Are there deadlines for applying for leniency or immunity, or for perfecting a marker?

There are no legally set deadlines for applying for leniency.

If the Office is already in possession of information needed to conduct an inspection or the Office has already conducted an inspection, it shall inform the offender submitting the application thereof in writing and return the application to the offender. Therefore an early filing is always advisable. There is, however, no established practice with respect to leniency applications, hence it is not yet possible to determine the best time under Slovenian rules. In any event being 'first in' will represent a significant advantage, and coordination of filings in all affected jurisdictions is highly recommended.

The Office determines the period for perfecting the marker. If a person applying for a marker fails to complete an application within the time limit specified by the Office, the marker shall be deleted from the ranking order and the application for marker shall be returned to the applicant.

26 Confidentiality

What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

Pursuant to the Competition Act, Office civil servants and persons cooperating with the Office in the implementation of tasks pursuant to the Competition Act and getting acquainted with confidential information shall treat such information as confidential in compliance with the rules determining protection of such information. Information obtained in accordance with the Competition Act may be used only for the purposes stipulated by the Competition Act. The Office may, however, disclose information in its possession to administrative bodies, other state authorities and holders of public authorisations for the purpose of carrying out their statutory responsibilities, on the basis of a substantiated written request by the principal or his or her authorised person clearly indicating the purpose of the request. The Decree seems to be more restrictive as far as disclosure is concerned. Pursuant to article 6 of the Decree, a leniency application shall be considered a 'business secret' of the leniency applicant. The Office may disclose information and evidence from the leniency application to the undertakings subject to investigation, but only after the issuance of the summary of the relevant facts and provided that it ascertains that the disclosure is required, since the right of defence of the respective undertaking subject to investigation objectively outweighs the interest of the leniency applicant to maintain such information and evidence as business secrets in accordance with article 18, paragraph 7 of the Competition Act.

The Decree also contains provisions on sharing of leniency applications with competition authorities of other EU member states.

27 Successful leniency or immunity applicant

What is needed to be a successful leniency or immunity applicant?

See question 22 concerning the substantial conditions. The Decree regulates the leniency procedure in more detail, including the necessary forms that are required to be completed.

28 Plea bargains

Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

Plea-bargaining procedures are not foreseen. Any undertaking being prosecuted by the Office may, however, propose to the Office commitments aimed at eliminating the alleged violations. Such commitments may be proposed at any time after the issuance of the order on the commencement of the procedure and before the expiry of the term to respond to the summary of the relevant facts. If commitments are proposed they may be accepted by the Office in its decision, and the case is thereby closed (provided that the commitments are complied with).

29 Corporate defendant and employees

What is the effect of leniency or immunity granted to a corporate defendant on its current and former employees?

Pursuant to the Decree (article 3, paragraph 2) a leniency application filed by a corporation also extends to its responsible persons, unless the leniency application provides otherwise. The leniency application has to name these responsible persons and contain their personal data. It is worth noting that the Competition Act expressly stipulates that it is without prejudice to the relationships between employers and employees.

30 Cooperation

What guarantee of leniency or immunity exists if a party cooperates?

Under the Competition Act, the Office is entitled, but not obliged, to waive sanctions. Under the Decree, however, the Office seems obliged to grant immunity from or reduction of fines if the leniency applicant fulfilled the applicable conditions: article 9 of the Decree provides that the Office shall grant immunity from or reduction of a fine provided that the offender fulfils all conditions set out in article 76 of the Competition Act and in the Decree at the time when the minor offences decision is issued by the Office.

It should be noted that leniency does not apply to criminal proceedings: benefits from the Decree can only be granted in the procedures before the Office and only extend to administrative sanctions, not to criminal sanctions. As mentioned above, the offender participating in the cartel may avoid criminal sanctions provided that it announced the violation prior to its discovery or before learning of the identification of violation; has been involved in the investigation and elimination of consequences; and did not force others to participate in the cartel or continue to participate in the cartel. The fulfilment of these conditions is separately assessed in criminal proceedings.

31 Dealing with the enforcement agency

What are the practical steps in dealing with the enforcement agency?

The Office is usually accessible and may be contacted in writing or orally. The Office is especially accessible to potential leniency applicants: there is a special phone number and a special e-mail address that may be used by leniency applicants only.

According to the Decree, a leniency application may be submitted either in writing or orally, provided that the request for oral submission is properly grounded. Hypothetical leniency applications, summary applications and markers are also available under the Decree in addition to standard leniency applications.

Update and trends

Following a substantial amendment of the Competition Act (ZPomK-1B) in March 2011, which envisaged transformation of the Office into an autonomous and independent Competition Protection Agency (the Agency), a new amendment of the respective Act was adopted in July 2012 (ZPomK-1D) that partially changed the structure of the managing bodies of the Agency. The two bodies of the Agency currently foreseen by the Act as amended are the director and a five-member council appointed by the National Assembly of the Republic of Slovenia at the proposal of the government of the Republic of Slovenia. The Agency was initially foreseen to become operational as of 1 January 2012. After a delay, the government of the Republic of Slovenia in August 2012 adopted a Ruling on the establishment of the Slovenian Competition Protection Agency (Official Gazette of the Republic of Slovenia No. 64/2012) which regulates the purpose, tasks and responsibilities of the Agency and its internal organisation and bodies. The Agency will become operative upon its registration, which is expected to happen in 2012.

The Office recently adopted a partial decision against several construction companies for participating in a cartel, dividing among themselves the construction and renovation of motorways in public procurement procedures and exchanging information on tender prices. The Office has not yet adopted the decision on the amount of fine: the Slovenian media question the amount of the fine, due to the hard financial situation in the construction sector, allegedly lower revenues and initiated bankruptcy proceedings against several of the infringing companies.

32 Ongoing policy assessments and reviews

Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

No.

Defending a case

33 Representation

May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

In proceedings before the Office counsel are not prohibited from representing employees under investigation as well as the corporation, provided that effective defence of both the respective employees and the corporation is possible, and it is not unusual for the same counsel to represent the corporation as well as its allegedly responsible individuals.

Independent legal advice should, however, be sought in any case of conflict of interest or potential conflict of interest, and therefore it is generally advisable for such employees to seek individual legal advice as early as possible, especially if the foreseen defence of such employees is not in line with the foreseen defence of the corporation (eg, if an employee wishes to claim that it is not a 'responsible individual').

Joint legal representation is not allowed in criminal proceedings: pursuant to article 36 of the Criminal Liability of Legal Entities Act, the accused legal entity may not have the same attorney as the accused individual.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

This is not expressly prohibited and is generally possible if there are no conflict of interest issues, but it would be rather unusual (except possibly in the case of group companies) due to the high possibility of conflict of interest in cartel cases.

35 Payment of legal costs

May a corporation pay the legal costs of and penalties imposed on its employees?

A corporation is not expressly prohibited from paying the legal costs of and penalties imposed on its employees. Certain academics have, however, argued that such payments are also prohibited if they were contractually agreed upon. In any event, such expenses would likely not be tax-deductible.

36 Getting the fine down

What is the optimal way in which to get the fine down?

The prospect of success of a leniency application should be considered and analysed as soon as possible after the violation is discovered.

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