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MILESTONES AND CHALLENGES FOR EFFECTIVE INTERNATIONAL COOPERATION IN COMPETITION MATTERS: THE EXPERIENCE OF THE SLOVAK NCA

ERIKA LOVÁSOVÁ
DANIELA LUKÁČOVÁ

Abstract:

International cooperation is one of key elements of successfully applying competition rules. As business becomes ever more global, there is an inevitable influence also on the assessment of competition. With increasing numbers of international transactions, powerful multinational companies and international cartels, it is all the more necessary for countries to cooperate with each other. The Antimonopoly Office of the Slovak Republic (hereinafter as the 'Slovak NCA') does not operate in isolation; on the contrary,it needs strong support from partnering agencies in various forms, either at a regional level or a global level. A number of different possible forms of international cooperation have developed during the existence of the Slovak NCA. We have recapped our overall experience with all of these (either positive or unsuccessful) in the article. The ambition of the article is further to review the existing obstacles to closer cooperation, uncover the main reasons behind unsuccessful attempts at cooperation, and at the same time find a way past these obstacles. The new Directive 2019/1, dealing with strengthening the NCAs' powers might be an important step towards more effective cooperation. The Slovak NCA's approach to the amendment of its legislation is described in the article.

Keywords:

bilateral, confidentiality, waiver, international cooperation, ECN, harmonisation, mergers

Introduction

Although the importance of cooperation between European national competition authorities and between the NCAs and the EC, tends to be credited mainly to globalisation trends in business, the roots of the need for international cooperation run deeper, and often with different content and significance depending on the ambient and historic connection in which an individual NCA applies the competition rules. The global nature of business today can be conceived as the tip of the iceberg, which demands cooperation in a broader sense and in the form of a broader forum.

The different historic development within countries and the specific features of the markets have brought forward different bases and forms of cooperation. For Slovakia, together with other CEE countries, due to their historical isolation from the rest of the Europe for almost forty years, it was natural that the main partners for increased cooperation were neighbouring countries with a similar history of political regimes. Due to the long-term common history, the closeness of language and cultural features, the interconnection with the Czech market is almost a rarity. This peculiarity demands a more intensive form of cooperation with our closest neighbour.

At the same time, in the context of the free movement of goods and services and the globalisation mentioned above, it is not sufficient to limit cooperation only to the closest partners. This holds generally for all NCAs, but is especially true for countries such as Slovakia due to the size of the national market in comparison with larger economies and due to the balance of international business flow.

With this in mind, it is obvious that various factors, presumptions, historic connections and specifics of business environment, as well as the membership of Slovakia in EU and the increasing globalisation of the business have resulted in a range of types of cooperation in the practice of the Slovak NCA.

Given, also, the increasing prevalence of digitalisation, technological advances and new types of products and services spread on online platforms, we expect a demand for even more intense cooperation in all areas. This results in a challenge to create prompter, more effective and comprehensive rules in order to be able to react better and faster to the development of new trends.

The engagement of the Slovak NCA in various forms of international cooperation

International cooperation is one of main activities of the Slovak NCA. Depending on the type of cooperation, it is one of its policy priorities, especially in cases where the Slovak NCA is bound by EU law or international agreements. The choice of the proper tool, type and intensity of cooperation depends on the legal possibilities with regard to type of competition enforcement, and is limited by existing forms and various obstacles.

The Slovak NCA is therefore engaged in various types of formal multilateral cooperation on the basis of international agreements or binding regulations. Concerning

this form of cooperation, the Slovak NCA is mainly active in the network of European competition authorities. Due to the unbalanced position of international cooperation with regard to antitrust enforcement on the one hand, and merger enforcement on the other hand, the tools of cooperation vary.

Outside the scope of the two EU regulations mentioned below, the Slovak Republic is not a party to any international agreement that would offer the legal basis for closer formal cooperation concerning specific enforcement measures, such as conducting dawn raids, exchanging information, executing decisions, etc. Other international fora in which the authority is involved include the Organization for Economic Cooperation and Development (OECD), the International Competition Network (ICN) and the European Competition Authorities (ECA). However, international cooperation on fora like ICN is limited for the Slovak NCA, due to its limited financial and personal sources (especially when it comes to participation in the workshops and events – depending on the site in which it takes place). These forms of organisational multilateral cooperation can provide added value, mainly from the prospective of providing better methodology to the uniform and effective application of competition rules.

