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TRANSNATIONAL EFFECTS OF DECISIONS OF THE ANTIMONOPOLY OFFICE OF THE SLOVAK REPUBLIC

National jurisdiction, or the State, are terms inherently connected with the jurisdiction of the State to regulate social relations existing in their national "territory" through legal acts[1]. The above-mentioned regulating jurisdiction is thus a part of the sovereignty and autonomy of each State. As a result of this activity, social relations are regulated through national legal acts whose effects are limited by the extent of the national territory and are binding upon both the nationals and the authorities acting in national structures.

Nowadays, the development of the legal situation and the laws of the States is marked by the intention of cooperation and globalisation which, in the area of economic law, are reflected in the effort to create a uniformly applied and effective system which ensures undistorted competition[2].

These objectives are achieved in defined areas where cooperation is most needed by means of acts that have effects beyond the territory of a particular State and thus apply to the territory of other States, as well. The originator of transnationality is a transnational entity, or its international legislation. The difference between them consists, in particular, in the transposition of a decision with a transnational effect which does not need to be recognised within a special procedure under the laws of the State concerned. In case of the Slovak Republic, a uniform approach to defined issues is regulated by the EU law through directives and regulations. Transnationality of administrative acts causes that these acts produce legal effects, in addition to their State of origin, also towards foreign national authori-

[1] R. Jakab, *Exteritorialita a transteritorialita v podmienkach EÚ a jej členských štátov* [in:] *Extrateritoriálne účinky činností orgánov verejnej moci. Zborník vedeckých prác*, Košice 2018, p. 10.

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty

ties. At the same time, this type of acts is characterised by reciprocity, which means that when issuing a transnational act with effects on legal relations outside the territory of their State of origin the State-originator also envisages or expects equivalent effects of decisions of foreign authorities in its territory[3].

Decisions characterised by transnational effects inherently interfere with the jurisdiction of another State, contrary to the principle of autonomy (which constitutes a prohibition on interfering with the jurisdiction of another State within its territory). A violation of this principle of autonomy is in accordance with law if it is in accordance with the rules of the EU law and with the aim to fulfill the intention of this transnational legislation. The aim is to "supervise" the regulation of activities taking place abroad (outside the territory of the Sate concerned) that have an actual or at least potential effect on the territory of that State. The application of this principle is most perceptible especially in the area of financial market regulation within the European Union[4].

For example, the protection of the right to privacy and the protection of personal data under Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), is still a topical issue with a strong transnational impact in the European context. The effects of this European legal act are not limited by the national borders of the Member States of the European Union. In addition to controllers and processors processing personal data in the territory of a Member State of the European Union, controllers and processors established outside the EU Member States also fall within its scope if they process personal data of a person who is in an EU Member State. It is an explicit extension of the transnational scope of that Regulation beyond the Member States of the European Union[5].

A more apparent expression of transnationality is most often perceptible in criminal matters, for example, in the form of organised crime. Given the increasing trend of crime at the transnational level, the need of the European Union to simplify and speed up the exercise of criminal jurisdiction between the Member States has increased proportionally. In this area, transnationality can be seen in various forms of cooperation in criminal matters, e.g., through the European arrest warrant, under which the States are required to arrest and surrender suspects or convicted persons to other Member States for the purposes of conducting a criminal prosecution, executing a custodial sentence, and the like. Under Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures

[3] J. Handrlica, *Vybrané problémy spojené s aplikací modelu transteritoriálních správnych aktú*, „Studia Iuridica Cassoviensia" 2016, vol. 4, no. 2.

[4] R. Jakab, *Exteritorialita a transteritorialita*…, p. 12.

[5] Redakcia časopisu ZSP. Zo súdnej praxe č. 3, 2018, p. 97. Ochrana osobných údajov a ochrana súkromia v novej legislatívnej kvalite. 1.06.2018.

between Member States, implementing the European arrest warrant, the Member States of the European Union are obliged to execute all European arrest warrants in accordance with the principle of mutual recognition of criminal decisions[6].

