

The International Comparative Legal Guide to:

Cartels & Leniency 2008

A practical insight to cross-border Cartels & Leniency



Published by Global Legal Group

Slovakia

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THE CARTEL PROHIBITION

1 The Legislation

1.1 What is the basis and general nature of the cartel prohibition?

The statutory basis for the cartel prohibition is Act No. 136/2001 Coll. on Protection of Competition and on Amendments and Supplements to the Act of the Slovak National Council No. 347/1990 Coll. on the Organization of Ministries and Other Central Bodies of the State Administration of the Slovak Republic as amended (the “Act”). This regime is a civil law regime. The Act applies to undertakings, whereby for the purposes of the Act, undertaking means an entrepreneur pursuant to the Commercial Code. The Act also applies to individuals and legal entities, their associations, and associations of these associations, with respect to their activities and actions that are, or may be, related to competition, regardless of whether or not these activities and actions are aimed at making a profit.

1.2 What are the specific substantive provisions for the cartel prohibition?

Pursuant to Art 4 Sec 1 of the Act agreements and concerted practices between undertakings, as well as decisions of their associations, the objective or effect of which is or may be the restriction of competition are prohibited, unless the Act provides otherwise (the Act provides, for instance, comparable to Art 81(3) EC Treaty for an exemption to the cartel prohibition provided the agreement restricting competition fulfils certain criteria).

1.3 Who enforces the cartel prohibition?

Cartel prohibition is enforced by the Antimonopoly Authority of the Slovak Republic (“Authority”). The entire enforcement process is a civil law process. An inspection performed by the Authority under the Act may only be performed on the basis of a respective court approval, which shall be issued following a respective proposal of the Authority according to the Slovak Code for Civil Procedure (OSP). Both, the investigation and the adoption of an infringement decision are performed by the Authority, however, a party affected by such court approval for an inspection may appeal this approval (whereas the appeal does not have a suspensive effect).

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Proceedings in the case of cartel prohibition always commence at the Authority’s own initiative. The Authority must instruct the parties to the proceedings on their procedural rights and obligations, so that they do not suffer any harm in the proceedings as a result of their lack of legal knowledge; the Authority is not required to do so if a party to the proceedings is represented by an attorney. As a rule, the Authority must notify the parties about the opening of an investigation in written form by a document delivered by post. However, the Authority may, depending on the circumstances, deliver a document via its own employees. The Authority must issue a decision within six months following the date on which the proceedings commence. In complicated cases, the Authority Chairperson may allow, also repeatedly, an appropriate extension of the time limit for issuing a decision by a maximum of 24 months in total. If the Authority is unable to make a decision within six months, it is required to notify the party to the proceedings thereof and indicate respective reasons. Before a decision is issued, the Authority is required to call on the parties to the proceedings to express, in oral or written form, their views on the grounds for the decision and the method by which it was established or to propose amendments thereto and to inform them about the conclusions of the investigation at which the Authority has arrived on the basis of the available information and documents.

1.5 Are there any sector-specific offences or exemptions?

The Act does not apply to competition restrictions by undertakings providing services in the public interest pursuant to special legislation, provided that the application of the Act would prevent them from legally or effectively fulfilling their tasks pursuant to special legislation (for example, Art 7 of the Act on Postal Services or Art 5 and 7 of the Act on Collective Bargaining as amended). Further, the Act does not apply to the field of the so-called Network Industries (see under question 9.2 below for more details).

1.6 Is cartel conduct outside Slovakia covered by the prohibition?

The Act also applies to activities and actions that have taken place abroad, provided that they lead, or may lead, to a restriction of competition in the domestic Slovak market. The Act does not apply to restrictions to competition the effects of which only take place in a foreign market, unless an international agreement published in the Collection of Laws of the Slovak Republic, by which the Slovak Republic is bound, provides otherwise.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Not Applicable
Carry out compulsory interviews with individuals	Yes	Not Applicable
Carry out an unannounced search of business premises	Yes*	Not Applicable
Carry out an unannounced search of residential premises	Yes*	Not Applicable
■ Right to 'image' computer hard drives using forensic IT tools	Yes	Not Applicable
■ Right to retain original documents	Yes	Not Applicable
■ Right to require an explanation of documents or information supplied	Yes	Not Applicable
■ Right to secure premises overnight (e.g. by seal)	Yes*	Not Applicable

Please Note: * indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

There are no specific or unusual features of the investigatory powers.