The Slovak NCA is involved in various forms of informal multilateral cooperation. The important one is the tradition of the regular organisation of a conference providing a forum mainly for competition experts from the region to exchange views and experience. At the same time, experts from the Slovak NCA regularly attend similar events across the Central Eastern European region.

Bilateral cooperation, in particular with the countries of the CEE region, is also a significant part of our international activities. We see various forms and attempts to enter into the closer bilateral cooperation, though that is nowadays almost exclusively in the form of informal cooperation.

Another important path of cooperation stems from learning from each other's decisional practice among NCAs (and EC). Due to the obligation to apply Articles 101 and 102 TFEU uniformly, there is a tendency by Slovak courts to review the NCA's decision to accept the reference to the EC decisions. Moreover, in the practice of the Slovak NCA as a small economy, the results of a similar market assessment carried out by a similar country can often be beneficial. Such sources are used in current practice when possible, and only informally.

Institutionally, within the Slovak NCA, the department dedicated to legal matters is also charged with managing foreign relations, namely to set up the whole concept of international cooperation, to secure the participation of experts at various fora, to establish contact points etc., bearing in mind possible capacity issues and financial resources.

The further parts of the article cover mainly the types of most often experienced types of multinational cooperation. The first of these is the ECN platform and multilateral cooperation in antitrust and merger issues based on EU legislation. Secondly we analyse bilateral cooperation, mainly attempts towards more institutionalised bilateral cooperation with our closest neighbour.

Antitrust issues - Cooperation under Reg. 1/2003[1]

Since Regulation 1/2003 entered into force, the national competition authorities of the Member States, including national courts, have the power to apply Articles 101 and 102 TFEU. The role of the EC, the NCAs and the national courts is therefore to apply Community competition law, in particular Articles 101 and 102 TFEU effectively and uniformly. To achieve this, NCAs cooperate with the EC and coordinate their activities in this field within the ECN.

An effective tool in antitrust proceedings, helping to make the application of EU competition law more uniform, is the institution of amicus curiae, within the meaning of Article 15 (3) of Regulation 1/2003. Under this article, the EC has the possibility to submit written observations to the courts of the Member States, and to submit oral observations where Article 101 or 102 TFEU applies. This institution has been used several times, when the Slovak NCA has asked the EC to intervene, and in general with positive results. In cases where the EC has used its intervention, the result has been in favour of the uniform application of EC competition law.

A good example of how this institution is applied is the antitrust case – Decision of Slovak NCA No 2006/DZ/R2/144, 22.12.2006, in which the Slovak NCA applied the economic continuity test and imposed a sanction on the economic successor of an undertaking that abused its dominant position. The Regional Court confirmed the decision in the main proceedings, but reduced the fine substantially, with the justification that, when responsibility is transferred to another entity, the punitive element of the sanction ceases, which was taken into account as a mitigating circumstance. The EC was asked to intervene as the amicus curiae by the Slovak NCA and, due to the EU-wide nature of the disputable question, it agreed to intervene. In its observation sent to the Supreme Court, the EC emphasised that economic continuity is a concept of EU competition law that should be applied in a consistent manner throughout the EU. The aim of this concept is to avoid the effectiveness of EU competition rules being compromised by changes to the legal structure of undertakings. The application of this concept implies not only that the successor company is to be held responsible for the infringement, but also that the successor company is liable for the penalty that would otherwise be imposed on its predecessor. Any reduction of the fine imposed on the successor company solely on the grounds that the infringement was committed by its predecessor would be contrary to the concept of economic continuity under EU law. The Slovak Supreme Court took this observation into account, overturned the judgement of the Regional Court and upheld the fine in the amount that was imposed by the Slovak NCA. Due to other procedural issues, the case was then overturned once again and the final fine

1 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

was lowered, but not on the basis of the economic continuity test. In that sense, also the final judgment respected the result of the former intervention by the EC.