In the context of the European Union, the substance of transnationality consists in an effort to achieve the fundamental objectives of the European Union, in particular, the free movement of goods, persons and capital. The aim of the effort for a uniform approach (achieved by the transnational effects of decisions) in defined areas with a transnational impact is to prevent the circumvention of the law of the European Union, whose Member States are committed to the common respect of the values and principles the European Union is founded on. One of these principles is the commitment to sustainable development based on a balanced economic growth and price stability, and a highly competitive market economy characterised by full employment and social progress and environmental protection. It is this principle that is the main pillar of the activities of the Antimonopoly Office of the Slovak Republic, whose role is to protect and promote competition, which is the basis of the good functioning of the market economy. It is the Antimonopoly Office of the Slovak Republic that ensures that competition law does not contain practices that restrict competition and that favourable competitive conditions are created and maintained.

The Slovak Republic, as a Member State of the European Union, is committed to enforcing competition rules together with the EU Commission and in cooperation with other national competition authorities. The purpose of this uniform procedure is to achieve an open, competitive and innovative internal market that is crucial for creating jobs and growth in important sectors of the economy, in particular, in the energy, telecommunications, digital and transport sectors[7]. Thus, as part of the European Community, the Antimonopoly Office of the Slovak Republic should also act in close compliance with the European Union law and enforce and supervise competition at both national and international level. One of its objectives is the coordinated participation in the development of the legislative framework for the protection of competition under the auspices of the European institutions enforcing the protection of competition in the context of the Member States of the European Union[8].

In relation to the activities of the Antimonopoly Office of the Slovak Republic, transnationality of the effects of its decisions is not clearly evident at first sight. The reason is that the Antimonopoly Office of the Slovak Republic

[6] K. Búranová, *Európsky zatýkací rozkaz a praktické problémy jeho uplatňovania*, „Legal point" 2018, č. 1.

[7] Directive No. 2017/0063 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market of 22 March 2017.

[8] Plán úloh Protimonopolného úradu SR – Metodické usmernenie Protimonopolného úradu SR zo 16.05.2017.

supervises in a regulatory manner the competition taking place on the "domestic market". Based on the purpose and nature of the activity of this authority, transnationality of the effects of the Antimonopoly Office of the Slovak Republic arises from Section 2, in particular from its sub-sections (4) and (5), of Act No. 136/2001 on the protection of competition, amending Act of the Slovak National Council No. 347/1990 on the organization of ministries and other central state administration authorities of the Slovak Republic, as amended (*hereinafter referred to as the "Competition Act"*).

Under Section 2(4) and (5) of the Competition Act

"(4) This Act shall also apply to acts and conduct that have taken place abroad, provided that they lead, or may lead, to restriction of competition on the domestic market.

(5) This Act, except Part Five, shall not apply to restrictions of competition that only have effect on a foreign market, unless an international treaty by which the Slovak Republic is bound and which is published in the Collection of Laws of the Slovak Republic provided otherwise".

It follows from sub-section 4 that the activities of the Antimonopoly Office of the Slovak Republic focus primarily on the exercise of competition on the domestic market, but the Competition Act also applies to activities or conduct taking place abroad whose effects may restrict competition on the domestic market. This situation reflects *the principle of effects* arising from *activities carried out outside the territory* of a certain State (*effect-based principle*), but with a potential to influence/distort competition in the territory of the State concerned, too[9]. Thus, the above-mentioned Section 4 expressly envisages the transnational effects of decisions of the Antimonopoly Office of the Slovak Republic in relation to transnationally operating economic entities whose economic activities, however, have a certain impact on or an ability to influence the domestic market. As a manifestation of the regulating competence of the Antimonopoly Office of the Slovak Republic in the context of transnational activities we can mention the sanctioning of the "cartel" of foreign entities resulting in coordinated behaviour of the individual cartel members on the relevant market by fixing prices, allocating markets, mutual restrictions in entering into licence agreements, and so on. The Slovak Republic was not directly involved in that agreement, but was only one of the potential target entities whose market could be affected by the cartel.

