

# Cartel Regulation

The application of competition regulation  
in 48 jurisdictions worldwide

**2013**

Contributing editor: D Martin Low QC



Published by *Getting the Deal Through*  
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**Cartel Regulation 2013**  
Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910

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ISSN 1473-3420

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Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112

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# Slovakia

**Adrián Barger, Soňa Princová and Matúš L'ahký**

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## Legislation and jurisdiction

### 1 Relevant legislation

What is the relevant legislation and who enforces it?

Competition rules in Slovakia, including the rules on cartels, are contained in Act No. 136/2001 on Protection of Competition (the Competition Act), which replaced the previous Act on Protection of Competition from 1994. So far, the Competition Act has been subject to five amendments, the last amendment becoming effective as of 1 January 2012. The most significant changes to the Competition Act were adopted by amendment in 2004 in connection with accession of the Slovak Republic to the European Union. The rules on cartels correspond to article 101 of the Treaty on the Functioning of the European Union (TFEU).

The Anti-monopoly Office of the Slovak Republic (the AMO) is the central governmental authority responsible for the protection and promotion of competition. It is led by a chairman, who is appointed by the president of the Slovak Republic based on a proposal by the government. The AMO has broad powers to facilitate the functioning of competition on the market. Among other things, it carries out investigations, decides whether an activity or conduct is prohibited, decides on imposing the obligation to refrain from such conduct and controls the observance of its decisions.

The Council of the Anti-monopoly Office (the Council) is a collective authority consisting of the chairman, vice-chairman and five other members. The chairman and the vice-chairman of the AMO are the chairman and the vice-chairman of the Council, respectively. The Council acts as the appellate body with respect to the first-instance decisions of the AMO.

### 2 Proposals for change

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

In 2010 the AMO commenced work on a comprehensive amendment to the Competition Act. It is expected that this amendment will significantly affect the cartel regime. At the time of writing, however, the final draft of the amendment has not been made available to the public. Thus, the actual extent of the changes that will be introduced by the amendment, if adopted by the Slovak parliament, is unclear at the moment.

Pursuant to a working draft of the amendment, it appears that the AMO intends to apply an economic approach (ie, it will assess the impact of certain practices on competition) more thoroughly in the enforcement of the competition rules. The AMO also proposes to introduce the EU concept of undertaking, including the concept of the single economic unit. The AMO expects that by adopting the new concept of undertaking it will be able to sanction cartel conduct more efficiently and react more swiftly to the evolving EU case law.

Since the adoption of the aforementioned amendment has

not been included in the government's legislative priorities for the current government term, it is not clear when, if at all, the proposal of the amendment will be made public.

### 3 Substantive law

What is the substantive law on cartels in the jurisdiction?

Sections 4 and 6 of the Competition Act comprise the substantive law on cartels. These sections correspond to article 101 TFEU.

Section 4(1) prohibits agreements and concerted practices between undertakings as well as decisions by associations of undertakings that have as their object or effect restriction of competition. The prohibition applies unless the Competition Act provides for an exemption.

The term 'agreements' covers both explicit oral and written agreements as well as implied consent of the parties, such as gentlemen's agreements or arrangements – the existence of which may be proved by evidentiary means other than the contract itself (if such proof shows that an 'agreement' must have been concluded). General business terms and conditions fall also within this definition.

A decision by an association of undertakings is any legal act of a body of the association, as well as any recommendations of a body of the association. Decisions are thus unilateral legal acts, usually having their legal basis in the incorporation documents of the association, which are binding for the members of the association.

Finally, concerted practices refer to the coordination of the behaviour of undertakings, which does not amount to an 'agreement'. Concerted practices must, however, be strictly distinguished from actions that are the accidental or logical results of market conditions or parallel behaviour.

A demonstrative list of prohibited agreements is set out in section 4(3). Such agreements are particularly those that contain:

- direct or indirect fixing of prices or other trading conditions;
- commitment to limit or control production, sales, technical development or investment;
- division of the market or sources of supply;
- commitment by the parties to the agreement to apply dissimilar conditions to equivalent or comparable performance to individual undertakings, which will or may disadvantage these undertakings in competition;
- conditions stipulating that the conclusion of contracts will require the parties to accept supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- signs of collusive behaviour, especially in the process of public procurement (bid rigging).