Another example is the Decision of Slovak NCA No 2010/DZ/R/2/049. Since it was not possible to assign the conduct in question to the specific type of abuse of a dominant position listed in Article 102 TFEU, letters a) to d) or national counterparts, the Slovak NCA prohibited the conduct and imposed the sanction on the basis of general prohibition of abuse. The Regional Court annulled the NCA's decision with the reasoning that the sanctioning of the undertaking should be in line with the *nulla poena sine lege* principle, and therefore only possible when the prohibited conduct was precisely defined by the law. In the absence of such a definition, it was not possible to impose a sanction for the behaviour, although it was possible to state that the behaviour is illegal. The Slovak NCA appealed against this judgement. In its written observations, the EC, as amicus curiae, argued that it was settled case-law that the list of abusive practices set out in the second paragraph of Article 102 TFEU is not exhaustive and that, therefore, bundling or tying may also infringe Article 102 TFEU where it does not correspond to the example given in Article 102(d) TFEU. Finally, once an infringement of Article 102 TFEU is established, the NCA must have the power to impose fines. The Slovak Supreme Court deciding on the appeal overturned the judgement of the Regional Court and accepted the possibility to sanction anticompetitive abusive behaviour pursuant to the general clause prohibiting an abuse of a dominant position.

The other tool that has been used by the Slovak courts when reviewing the NCA's decision was asking a preliminary question to EU courts. The practice of national courts asking a preliminary question in competition matters has been supported by the Slovak NCA in the past, and still appears as a proper tool in the system of cooperation. However, in some cases, due to the lack of knowledge of EC competition law and the decisional practice of EC courts, the national courts tend to ask preliminary questions that had already been resolved, which can slow down the procedure. Slovak courts have used the possibility to submit preliminary questions to the Court of Justice pursuant to Article 267 TFEU regarding a review of the decisions of the Office in just a few cases so far. A good example is case No C-68/12.

The specific nature of the division of powers within EU competition law also means that certain parts of EU law – known as soft law – as well as case law of the European Courts, should be applied by national institutions including national review courts. In view of the above, competition law contains various specific principles and institutions that are not traditional to Slovak law, and which the Slovak NCA is obliged to apply. As was written above, the courts in the Slovak Republic accept and apply those specific institutions of competition law in their judgments, also with the help of both instruments mentioned above. The Slovak NCA also tries to provide comprehensive explanations of specific competition issues with the support of the precedential EU law when defending its case before the courts.

The other forms of cooperation within Regulation 1/2003 and within the ECN, covering not only cooperation with the EC but also between NCAs, are in most formal and most useful areas of antitrust. There are different objectives of such cooperation, mostly it is simply fulfilling obligations stemming from law, sharing experience and knowledge, avoiding conflicting outcomes in similar cases, etc.

Concerning the exchange of information with the NCAs, this primarily takes place on the basis of Regulation 1/2003, which only applies to the exchange of information between EU Member States (between the EC and the competition authorities of the Member States, or between them). Such an exchange may only takes place for the purposes of applying Articles 101 and 102 TFEU, and subject to the conditions set up by Regulation 1/2003 with regard to the confidentiality and to the purpose of sharing such information.

With regard to the investigative tools, Regulation 1/2003 gives the power to the NCAs to, in their own territory, carry out any inspection or other fact-finding measure under national law on behalf and for the account of the competition authority of another Member State, in order to establish whether there has been an infringement of Article 101 or Article 102 TFEU.

The relevant corresponding provision in the Slovak Act on Protection of Competition, reflecting those in Regulation 1/2003, is Article 22 according to which:

1) The Slovak NCA will:
   c) conduct investigative actions and other actions of legal aid at the request of the competition authority of another state pursuant to special legislation (Regulation 1/2003) or pursuant to the international treaty by which is the Slovak Republic bound [...]
   i) ensure international relations in the area of protection of competition at the level of authorities having jurisdiction over this area
   j) submit an application to a court for approving an inspection for the EC for the performance of its activities pursuant to special legislation (for example Regulation 1/2003 and Merger Regulation[2]).
2) In connection with the performance of duties pursuant to this Act and special legislation (Regulation 1/2003), the Slovak NCA will have the right to request undertakings (and its employees and bodies), as well as other natural persons and legal persons, to provide information and documents necessary for the NCA's activities, regardless of the medium on which they are recorded, and make copies of and notes of these documents or request their officially certified translations into the Slovak language, request written or oral explanation with the possibility to make its audio record. These entities are obliged to provide the NCA with this information and documents free of charge in the time limit stipulated by

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.

the Office; in the case of classified information under the conditions set by the special legislation.