This was namely the case in which the Antimonopoly Office of the Slovak Republic was deciding on the agreement between Japanese and European companies that coordinated their behaviour on the relevant market for the manufacture and sale of gas insulated switchgears by fixing prices, allocating markets, maintaining stable market shares based on quotas agreed in advance, mutual restrictions in entering into licence agreements with third parties, and so on. As

[9] R. Jakab, *Exteritorialita a transteritorialita*…, p. 12.

mentioned above, the Slovak Republic was not directly involved in that agreement. In that case, the Antimonopoly Office of the Slovak Republic commenced proceedings under the Competition Act.

The competence of the Antimonopoly Office of the Slovak Republic to deal with that matter was challenged by the parties to the proceedings on the grounds of the allegedly absent legal basis of its competence. One of the members of the agreement, Mitsubishi Electric Corporation, stated that it did not intend to import its products to Slovakia and thus to apply the effects of the cartel to Slovakia, because it was neither technically possible nor advantageous. According to that statement, any impact or effect of these agreements on the Slovak Republic was allegedly excluded. In this context, the commentary of Czech authors on the Czech Competition Act was pointed out as follows: "When assessing an example of the agreement of parties that are not present on the Czech market at the time of entering into the same but only intend to enter the market, such an agreement does not meet the conditions of Section 1(5), which are not met if there is no threat of distortion of competition on the market concerned. However, the provision will certainly not apply to situations where the concerned party to the agreement did not even intend to enter the market".

The basis of the competence of the Antimonopoly Office of the Slovak Republic to deal with this and similar cases of a threat to competition stems from Art. 81 and 82 of the Treaty establishing the European Community, whose Title VI establishes the common rules on competition, taxation and approximation of laws. Point 1 of Art. 81 contains a general prohibition on all agreements, decisions and concerted practices between undertakings which may affect trade between Member States and which have as their object or effect the restriction or distortion of competition within the common market.

Such a kind of conduct is incompatible with the common market. The above-mentioned basic platform of competence of the Antimonopoly Office of the Slovak Republic is also supported by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty (*hereinafter referred to as the "the Regulation on the implementation of competition rules"*). In the Slovak Republic, competition law is fully harmonised with the provisions of Art. 81 and 82 of the Treaty. The EU Member States are key partners of the European Commission in enforcing the EU competition rules. The transnational effect of the decisions of the Antimonopoly Office of the Slovak Republic arises from recital 8 of the Regulation on the implementation of competition rules. This point emphasizes the need for a uniform obligation of the competition authorities of the Member States to also apply Art. 81 and 82 of the Treaty where they apply national competition law to agreements and practices which may affect trade between Member States. In addition, as regards the protection of competition on their own territory, the Regulation on the implementation of competition rules allows

Member States to adopt and apply stricter national competition laws. These stricter national laws may also include provisions which prohibit or impose sanctions on abusive behaviour towards economically dependent undertakings[10].

The relationship between national competition laws and Art. 81 and 82 of the Treaty is provided for in Art. 3 of the Regulation on the implementation of competition rules. Under that Art., "Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Art. 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Art. 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Art. 82 of the Treaty, they shall also apply Art. 82 of the Treaty".

The effort for a uniform competition law to ensure the good functioning of the common market is further enhanced by intensive cooperation between the Commission and the competition authorities of the Member States: "The Commission and the competent authorities of the Member States shall apply the Community competition rules in close cooperation"[11].