Under the de minimis exemption set out in section 6(1), an agreement otherwise prohibited shall be exempted from prohibition if the market shares of the parties thereto do not exceed certain thresholds. In order for the undertakings to benefit from the exemption, their

combined market share or the market share of each party must not exceed 10 per cent. The de minimis exemption shall, however, not apply if the agreement in question contains hard-core restrictions or if competition is restricted by the cumulative effect of agreements that contain similar types of competition restrictions and lead to similar effects in the relevant market and their combined market share exceeds 10 per cent.

Section 6(3) follows the wording of article 101(3) TFEU and exempts the agreements that meet the requirements of the rule of reason. Pursuant to the rule of reason, agreements that contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit are excluded from the prohibition set forth in section 4(1). For the exemption to apply, the agreement must not impose restrictions that are not indispensable and must not afford the parties thereto the possibility of eliminating competition in respect of a substantial part of the products in question.

In line with the modernisation of the EU antitrust rules, as of 1 May 2004, it is no longer possible to request an individual exemption under section 6(3). Undertakings must themselves assess potential anti-competitive arrangements and ensure compliance with the law. Moreover, undertakings cannot request the issuance of a negative clearance, although they can ask the AMO to review a draft agreement or a draft decision of an association. The AMO is obliged to issue its view within 30 business days from receipt of the request, and, in exceptional cases, the review period may be extended up to 60 business days.

#### 4 Industry-specific offences and defences or antitrust exemptions

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

The Competition Act does not contain any industry-specific offences and defences or antitrust exemptions. In particular, the Competition Act is silent on the application of the competition rules on agriculture and transport. On the other hand, the regime set out in the Competition Act does not apply to the anti-competitive activities of undertakings entrusted with the operation of services of general economic interest, such as postal services, to the extent to which the application of the competition rules would obstruct the performance of the tasks assigned to them.

The cartel ban in section 4 of the Competition Act does not apply to those arrangements that cannot affect interstate trade but have as their object, or may result in, restriction of competition on the domestic market and meet the conditions of the EU Commission block exemptions. Similar to the authorisation of the EU Commission to withdraw the benefit of a block exemption, where the particular arrangements have effects that are incompatible with article 101(3) TFEU, the AMO may withdraw the benefit of a block exemption in respect of arrangements having no effect on interstate trade but which are incompatible with section 4(3) of the Competition Act.

#### 5 Application of the law

Does the law apply to individuals or corporations or both?

The law applies to undertakings and associations of undertakings. The Competition Act defines an undertaking broadly and its definition covers both individuals and corporations. However, the law applies to individuals and corporations only with respect to their activities, which are related or potentially related to competition. An individual or a corporation falls under the definition of the undertaking irrespective of whether its activities are profit-oriented. Note that employees or officers of a corporation are not subject to the Competition Act. The criminal or civil liability of such employees or officers is, however, not excluded.

#### 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 Slovak competition rules are based on the effects doctrine. Therefore, the AMO may only assert jurisdiction over infringements incurred outside Slovakia where such infringements affect, or threaten to affect, competition within Slovak territory. Since cartel conduct that includes indirect sales of the cartelised product to Slovakia may under certain circumstances have a restricting effect on competition within Slovak territory, pursuant to the effects doctrine, the Competition Act may apply to such conduct even if it takes place wholly outside of Slovakia. However, we are not aware of any decisions or pending proceedings where the AMO would adopt this approach.

On the other hand, activities restricting competition that only affect foreign markets fall outside the scope of the Competition Act, unless an international treaty provides otherwise (eg, the Accession Treaty).

#### Investigation

#### 7 Steps in an investigation

What are the typical steps in an investigation?

As the first step, the AMO collects information on potential cartel activities through its own activity and from various other sources (cartel members under the leniency programme, media, third-party complaints or notifications etc). The collection of information is usually an informal process without the actual administrative proceedings having been formally opened. This is to prevent the cartel members from learning that the AMO knows of the existence of the cartel.