2.3 Are there general surveillance powers (e.g. bugging)?

In general, surveillance powers are only foreseen in criminal proceedings. Consequently, such surveillance powers are only available in case the infringement of the Act constitutes a criminal offence (see under question 3.2 below).

2.4 Other powers of investigation.

Authority employees are empowered, on the basis of a written authorisation by the Authority Chairperson, to enter any buildings, premises and means of transport of an undertaking which are related to the activities or actions of the undertaking in order to carry out an inspection. If reasonable suspicion exists that information or documents related to the activities or actions of an undertaking, on the basis of which a serious restriction of competition may be proven, are located in an undertaking's buildings, premises or means of transport, as well as in private buildings, private premises or private means of transport of the undertaking's employees, the Authority may issue a decision over an inspection to be performed by Authority employees. An inspection may only be performed with court approval.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

An inspection will be carried out by Authority employees. The Authority shall only invite a custodian appointed by the court that

has decided on the approval of the inspection to attend the inspection.

2.6 Is in-house legal advice protected by the rules of privilege?

In-house legal advisors are not protected by the rules of privilege. Pursuant to Act No. 583/2003 on attorneys (as amended) and pursuant to the Bar Association Attorneys Order an attorney is obliged and protected by the rules of privilege.

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals.

There are no other material limitations of the investigatory powers.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used in connection with a cartel investigation?

Undertakings are obliged to (i) submit to the Authority the requested information and documents, (ii) allow an examination of this information or these documents, (iii) cooperate with the Authority in its investigation, and (iv) allow employees of the Authority, employees of other national competition authorities, and employees of and persons authorized by the Commission to enter all buildings, premises and means of transport of the undertakings. The Authority may require the undertakings to divulge the subject of business secrecy and their confidential information. The Authority may impose a fine of up to SKK 5,000,000 (EUR 150,000) on an undertaking or legal entity that fails to fulfill the obligation to submit the requested documents or information to the Authority within the specified time limit, that submits false or incomplete documents or information, or that does not allow the examination or access to premises. The Authority may impose a fine of up to SKK 100,000 (EUR 3,000) on an entrepreneur who fails to attend, without valid reason, a hearing or otherwise interferes with the progress of the proceedings. The Authority may repeatedly impose these fines. Such sanctions are not used very often.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Firstly, provisions in agreements and decisions infringing the cartel prohibition are void. Secondly the Authority may impose a fine on an undertaking of up to 10% of its turnover for the preceding closed accounting period and a fine of up to SKK 10,000,000 (EUR 300,000) on an undertaking that attained a turnover of up to SKK 10,000 (EUR 3,000) or attained no turnover, or on an undertaking the turnover of which cannot be calculated.

When imposing a fine, the Authority shall consider the gravity and duration of the violation of (i) the provisions of the Act, (ii) special legislation or (iii) a condition, obligation or commitment imposed by a decision of the Authority. When assessing the gravity of the violation, the Authority shall consider its character, actual impact on the market and, where appropriate, the size of the relevant market. In addition to these criteria, the Authority shall also consider other facts with respect to imposing a fine, especially a repeated violation by the same undertaking, an undertaking's refusal to cooperate with the Authority, an undertaking being in the position of leader or instigator of a violation, gaining financial

benefit as a result of a violation or failure to fulfill in practice an agreement restricting competition. The imposition of other sanctions on companies, such as black-listing from tendering for governmental contracts, is provided by Slovak Law but is not in the Authority's competence.

3.2 What are the sanctions for individuals?

The Authority may impose a fine only on individuals qualifying as entrepreneur. Such entrepreneur could further be accused of the criminal offence of misuse of participation in economical competition, which carries the possible criminal penalty of imprisonment for between 2-6 years.

3.3 What are the applicable limitation periods for the imposition of sanctions for cartel conduct?

The Authority may impose fines within four years from the commencement of proceedings. However, the Authority may impose these fines within eight years of the day of the violation of the provisions of the Act and/or the provisions of special legislation (Articles 81 and 82 of the Treaty establishing the European Community), the failure to fulfill a condition or the violation of an obligation or commitment imposed by a decision of the Authority; in the event of a continuing administrative offence or lasting administrative offence, the time limit shall begin on the date on which the violation last occurred.

3.4 Is cartel conduct by individuals potentially an extraditable offence?

If an individual is participating in economic competition (as entrepreneur) this could be an extraditable offence.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

As explained in questions 3.2 and 3.4, a penalty cannot be imposed on an employee.