Due to the dual action of the authorities protecting common "European" competition, it is important to respect the principle *ne bis in idem* in relation to the initiation of proceedings for infringement of the competition rules and the administrative punishment of infringers. This means that, where proceedings under Art. 81 of the Treaty have been initiated by the European Commission, the national competition authority will be deprived of its competence to deal with that case by virtue of Art. 11(6) of the Regulation on the implementation of competition rules. In this case, the national competition authority – the Antimonopoly Office of the Slovak Republic – could only apply the national competition law if it would do so with regard to an objective different from the objective pursued by Art. 81 and 82 of the Treaty[12]. The principle *ne bis in idem* in the context of dualism in the protection of competition at both national and European levels has been the subject of several case analyses. In Case Aalborg Portlad[13] before the European Court of Justice it was established that the application of the principle *ne bis in idem* is sub-

[10] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty.

[11] Art. 11(1) of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty.

[12] Decision of the Antimonopoly Office of the Slovak Republic No. 2009/KH/R/2/035 of 14 August 2009.

[13] Judgment of the Court (Fifth Chamber) of 7 January 2004 in joined cases Aalborg Portland A/S (C-204/00 P), Italcementi – Fabbriche Riunite Cemento SpA (C-213/00 P) and other C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P (§ 338).

ject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. The presence of the principle *ne bis in idem* in parallel proceedings is not strictly confined to violation of the same legal act. This means that the application of this principle to the relationship between the Commission and the national competition authority – the Antimonopoly Office of the Slovak Republic – is not prevented by the fact that the EU competition laws protect competition within the whole common market, while the national authorities protect individual territorial parts of the common market. However, the substance of both laws is identical and consists in the protection of free competition, while a difference in the territorial scope of anti-competitive conduct is of secondary importance, because it does not change the substance of such anti-competitive conduct, but has an impact on its intensity[14].

The competence of the Antimonopoly Office of the Slovak Republic in case of protection of competition is given by Section 2(4) of the Competition Act. Consequently, the Competition Act also applies to activities and conduct that have taken place abroad, provided that they lead, or may lead, to restriction of competition on the domestic market. It follows from the above that a potential to restrict competition, expressed by the word "may", is sufficient. Therefore, the competence of the Antimonopoly Office of the Slovak Republic to deal with an agreement in which the Slovak Republic was neither a direct party nor a member is even given if this agreement might hypothetically lead to a restriction of competition on the Slovak market. The competence of the competition authority is not given where anti-competitive conduct has taken place abroad, but there is no threat of distortion of competition in relation to the domestic territory.

In the case of the agreement between the Japanese and European companies on the manufacture of gas insulated switchgears, it was clear from the very text of the agreement that there was targeted allocation of projects, the fixing of prices and market sharing between the European and Japanese parties. This conduct itself taking place in the territory of the European members had a potential to influence or restrict competition in the territory of the Slovak Republic. An agreement to restrict competition exists even when its parties follow a common plan that has a potential to restrict their individual business conduct by identifying the limits of their mutual action or abstaining from action.

The impact and effect on the market of the Slovak Republic, which established the competence of the Antimonopoly Office of the Slovak Republic to deal with the case, consisted in the proved negotiation of the parties of the restrictive agreement on projects planned in the Slovak Republic. Mitsubishi's allegation of the technical impossibility and economic disadvantage of importing their products to Slovakia was to prove a lack of an appropriate effect on compe-

[14] Decision of the Antimonopoly Office of the Slovak Republic No. 2009/KH/R/2/035 of 14 August 2009.

tition in the Slovak Republic. However, according to expert opinions prepared in that case, the entry of the Japanese products into the Slovak market was not hindered by any technical or economic barriers, since the Japanese companies had a real possibility to adjust the parameters of the supplied products to the Slovak market. The alleged impossibility to import the products to the Slovak market was not proven, although a greater amount of investment would have been associated with its implementation. The effect of anti-competitive conduct does not necessarily relate to its actual effect[15]. Even under the case-law of the European courts it is not necessary to specify in detail the effect of anti-competitive conduct, in particular, because of the presence of many external factors which make it impossible to objectify the actual extent of the effect on the market. Therefore, in order to assess the potential of a threat to competition, it is sufficient to prove with reasonable probability what effect of anti-competitive conduct on the economic market might be.