Once the AMO has collected sufficient evidence to prove the existence of a cartel, it opens administrative proceedings and notifies the parties thereto. After the administrative proceedings have been opened, the members of the alleged cartel may propose certain commitments in order to remove the concerns of the AMO. If the AMO accepts these commitments, it will issue a decision imposing the obligation to comply with the commitments. Such decision does not confirm the existence of the cartel and no sanctions are imposed on the parties. If the commitments are not observed by the undertakings, the AMO may open new administrative proceedings and impose a fine of up to 10 per cent of the undertakings' respective turnover for the preceding accounting year. If the cartel participants do not propose any commitments or if the commitments are rejected, the AMO will usually issue a final decision by which it adjudicates the cartel matter.

Prior to the issuance of the final decision, the AMO is obliged to invite the parties of the alleged cartel to submit their observations, objections, and proposals for supplementations to the draft decision, the information on which it is based, and the manner of obtaining such information.

The AMO may conduct an oral hearing, although it is not compulsory. The AMO must issue its final decision within six months. However, the chairman of the AMO is entitled, in complicated cases, to repeatedly extend this period up to two years. The first instance proceedings are completed upon issuance of the final decision by the AMO.

#### 8 Investigative powers of the authorities

What investigative powers do the authorities have?

In general, the AMO is entitled to request information and documents from undertakings, enter any premises, land or means of



transport belonging to the undertakings concerned, take or obtain copies of documents, and request oral or written explanations. Oral explanations may be recorded.

The AMO is entitled to request submission of information or documents, which are necessary for the assessment of the cartel matter from the undertakings concerned. Moreover, the AMO may seal the documents or premises in which the documents are located when carrying out a dawn raid or may seize documents for the time necessary irrespective of the medium on which information or document is recorded. The AMO may request that an official Slovak translation be submitted by the undertaking.

Employees of the AMO may carry out unannounced inspections (dawn raids) at any premises, land or means of transport belonging to an undertaking on the basis of a written authorisation issued by the chairman of the AMO. If there is reasonable suspicion that evidence related to a cartel may be located at private premises, on land or in vehicles of the undertaking's employees, a dawn raid may be carried out at such premises, on land or in vehicles, subject to, and on the basis of, a decision of the AMO and authorisation of the court. The decision and the authorisation have to be submitted to the undertakings or employees concerned at the beginning of the dawn raid. If the raided party refuses to cooperate with persons authorised to carry out the dawn raid, the assistance of the police may be requested.

The AMO may impose fines of up to 1 per cent of the undertaking's turnover if the undertaking concerned fails to comply with the information or document request, if it submits incorrect or incomplete information and documents, or if it obstructs a dawn raid.

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## International cooperation

### 9 Inter-agency cooperation

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

Since Slovakia is a member state of the European Union, the AMO is a member of the European Competition Network (ECN) established by Council Regulation No. 1/2003. In this context, the AMO exchanges information with other members of the ECN (competition authorities of other member states and European Commission) and carries out dawn raids in Slovakia at the request of other ECN members. Further, the AMO is entitled to request a dawn raid to be carried out in other EU member states.

The AMO also cooperates with competition authorities of non-EU countries within the Competition Committee of the OECD and as a member of the International Competition Network.

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### 10 Interplay between jurisdictions

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

EU cartel regime is directly applicable in Slovakia. Pursuant to section 3(1) of Council Regulation No. 1/2003, the AMO and general courts are obliged to apply article 101 TFEU in cartel cases affecting interstate trade. Furthermore, agreements, decisions of associations of undertakings or concerted practices that do not restrict competition within the meaning of article 101(1) TFEU or that fall under the exemption laid down in article 101(3) TFEU cannot be prohibited under Slovak cartel law.

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### 11 Adjudication

How is a cartel matter adjudicated?

The AMO is responsible for the investigation, prosecution and sanctioning of cartel activity. A cartel matter is adjudicated by a decision of the AMO issued in administrative proceedings.

If a cartel constitutes a criminal offence, the criminal proceedings can only be initiated by a prosecutor and adjudicated by the court of relevant jurisdiction.

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### 12 Appeal process

What is the appeal process?