LENIENCY / WHISTLE-BLOWING

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The fine for participation in a cartel agreement may be reduced or not imposed on those participants of a cartel agreement who assist the Authority in proving the cartel's existence (prompt disclosure and discovery of a cartel is considered more important than the imposition of sanctions against each participant).

The Authority will not impose a fine on an undertaking which was a party to a prohibited cartel and which, at the same time: (i) was the first to provide, on its own initiative, decisive evidence to prove such prohibited cartel; (ii) terminated its participation in the prohibited cartel at the latest when it provided evidence to the Authority; (iii) did not force another undertaking to take part in the prohibited cartel and was not the instigator of the conclusion of said cartel; and (iv) provided the Authority with all evidence available to it and cooperated with the Authority throughout the entire investigation.

The Authority will impose a fine, with a reduction of up to 50% in case another undertaking has been first to contact the Authority (and is finally granted leniency) provided that the following undertaking provides evidence of the infringement which adds value to the proceedings and it terminates its participation in the infringement at the latest when filing the evidence with the Authority.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

No, there is no specific marker system.

4.3 Can applications be made orally (to minimise any possible subsequent disclosure risks in the context of civil damages follow-on litigation)?

An application to initiate a leniency programme may be filed in writing or orally (minutes are taken by the Authority). It can be filed telegraphically or by fax (however, the written original of such application needs to be filed within the next three days).

4.4 To what extent will the application be treated confidentially and for how long?

The Authority is bound to treat information confidentially about which it has been asked to do so. The confidentiality of such information shall, however, constitute no obstacle to its disclosure if this is necessary for a decision.

4.5 At what point does the continuous cooperation requirement cease to apply?

The continuous cooperation requirement applies until the end of the administrative procedure.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

There are no specific procedures in this respect (the Authority may initiate proceedings on its own initiative and on the basis of a written petition by any individual or a legal entity).

6 Plea Bargaining Arrangements

6.1 Are there settlement or plea bargaining procedures (other than leniency)?

Not applicable.

APPEALS AND DAMAGES ACTIONS

7 Appeal Process

7.1 What is the appeal process?

A decision issued in the first instance proceedings may be appealed within 15 days following the date of delivery of the decision. The

Council of the Authority decides on appeals and reviews decisions outside appellate proceedings. The Council also decides on the reopening of proceedings. It is not possible to appeal against a decision of the Council, but it is possible to file a lawsuit with the Regional Court in Bratislava within two months of delivery of the decision. In the cases where an appeal against a verdict of the Regional Court is permissible, appeals are decided by the Supreme Court of the Slovak Republic.

7.2 Do courts frequently adjust the level of penalty imposed by the competition authority? If so, on what grounds?

The Adjustment of penalties by the courts is uncommon. Further, we are not aware of a single case where the courts have ever adjusted any reductions granted by the Authority following the leniency programme.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

Individuals or undertakings who have suffered losses as a result of cartel conduct are entitled to claim for damages in civil courts on the basis of general civil tort law principles. However, comparable to other jurisdiction, claimants usually face problems to justify their claims before courts (in particular when it comes to presenting proof of damages).

8.2 Do your procedural rules allow for class-action or representative claims?

The Slovak Code for Civil Procedure does not provide for class-actions. However several plaintiffs may combine their actions against one and the same defendant or several plaintiffs may join their claims for damages provided that, inter alia, their claims: are directed against the same defendant; are based on the same title

(e.g. the plaintiffs have been parties to the same contract with the defendant); or result from the same fact pattern (e.g. the plaintiffs have all been affected by the same unlawful behavior of the defendant).

8.3 Have there been successful civil damages claims in the past?

We are not aware of any such actions for damages to date or whether any “out of court” settlements have been reached.

OTHER MATTERS

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

Supported by the European Commission’s policy on the discovery of cartel law violations, Slovak competition authorities have been increasingly active during the last years (leading to an increasing number of proceedings and fines). We expect this trend to continue and to see an increasing number of leniency cases in the near future.

9.2 Please mention any other issues of particular interest in Slovakia not covered by the above.

The protection of competition in the field of Network Industries (such as the electricity sector, the gas industry, the heating supply sector or the water service sector) is supervised by an independent body, the so-called Regulatory Office of Network Industries. Such authority inter alia determines the methods, procedures, and conditions for ensuring competition in Network Industries (whereas the Act does not apply to such Network Industries).

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