3) When fulfilling the obligations pursuant to this Act or special legislation, (Regulation 1/2003), the Slovak NCA will have the right to request the police department or the authorities involved in criminal proceedings to provide information acquired according to the special legislation; above all, it will have right of access to the files kept within the criminal proceedings, make excerpts and notes from the files and make copies of files or their parts at its own expenses and use them for the purposes pursuant to this Act.

We can evaluate the experience regarding the cooperation in terms of using different investigatory measures under the Regulation 1/2003 (and corresponding Slovak Act provisions) as positive. Very useful and important is cooperation within the ECN network due to the rules on handling the same cases/parallel investigations.

The specifics of the cooperation concerning investigatory measures and tools depends on the case. It might be needed in early or later stages of the investigations/proceedings depending on the measure requested and type of cooperation needed. Within the ECN, the members of the network are informed about first investigatory measures taken in Article 101 or 102 TFEU cases. The form of cooperation within the ECN varies case by case. Most often it has the form of a request for information/gathering information, interviewing witnesses, contribution to conducting the inspection.

The most important fact for cooperation is to have a legal basis and a form of agreement allowing the Slovak NCA to conduct the requested measures. Other factors, such as the forms of cooperation, whether the requested authority is able to handle a request of confidentiality if needed, whether it has powers to handle the request, and any language barriers to conduct the request etc. are also important for successful cooperation.

Multilateral cooperation in Merger issues

Multilateral cooperation concerning mergers is rather different in comparison with antitrust cases. Due to the fact that the competence between the EC and the NCAs is strictly divided and the merger rules across EU are not altogether harmonised, formal cooperation is more limited. The legal basis for more formal cooperation is mainly the Merger Regulation. However, it does not provide the legal basis for the same scope of cooperation and exchange of information among NCAs as Regulation 1/2003.

The only formal instruments in the area of merger control concerning cooperation between the NCAs and the EC is the system of referrals (ruled by the Commission Notice on Case Referral in respect of concentrations) and the participation of the NCAs in the form of Advisory Committees before the Commission adopted certain final merger decisions (governed by the Working Arrangements for the functioning of the Advisory Committee on concentrations).

With regard to the referral system, the Slovak NCA has not been involved in the referral process many times. The main reasons for this are, we believe, the size of the Slovak market as the merger cases assessed by the EC usually cover markets broader

than Slovakia and more countries are involved, meaning that the EC is the best placed authority to resolve merger cases. At the same time, purely national transactions covered by the Slovak NCA are often outside of the competence of the EC. Despite this, we find the system of pre-notification referrals to be particularly useful, due to the indisputable advantages to the parties as well as to the competition authority (time management, possibility for informal discussions etc.)

Although it is not so frequent in recent years, the Slovak NCA has noticed more cases of referrals according to Article 4(4) of the Referral Notice (pre-notification referral of the case made by the parties from the EC to the Slovak NCA). Typically, examples of such Article 4(4) referrals have concerned cases in which joint control is acquired by the acquirers, which are active on a European-wide field (or at least on markets covering several countries), which reach EU notification turnover thresholds, and where the target is a company active only on the local Slovak market. In that sense, the system developed and governed by the Referral Notice works well. It provides enough time and sufficient sources to assess whether the referral in a particular case is the most appropriate tool. We do not see much room for improvement there. The only obstacle the Slovak NCA has met with has been a lack of experience of the parties with the referral procedure, as well as with the preparation of the arguments necessary to ask for a referral. However, this is sufficiently covered by the EC's willingness to discuss the case with the parties, and the Slovak NCA also provides informal consultations to the referral as part of specific pre-notification consultations.