A decision of the AMO adjudicating a cartel matter may be appealed to the Council. The appeal has to be filed no later than 15 days from the receipt of the decision. The decision of the Council may be challenged by an administrative action at the Regional Court in Bratislava. Subsequently, an appeal against the judgment of the Regional Court may be filed to the Supreme Court of the Slovak Republic.

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### 13 Burden of proof

With which party is the burden of proof?

The burden of proof in cartel cases rests with the AMO. However, if an undertaking claims the benefit of an exemption under section 6(1), (3) or (4) of the Competition Act (see question 3), it is obliged, upon request of the AMO, to demonstrate that the agreement in question qualifies for the respective exemption.

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## 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?

Participation in a cartel constitutes a criminal offence provided that the illegal conduct has caused damage in excess of €26,000 to a competitor or has threatened the business operation of a competitor. In such case, an individual may face imprisonment for up to three years as well as other sanctions (eg, imposition of a fine or prohibition to pursue business activity). If the damage caused to a competitor exceeds €133,000 or the illegal cartel conduct results in the bankruptcy of a competitor, the imprisonment sentence shall be from two to six years. Even more severe sanctions apply if the conduct qualifies as bid rigging. In such case, the individual may face an imprisonment sentence of up to 12 years.

Recent amendments to the Slovak Criminal Code introduced indirect criminal liability of corporations. Corporations may have forfeiture of financial resources or property imposed upon them, which is, however, not a criminal sanction but a protective measure. If a court imposes property forfeiture on a corporation, the competent bankruptcy court shall, without undue delay, declare the corporation bankrupt. It should be noted that the indirect criminal liability of corporations has limited application in Slovakia.

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### 15 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Although the Competition Act does not explicitly stipulate that a prohibited agreement is null and void, such consequence stems from section 39 of the Civil Code. If any part of the agreement, which is not affected by the prohibition, can be separated from the remainder of the agreement, that part shall remain valid and effective.

The AMO may impose fines on undertakings participating in a cartel of up to 10 per cent of their respective turnover for the preceding accounting year. If an undertaking's turnover for the relevant accounting year did not reach at least €330 or the undertaking did not have any turnover, the AMO may impose a fine up to €330,000. Furthermore, the AMO may impose an obligation on the cartel members to refrain from the illegal conduct and an obligation to remedy the unlawful state.

#### 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?

Criminal, civil and administrative sanctions can be pursued in respect of the same conduct.

#### 17 Private damage claims and class actions

Are private damage claims or class actions possible?

No specific legal basis for private damage claims within the realm of competition rules exists under Slovak law. A person who incurred damage in connection with a cartel may, however, claim compensation of damages under the general provisions of the Commercial Code or Civil Code before the courts. No such claims have yet been reported. In line with the general trend in the European Union, the AMO is trying to promote and raise the general awareness of the private enforcement of the antitrust rules in Slovakia.

Class actions are not possible under Slovak civil procedure rules, although several related claims can be dealt with in one proceeding if such combination of claims contributes to a fast and economical trial. Consumers and consumer associations can file actions seeking a judgment imposing the obligation on the cartel members to refrain from illegal conduct.

#### 18 Recent fines and penalties

What recent fines or other penalties are noteworthy?

The highest fine that the AMO has imposed to date related to a highway construction cartel involving six undertakings and originally totalled €44.8 million. The decision was revoked by the court, however, and the final decision of the Supreme Court is still pending. In 2009, the AMO imposed a fine totalling €10.2 million on three Slovak banks for agreeing on termination and refusal to re-conclude contracts on current accounts with a Czech company. In 2009 the AMO also sanctioned the biggest European producers of gas insulated switchgears for price fixing, division of markets and coordination of procedure in a tender for gas insulated switchgear supplies. The fines imposed on 16 undertakings totalled €8.6 million. This was the first case of successful application of the leniency programme by the AMO. More recently, the AMO imposed a fine totalling €0.8 million on nine producers of cathode ray tubes for price fixing, commitment to restrict and control production and exchange of sensitive information and a fine totalling nearly €0.5 million on laundry detergent producers for agreeing to restrict the volume and frequency of promotion of highly efficient detergents.

It should be noted that the fines imposed by the AMO are often subject to judicial review and the courts have revoked the decisions imposing the fines in several cases.