On this basis, the Antimonopoly Office of the Slovak Republic concluded that there was a threat of restriction of the domestic market, as a result of which a sanction was imposed on the Japanese and European companies under Section 38(1) of the Competition Act.

A similar undesirable conduct of participation in an agreement restricting competition is a breach of procedural obligations under the Competition Act. An example of a transnational reach of the Antimonopoly Office of the Slovak Republic is the decision to impose a fine under Section 38a(1) on Opel Southeast Europe, a Hungarian company operating in the Slovak Republic through its branch[16]. The Antimonopoly Office of the Slovak Republic initiated an investigation under Section 22(1)(b) in the area of providing after-sales services related to the sale of Opel motor vehicles in the Slovak Republic. These motor vehicles are sold in the Slovak Republic through authorised dealers. As a part of these proceedings, the Antimonopoly Office of the Slovak Republic requested the Opel branch, as an importer of Opel vehicles, for information and documents related to the provision of after-sales services. Opel provided the Antimonopoly Office of the Slovak Republic incomplete and untrue information and thus breached Section 22(2) of the Competition Act. The fine was imposed not on the Opel branch, but directly on the Hungarian company Opel.

"The fact that a branch of a foreign legal entity established in the Slovak Republic is registered in the Business Register does not imply that this branch is the holder of legal personality and has a capacity to be a party to proceedings"[17].

[15] Judgment of the Court of First Instance (Third Chamber) in Case T-203/01 Michelin v Commission of the European Communities of 30 September 2003.

[16] Decision of the Antimonopoly Office of the Slovak Republic No.: 208/2017/OZDPaVD-2017/SP/2/1/002 of 26 January 2017.

[17] Resolution of the Supreme Court of the Slovak Republic 4 Obdo 54/2011 of 30.11.2011.

Therefore, a foreign legal entity has the capacity to be a party to proceedings. Undertakings have, under Section 22(2) of the Act, an obligation to submit to the Office complete and true information and documents required by the Office within the time limit specified by the Office, and in case of a breach of this statutory obligation the Office shall impose a fine on the undertaking under Section 38a(1)(a) a) of the Act. An administrative offense of a failure to submit true information and documents required by the Office within the time-limit set by the Office is committed at the moment when the obliged entity provides the Office with false information or does not provide the requested information and documents within the time limit specified by the Office. By failing to submit the required documents and information, Opel breached its obligation under Section 22(2) of the Competition Act. The existence of the statutory obligation declares the importance of detecting and proving an infringement of the competition rules. A breach of these obligations has a negative impact on the effectiveness of the exercise of the Antimonopoly Office's competence in the protection of competition. Therefore, the Antimonopoly Office of the Slovak Republic is obliged to impose a fine for such a kind of conduct, taking into account of its proportionality to the seriousness of the related conduct, as well as the need for its repressive and preventive nature. In determining the amount of the fine, the Antimonopoly Office of the Slovak Republic also takes into account of the proportionality of the amount of the fine and the consequences of the conduct of the party to the proceedings, which in this case consisted in the intentional hindering of the Office's activity. As regard the seriousness of the conduct, it is necessary to take into account of its impact on the proper and effective detection of possible anti-competitive behaviour and the procedural obstacles and the actions of the Antimonopoly Office of the Slovak Republic to remove them. After taking into account of and objectivising the above-mentioned facts, the Antimonopoly Office of the Slovak Republic imposed a fine on the Hungarian company Opel under Section 38a(1)(a) as a percentage of Opel's turnover in the Slovak Republic in 2015.

The potential for distortion of competition is negligible where there is a concentration of business entities whose impact on the Slovak market is negligible. The above-mentioned conduct occurred in case of proceedings on concentration, where the Antimonopoly Office of the Slovak Republic decided to agree with a concentration consisting in the gaining of a direct exclusive control by a Japanese undertaking over a Swedish undertaking. In this case, the notifier – a Japanese company – is the parent company of several entities involved in the manufacture and supply of steel and titanium products. The target territory of the Group of Entities of the notifier was, in the Merger Notification, defined as the territory of Asia, while its presence is minimum in the European area and negligible in the territory of the Slovak Republic. The group of the Swedish undertaking pursues its business activity mainly in the European area, especially in the Nordic countries. In the territory of the Slovak Republic, it is only present as a foreign supplier.