When it comes to the other type of formal cooperation with the EC within the Advisory Committee, the Slovak NCA also has some experience. The system presents a generally good tool by which mutual cooperation between the EC and NCAs can contribute to the better application of competition rules. The Slovak NCA follows carefully all notifications of mergers to the EC, covering also the Slovak market, and especially those concerning Slovakia as an affected market. The decision of the Slovak NCA to enter into active participation at the Advisory Committee is, mainly due to the capacity reasons, limited primarily to those cases where the preliminary results of the EC seem not to be in concert with the views of the Slovak NCA, which then seeks to ask the EC to take into account certain peculiarities of a particular case with regard to the Slovak part of the merger. The recent experience in this field has shown that there is a certain gap and that the established procedure lacks some rules.

More specifically, according to Advisory Committee rules the NCAs are informed about the notifications of mergers (and on all the steps necessary to evaluate the possibility of a referral) and they are informed about the Phase two decision of the EC. The next obligatory step of the EC is to inform the NCAs about the proposal of the final merger decision within not less than ten working days before the Advisory Committee takes place, or about the final remedy proposal made by the parties with the possibility to express views on the remedies proposed. The most recent amendment to the Working Arrangement for the Functioning of the Advisory Committee has allowed, in the

broader sense, access to other documents from the EC file upon the NCA's request. This step was very welcomed by the Slovak NCA (and the request of access has been used with regard to one specific case). However, this seems to be insufficient in a case when the EC changes its preliminary conclusions described in the Phase two decision and the NCAs learns about this change only in the proposal of the final decision in the worst-case scenario, or from the final remedy proposal. This is not sufficient particularly in the scenario where the request for a remedy does not cover a particular part of the transaction, although preliminarily in the Phase two decision the EC expressed its concerns also towards this part. At this stage, it is usually too late to enable an NCA that does not agree with the conclusion to bring forward new arguments supported by new evidence, or to ask the EC to investigate certain aspects of the case from its own national experience of the markets in question. There we see room for improvement in setting up rules governing the EC cooperation with NCAs in a more effective way, for example binding the EC to give an early possible notice to all affected NCAs in each case in which the preliminary conclusions described in the Phase two decision tend to be substantially changed.

Outside of those formal instruments, we see the established Merger Working Group as a very useful tool, both to exchange experience and contribute to the mutual consent in merger rules application, and as a platform with a strong voice to propose changes to the merger legislation. We see as particularly useful the possibility to resolve jurisdictional issues in this platform, which contributes to a more uniform application of merger rules. The Slovak NCA has used the possibility to discuss and to ask for the opinion of other NCAs and the EC in matter of jurisdiction issues several times. Even if the merger legislation is not harmonised across Europe, the principal rules are more less the same, and legal certainty demands a more or less uniform explanation and application of merger institutions and terms. Under the current legislative limits, the Slovak NCA therefore seeks to explain and apply all the possible merger terms uniformly with the EC, which seems similar to the approach of other EU Member States.

Summarising the issues written above, the principal tool used in antitrust cases concerning multilateral cooperation is missing in merger control. Although the current tools are widely used, we feel this area would benefit from international agreement on the purpose of using investigatory measures.

Bilateral cooperation

There are no international bilateral agreements regulating the sharing of information among the Slovak NCA and other NCAs. However, the Slovak Act on the Protection of Competition provides for the possibility to exchange such information on the basis of the consent of the party concerned. Pursuant to Article 22 (4) of the Act on the Protection of Competition, on the basis of an international treaty by which the Slovak Republic is bound, or on the basis of consent from a person who has provided information or to whom information refers, the Slovak NCA will provide information to the

competition authorities of other countries for the purposes necessary to apply competition law in those countries, including information protected pursuant to this act or pursuant to special legislation. The Slovak NCA may provide information according to the first sentence only if reciprocity is ensured. This tool is not limited to EU Member States only. In practice, this provision could be fulfilled given the existence of a bilateral agreement ensuring the same status and rights on both sides, or only with the consent of the relevant undertakings.

Especially for merger cases, where, in the current absence of EU-wide legislation enabling the exchange of information, in the need of closer cooperation, the Slovak NCA can only rely on the provision of such consent (waivers) from the undertakings concerned. However, it should also be noted that, in mergers, unlike in antitrust, the parties are typically cooperative as they have the incentive to close the transaction as expeditiously as possible, and thus have the review finalised quickly. The problem for the Slovak NCA arises when information is needed from third parties. They might be reasonably cooperative, but if such willingness is absent, problems may occur.