Depending on the severity of the conduct, a court may impose imprisonment sentence up to six years for a cartel offence and up to 12 years in case the cartel offence falls under the definition of bid rigging (see question 14).

We are not aware of any conviction of an individual for a criminal offence relating to cartel conduct.

## Sentencing

### 19 Sentencing guidelines

Do sentencing guidelines exist?

In 2008, the AMO issued guidelines on determining the amount of fines in cartel cases (the Guidelines on Fines).

Pursuant to the Guidelines on Fines, a fine is calculated using a multiple-step procedure. First, the AMO determines the amount of the turnover relevant for the calculation of the fine. The relevant turnover is the turnover achieved in the preceding accounting year on the markets affected by the cartel. Second, the relevant turnover is multiplied by the severity factor, which may amount up to 30 per cent in the most serious cartel cases. Third, the fine amount is multiplied by the number of years during which the undertaking participated in the cartel. If the participation in the cartel lasted less than one year, the amount of the fine is not adjusted. Finally, the amount of the fine is adjusted by taking into account aggravating and mitigating circumstances and other factors, if applicable. Pursuant to the Guidelines on Fines, the aggravating circumstances are, for example, repeated offence, leadership in the cartel or intentional obstruction of the investigation. The mitigating circumstances are, among others, a passive role in the cartel or effective cooperation with the AMO. The AMO may also adjust the amount of the fine to ensure that it has a deterrent effect. However, the maximum amount of the fine cannot exceed 10 per cent of the undertaking's total turnover.

### 20 Sentencing guidelines and the adjudicator

Are sentencing guidelines binding on the adjudicator?

The Guidelines on Fines are not a generally binding legal regulation. Pursuant to section 3 of the Guidelines on Fines, their purpose is to explain the general principles of setting fines. On the other hand, the case law of the Slovak Supreme Court has repeatedly confirmed that guidelines issued by a state authority are binding upon such authority and may establish legitimate expectations on the side of the undertakings. Thus, the AMO should not depart from their application for other than objective reasons. Otherwise, its decision could be challenged in court.

### 21 Leniency and immunity programmes

Is there a leniency or immunity programme?

A leniency programme in Slovakia has been in force since 2001. The main provisions governing leniency are contained in section 38(10) and (11) of the Competition Act. The AMO has also issued guidelines on the application of the leniency programme ([www.antimon.gov.sk/files/30/2009/Leniency5\(k\)-en.rtf](http://www.antimon.gov.sk/files/30/2009/Leniency5(k)-en.rtf)) (the Leniency Guidelines).

### 22 Elements of a leniency or immunity programme

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

A cartel member may be granted either full immunity or a reduction in fines of up to 50 per cent. Full immunity is granted if the following conditions are cumulatively met:

- the undertaking was the first to provide the AMO with decisive evidence proving the existence of a cartel, or evidence instigating a targeted dawn raid, by which the decisive evidence has been obtained;
- the undertaking had terminated its participation in the cartel no later than the time when it provided the evidence to the AMO;
- the undertaking did not force another undertaking to participate in the cartel or was not the instigator of the cartel; and

- the undertaking provided the AMO with all evidence available to it and cooperated with the AMO throughout the entire investigation.

A reduction in the fines of up to 50 per cent may be granted subject to fulfilment of the following conditions:

- the undertaking provides the AMO significant evidence, which, in combination with information and documents already available to the AMO, enables the AMO to prove the existence of the cartel; and
- the undertaking had terminated its participation in the cartel no later than the time when it provided the evidence to the AMO.

When determining the intensity of the fine reduction, the actual contribution of the evidence to revealing the cartel and the time of its submission is taken into account.

Joint leniency applications by two or more undertakings as well as leniency applications of associations of undertakings are not allowed. The leniency programme applies only to horizontal agreements.

### 23 First in

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

Only the undertaking that first approaches the AMO with the decisive evidence proving the existence of the cartel receives full immunity from fines, subject to fulfilment of the remaining conditions (see question 22). If the undertaking submits evidence that does not suffice for the full immunity to be granted, the undertaking may still obtain a reduction of fine up to 50 per cent. In such case, being the first to apply for leniency is an important factor for determination of the amount of fine reduction.