According to the information contained in the Notification, there is no horizontal overlap between the activities of the undertakings concerned in the territory of the Slovak Republic from the product or geographical points of view. Likewise, there is no vertical link between the activities of the undertakings concerned in the territory of the Slovak Republic. The absence of a horizontal overlap or a vertical link between the activities of the undertakings concerned means that it applies to all available alternatives within the product and geographic relevant markets that

- none of the undertakings concerned or its related undertaking operates on the same product relevant market and geographic relevant market, including the territory of the Slovak Republic, as another undertaking concerned and its related undertaking, and
- none of the undertakings concerned and its related undertaking operates on a market that is a market for supply or sale in relation to the product relevant market and the geographic relevant market in the territory of the Slovak Republic where another undertaking concerned and its related undertaking operates.

Such concentrations do not normally cause a risk of distortion of competition (except in certain specific cases). In these cases, it is the so-called conglomerate concentration in which undertakings expand their portfolio of activities, but without strengthening their position in the markets in which they operated before the concentration. The vertical link is the case where the undertaking concerned or its related undertaking operates on the relevant market which is the market of supply or sale in relation to the relevant market on which another undertaking concerned operates, and the geographic relevant market also includes the territory of the Slovak Republic. The supplier-customer relationship between the undertakings concerned is not decisive[18].

Conclusion

Despite a priority protection of the domestic economic market, the effects of decisions of the Antimonopoly Office of the Slovak Republic have a transnational impact. This fact is mainly due to the membership in the European Union (and has the origin in its documents), which seeks to achieve a good functioning of the common market with free competition. The decisions of the Antimonopoly Office of the Slovak Republic always affect the Slovak market, but the Slovak domestic market is a part of the European competition. Any fluctuations on the internal markets of the Member States may undermine the effort for the continuity of the European competition, and it is therefore necessary to have due regard

[18] Guidelines of the Antimonopoly Office of the Slovak Republic laying down the details of a simplified merger notification of 16.09.2014.

to its protection. The transnational effects of the decisions of the Antimonopoly Office of the Slovak Republic protect competition in the territory of the Slovak Republic even in cases where is a only potential threat to competition and, as a result, the European economic market is protected to a greater extent.

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Summary

In this paper the author deals with transnational effects of decisions of the Antimonopoly Office of the Slovak Republic as an authority for the protection of competition of the national nature, however, in the European law context. The author points out the application of national competition law in close association with legal provisions contained in the essential documents of the EU. The paper also mentions the European tendencies of unifying competition protection legislation. In the context of a threat to competition, the author also points out the importance of complying with obligations in detecting and proving the same. He also refers to situations where, despite the potential presence of competition concerns, competition distortions do not occur.

Keywords: of competition law, the Slovak Republic, the European law

TRANSNARODOWE SKUTKI DECYZJI URZĘDU ANTYMONOPOLOWEGO REPUBLIKI SŁOWACKIEJ

Streszczenie

W niniejszym artykule autor zajmuje się ponadnarodowymi skutkami decyzji Urzędu Antymonopolowego Republiki Słowackiej jako organu ochrony konkurencji o charakterze krajowym, jednak w kontekście prawa europejskiego. Zwraca on uwagę na stosowanie krajowego prawa konkurencji w ścisłym powiązaniu z przepisami prawa zawartymi w podstawowych dokumentach Unii Europejskiej. W tekście wspomniano również o europejskich tendencjach w ujednolicaniu przepisów dotyczących ochrony konkurencji.

Słowa kluczowe: prawo konkurencji, Republika Słowacka, prawo europejskie