A very useful tool in establishing basic cooperation in cases of multijurisdictional merger fillings is the ECA notices system, which provides basic information and early notice among countries (and the EC) on the notification of a particular merger across several jurisdictions. Without other formal instruments for cooperation, this system creates a space where the contact details can be found and the informal contacts, discussion etc. can be introduced. This is often the first knowledge that a particular merger case would be assessed also in Slovakia (as the timing of the notification is not often the same across jurisdictions) and helps to coordinate and discuss the case in case waivers are given, and to coordinate the preliminary outcomes of the assessment in order to avoid conflicting results.

The absence of a formal bilateral agreement between the Slovak NCA and any other competition authority has demanded the creation of other tools and possible platforms for cooperation. This resulted in concluding memoranda of cooperation with several partnering NCAs, or creating more informal contacts. Currently, in the absence of better tools, we see high potential for concluding at least some kind of Memorandum of understanding. We see that an increasing number of competition authorities are entering into agency-to-agency MoUs in order to strengthen their relationship with their counterparts. MoUs are not legally binding, and are, compared to government-to-government cooperation agreements, flexible and easier to conclude or amend because their negotiation does not require the authorisation of legislative bodies or the involvement of other governmental bodies. MoUs may be concluded at the initiative of competition authorities based on their specific needs and are modelled with less detailed and formal provisions focused more on establishing a basic framework to ensure a dialogue between the two competition authorities (provisions on transparency, communication and technical cooperation, participating in conferences, seminars, workshops or training courses, exchange of personnel or study trips, providing assistance in advocacy activities).

MoUs often designate a contact point of each party for the purpose of effective communication. Therefore, the Slovak NCA has entered into informal bilateral cooperation agreement with the Czech NCA and the Moldovan NCA.

In 2014, the chairmen of the Czech and Slovak NCAs signed a memorandum of cooperation[3]. This memorandum is the formal result of long-term cooperation based on good relations of a high standard between these two partnership institutions. With their signatures, both chairmen expressed their wish to develop and strengthen the existing good cooperation into the future. The memorandum creates a platform for broader cooperation regarding exchanges of information and experience in the field of legislation, case law, and methodology, as well as information on market functioning, study visits, and the organisation of conferences and other events. Always with more effective enforcement of competition policy in mind, the memorandum sets out rules for the mutual supply of information in cases of anticompetitive behaviour by undertakings or mergers, as well as in cases of mutual assistance while maintaining the protection of sensitive information. Besides publicly available information, the competition authorities will also exchange other information upon the consent of the supplier of such information. The parties to the memorandum also expressed their interest in organising regular meetings between their representatives, with the aim of discussing issues of mutual interest and cooperation.

On the basis of this, representatives of the Czech and Slovak authorities meet regularly for informal meetings to find out about the day-to-day activities of the authorities, the case-law of the courts and legislative activities. They exchange competitive know-how.

The Slovak NCA has also concluded a cooperation agreement with the Competition Council of the Republic of Moldova. The agreement has a similar nature as the memorandum with the Czech Republic. The different nature of the agreement provisions stems from the fact that Moldova is not a member of the EU. This document contains commitments towards cooperation and support within European Project partnerships. Practical differences will surely also arise with regard to the geographical and linguistic distance or differences of legal systems in comparison with the cooperation with Czech Republic.

Beside the positive aspects of MoUs however, this is a form that does not allow the Slovak NCA to exchange information pursuant to Article 22 (4) of the Act on the Protection of Competition, or to conduct investigatory measures at the request of other NCAs outside the scope of Reg. 1/2003 or 139/2004.

3 Memorandumo spolupráci medzi protimonopolným úradom Slovenskej Republiky a úradom pre ochranu hospodárskej súťaže Českej Republiky (April 16, 2014). Available from: https://www.antimon.gov.sk/data/att/1378.pdf [Accessed September, 12 2020].

The efforts for more formal bilateral cooperation with the Czech NCA

As mentioned above, the main obstacle to closer cooperation between these two historically close partners is the lack of legal basis. The Slovak NCA can only disclose information from the case file on the basis of an international agreement or EU Regulations, and on the basis of reciprocity or with the consent of the relevant company/person. The OECD recommendation has helped the Slovak NCA to better specify the need for closer cooperation. That is why the Act on the Protection of Competition was amended in a way that would allow the Slovak NCA to exchange information with other NCAs and open the way to negotiate a more formal agreement. However, such an agreement, allowing the Slovak NCA to conduct any investigatory measures upon request or exchange information from case files, would have to be approved and signed by either the president or the government, depending on its final wording.