### 24 Going in second

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

Those cartel members who were not the first to approach the AMO may still obtain a reduction of up to 50 per cent of the fine if the evidence submitted is significant for proving the existence of the cartel. The reduction of the fine is not limited to the 'second-in', although the order and the time of the submissions are taken into account by the AMO. More importantly, the AMO assesses the importance of the evidence submitted.

The Competition Act does not provide for an 'immunity plus' or 'amnesty plus' option.

### 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?

An application for leniency may be filed prior to commencement or at any stage of the investigation as well as during the course of the administrative proceedings. After the undertaking decides to apply for leniency, it should file the application as soon as possible. Otherwise, it may lose the benefit of being the 'first-in'. Neither the Competition Act nor the Leniency Guidelines explicitly provide for any deadline to apply for leniency, however, for the application to be relevant, it must be submitted before the decision adjudicating the cartel matter is issued by the AMO. The deadline for perfecting a marker is always determined by the AMO on a case-by-case basis. The applicant shall propose and justify a time period needed for perfection of marker, which should be taken into account by the AMO.

### 26 Confidentiality

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

Any information and documents submitted to the AMO by the leniency applicant can only be used for the purpose of the administrative proceedings. Nonetheless, the AMO will disclose the identity of the leniency applicant in the final decision adjudicating the cartel matter and it will describe the extent of the applicant's cooperation. The parties to the administrative proceedings shall be granted access to the file, but the AMO has to take into consideration the legitimate interests of the leniency applicant. The Competition Act does not contain specific provisions in this respect and thus the decision on disclosure of particular information and documents is always made on a case-by-case basis weighing the interests of all parties involved.

Employees of the AMO have to maintain confidentiality of the information and documents they have reviewed during the administrative proceedings. Such information and documents may, however, be disclosed to a court in the civil proceedings and to the police and prosecutor in criminal proceedings.

### 27 Successful leniency or immunity applicant

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

The conditions of successful leniency application are specified in question 22. Full immunity from fines will only be granted if the applicant provides the AMO with either 'decisive' evidence proving the existence of a cartel or evidence 'decisive' enough to prompt a targeted dawn raid by which 'decisive' evidence will be obtained. The AMO considers the evidence to be decisive if it is sufficiently specific and enables it to open the administrative proceedings. If evidence prompting a targeted dawn raid has been submitted, full immunity will be granted if said evidence convincingly justifies the performance of a dawn raid. The fact that the AMO may decide not to perform a dawn raid does not preclude the right of the applicant to full immunity.

### 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?

There is no legal basis allowing the AMO to enter into 'plea bargaining' agreements. Since January 2012, cartel participant may, however, benefit from a reduction of the fine if, as a result of the settlement procedure, it voluntarily acknowledges its participation in the cartel. The settlement procedure is governed by guidelines adopted by the AMO (the Guidelines on Settlement Procedure). Even though the Guidelines on Settlement Procedure are not a generally binding legal regulation, the AMO may not depart from them unless there are objective reasons (see question 20). The AMO has declared its intention to include the provisions governing the settlement procedure in the Competition Act through the upcoming amendment of the Competition Act.

The settlement procedure may be initiated either by a cartel participant or the AMO. During the settlement procedure, the AMO shall inform the applicant about the details of cartel conduct, which the AMO deems proven, and the amount of fine it intends to impose on the applicant. The applicant may submit its observations and objections in this respect. The settlement procedure is successfully completed if the applicant fully and without reservations acknowledges its participation in the cartel and admits its liability. In such case, the AMO shall grant a reduction of 50 per cent of the fine to participants in vertical agreements and 30 per cent in case of horizontal agreements.

### Update and trends

In recent years, we have witnessed a more frequent application of the AMO's leniency programme. Since immunity was granted under the leniency programme for the first time in 2009 with respect to the gas insulated switchgear cartel, the AMO has received several leniency applications. The second decision, which granted immunity to a cartel participant was issued in late 2011 and confirms that the undertakings are more inclined to approach the AMO using this tool. The trend has been supported by adoption of the amendment to the Criminal Code, which offers criminal immunity to the employees and officers of successful leniency applicants.