Hence the Slovak NCA started negotiations with the Czech authority, being the most appropriate candidate for such closer bilateral cooperation upon formal agreement.

The Slovak NCA requested and acquired a mandate from the Slovak government to enter into, firstly, informal discussions with the Czech NCA on the content of a future bilateral international agreement. In an amendment to the Act on the Protection of Competition, the Slovak NCA prepared a platform for a future inter-ministerial international agreement and, in consultation with the Ministry of Foreign Affairs of the Slovak Republic, amended the provision of Section 22 of the Act on the Protection of Competition. The Czech Republic introduced a similar provision in 2017, allowing the exchange of information on the basis of an international agreement.

The basic framework that should be covered by an international Czech-Slovak treaty is as follows:

- Exchanging information held by either authority in the form of evidence, as well as the know-how of the authorities.
- Obtaining information for the other authority (which the addressed authority does not have, but will do for the requesting authority by requesting third parties, possibly through inspections).
- Exchanging information with the consent of the parties concerned – waiver.
- Exchanging information without the consent of the parties – including protected information, in particular business secrets, confidential information, as well as information protected by special regulations in the country of a party to the agreement, such as: bank secrets, personal data, etc.
- Providing legal assistance – performing individual acts for the other party, in particular by sending and delivering documents, conducting inspections, withdrawing and transmitting factual evi dence, obtaining expert opinions, questioning participants, witnesses, experts and other persons with possible involvement of the requesting party's staff there where appropriate.

The agreement should cover the exchange of information of any kind, such as oral information, written information and information regardless of the medium on which it is recorded.

One of the aims of the agreement should be to enable the efficiency of the activities of both competition authorities to enforce competition principles and preventing inconsistent outcomes. This should be done bearing in mind the cost savings of authorities, in particular through the coordination of the parties' activities. However, coordination will only be possible and useful in the event of the same or similar related matters (especially in the field of cartel investigations, inspections).

The provisions designed to prevent conflicting situations that could arise if the enforcement of competition rules by one competition authority would have led to obstacles to the enforcement of competition rules by another competition authority should also be included. In order to prevent such conflicts, the agreement should create a mechanism for mutual information on cases of a possible conflict of interest, as well as on the action of both authorities when they identify a possible conflict of interest.

The parties to the agreement should have the right to refuse to provide information if this would be contrary to, or unduly burdensome to, the law of the country of the party to the agreement.

The protection of the information obtained should be ensured by each party to the agreement under its national law, and the use of any information exchanged or transferred between the parties under the agreement should stay under the responsibility of the receiving party.

The agreement has not yet been concluded and the negotiation process is still ongoing. On the basis of the current legal situation, representatives of both authorities regularly meet in informal meetings, where they inform each other about the ordinary activities of the authorities, the case law of the courts, legislative activities and the exchange competitive know-how. The exchange of information concerning the application of European competition law, which the Czech and Slovak authorities are authorised to apply, is governed by Regulation 1/2003. As regards national law, the authorities may not exchange information obtained in the course of their activities that is not publicly available without the consent of the parties concerned. An international treaty should make this possible.

Conclusion and challenges for the future

All the above-mentioned types of cooperation are relevant for the Slovak NCA, as each type of cooperation has its own added value for the effectiveness of the competitive enforcement. At the same time, as was shown above, almost all types of cooperation record some gaps and limitations.

So far, based on the Slovak NCA's experience and practice in antitrust matters, the cooperation pursuant to Regulation 1/2003 works well, especially when the NCAs are applying Articles 101 and 102 TFEU. The area of mergers would benefit from re-

moving legal obstacles, which would mean to create a multilateral legal basis similar to that under Regulation 1/2003. However, under the current legal set up and division of powers between the EU and Member States in the area of mergers, we do not see any real possibility of such a solution.

From a broader point of view, the global nature of the business today requires cooperation that demands a broader consensus and stricter rules of the game. In that sense, in the area of antitrust we expect the new EU Directive 1/2019 will be transposed in all EU Member States, providing room for more effective cooperation, especially in mutual assistance regarding the notification of decisions and other acts, as well as the enforcement of fine cross border, which was lacking so far. From the Slovak NCA's perspective, it is also expected that the new legislation will bring a more EU-consistent approach towards the definition of the undertaking as the economic entity (the economic group as a single economic unit) and the possibility to hold the addressees jointly and severally liable for the illegal conduct.

The other option is to think about more formal bilateral or regional cooperation in the case of mergers and cross-border antitrust cases. The possibility of setting a framework that would facilitate cooperation could be further explored; it would be useful to have a better system of information exchange and administrative assistance. The first step towards this might be the identification of problems and drafting ways forward, and thus inducing a possible improvement of the current legal framework.

The main obstacles that rose from the everyday practice and experience are various by nature, as was seen above. The main formal and legal obstacle is the absence of a legal basis to conduct the measures requested, or to request the measures, or to exchange information. Even under ideal conditions and with the political will to conclude bilateral agreements with the most probable sparring partners, the procedure itself is the challenge, as well as the rules that would be set up by the agreement, which should be consistent with other national rules of each of the NCAs in question.

In particular, a big gap consists in differences in confidentiality rules, which prevents a smooth exchange of information, and using investigative tools in cooperation. Even in the absence of a uniform approach to confidentiality, we think there is still room to create a system on how to deal with shared information, which remains confidential under the legal rules of one country, but not of the country that asked to share the information. The possibilities involve, for example, in making compilations of the information shared in order not to discover any confidential information, treating sharing such information as voluntary, to introduce the principle to return or destroy any confidential information. All those instruments, however, require the same safeguards to be provided in each jurisdiction for the undertaking, as well as its exclusion for use for criminal sanctions. To create an international mechanism of how to identify the confidential information and how to treat them in the event of differences in legal rules could help to improve the cooperation.

It is also necessary to consider, in addition to the limitations on sharing confidential information, the institutional and investigatory impediments (resource constraints and practical difficulties), and lack of trust and confidence in legal systems, the limitations due to differences in legal frameworks (criminal vs. civil enforcement), jurisdictional constraints – differences in legal standards.

Outside the initiative made by the NCAs to exchange information, there is a possibility to push for a better policy towards the increase of the incentives of undertakings to grant confidentiality waivers. Through discussion or soft law, the NCAs can explain the positive effects on the speed of the proceedings and on savings of administrative costs in the proceedings, especially in merger cases, but towards third parties (for example claimants) also in antitrust cases.

Broadly speaking, a general and mutual trust between NCAs that would like to be involved in a more intense mutual cooperation is a key prerequisite. This can only be achieved through regular contacts, greatly facilitated by a forum like ad hoc working groups in order to build co-operative relationships between competition authorities. Therefore, mutual understanding and trust building between agencies through formal and informal mechanisms is essential.

With regard to the use of cooperation tools in connection with a court review of the NCA's decision, given the positive experience with the application of amicus curiae in the judicial review of decisions, we propose to use this institute also in future court proceedings. The Slovak NCA may also contribute to the identification of the relevant decision-making practice of the EC and European Courts' case law by referring to relevant case law in its decisions.

At the same time, it is necessary for the courts themselves to know the specificities of competition law and its institutes. One solution could be the specialization of courts in the SR. However, this seems unlikely given the small number of competition cases compared to the volume of the other courts' agenda. Another obstacle for judges is that most of the competition literature and often the latest EC and European Courts decisions are in a foreign language. Based on previous experience with the participation of the Slovak NCA in the training of judges in Slovakia, as well as the experience of other competition authorities, we feel there is a space for more focused training, taking into account the specialties of competition law and at the same time broader national legislative setting. The training could be covered by experts from the competition authorities of the Slovak Republic, the Czech Republic, EC and covered by judicial training organizations. We believe that such a procedure could eliminate the risk associated with the possible involvement in such training of the Slovak NCA only and would benefit from providing information in Slovak or Czech language. This training could be provided for courts in Slovakia and the Czech Republic, which would also contribute to the exchange of information and relevant know-how between judges from both countries.