In early 2011, the AMO published two extensive reports on its inquiries into the Slovak gas and railway sectors. In the reports, the AMO identified certain competitive threats and expressed its willingness to support the development of effective competition in these sectors. The concrete steps and results are yet to be seen.

In January 2012, the AMO issued its Guidelines on Settlement Procedure, which provide for an alternative way of decreasing fine with respect to cartel conduct. However, the AMO has not published any information on practical application of the settlement procedure.

It should be noted that the AMO is not obliged to accept the cartel participant's application for settlement procedure. The AMO will most likely reject the application for the settlement procedure in cases, where it has sufficient evidence of the cartel conduct at hand and cartel participant's confession is not necessary for the AMO.

### 29 Corporate defendant and employees

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

Employees may obtain immunity from criminal sanctions if they have contributed to a successful leniency application. Administrative sanctions cannot be imposed on employees of an undertaking by the AMO.

### 30 Cooperation

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

If the undertaking fulfils the conditions of leniency and fully cooperates during the investigation and the administrative proceedings, the AMO is obliged under the Competition Act to grant full immunity or a reduction of the fine, as the case may be. After a leniency

application has been submitted, the AMO preliminarily notifies the applicant as to whether it considers the conditions of leniency to be met. The preliminary notification, however, is not binding upon the AMO. The immunity or reduction of the fine is granted in the final decision adjudicating the cartel matter. The undertaking may challenge a decision not to grant immunity or reduction of the fine at the Council and later at court.

### 31 Dealing with the enforcement agency

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

When applying for leniency, the undertaking should contact the Division of Agreements Restricting Competition of the AMO. It is advisable that counsel act on behalf of the undertaking when dealing with the AMO. The applicant has to submit all evidence it has available in order for its application to be successful.

If the undertaking decides to file a leniency application but is not able to submit any or all evidence immediately due to objective reasons, it may benefit from the marker system. The marker system allows the undertaking to 'reserve the order' of its application (place a marker) on the condition that the evidence will be submitted within a period specified by the AMO. If the evidence is submitted in a timely manner, the leniency application will be deemed as filed at the time when the marker was placed.

Another option for applying for leniency is a 'hypothetical application'. An undertaking may anonymously file a hypothetical application in which it provides a descriptive list of evidence and documents it intends to submit to the AMO. If the AMO concludes that the evidence described in the application would suffice in revealing the cartel it will specify a period for submission of the evidence. If the evidence is submitted in time, the leniency application will be deemed as filed at the time when the hypothetical application was filed.

### 32 Ongoing policy assessments and reviews

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

In 2010 the AMO has informed the public of its intention to adopt certain changes to the leniency programme through the upcoming amendment to the Competition Act (see question 2). The AMO has not yet specified the precise extent of the changes; however, it appears that the AMO intends to include a number of provisions from the Leniency Guidelines, which represent a soft-law document, directly



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in the Competition Act. In addition, the AMO plans to issue a new detailed leniency programme in the form of a generally binding legal regulation.

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### Defending a case

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#### 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?

At the outset, employees cannot be prosecuted by the AMO in the administrative proceedings at all. However, criminal prosecution is not excluded. Counsel is not prohibited from representing both the corporation and its employees provided that no conflict of interest exists. However, it should be noted that a conflict of interest may indeed arise in cartel cases between the employees and the corporation. The likelihood of such conflict should be carefully evaluated when deciding on legal representation. Employees should seek independent counsel if the circumstances indicate that they may be subject to criminal prosecution.

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#### 34 Multiple corporate defendants

May counsel represent multiple corporate defendants?

Counsel may represent multiple corporate defendants on the condition that no conflicts of interest arise.

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#### 35 Payment of legal costs

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

There is no general prohibition preventing a corporation from reimbursing its employees for their legal costs and penalties imposed on them. The tax ramifications on the corporation and the relevant employees will, however, need to be carefully considered on a case-by-case basis.

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#### 36 Getting the fine down

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

The undertaking should always assess the option to apply for leniency, which in most cases will be the most effective way of avoiding or reducing a potential fine. Individuals and employees of a corporation that successfully apply for leniency can also obtain immunity from criminal prosecution. The AMO also takes into account the cooperation of the undertakings in the administrative proceedings when determining the amount of the fine.

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