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Slovenian and German Competition Policy Regimes: A comparative analysis

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Abstract

We use an institutional approach to analyze differences and similarities between competition policy regimes in Slovenia and Germany. We first indicate differences that exist in the implementation of EU competition law at the national level, given the unified framework of EU competition policy. In a next step, we discuss recent cases in both countries and indicate how historical developments and economic factors influence decision making and case law. We also discuss recent developments of the national competition policy regimes and indicate how the digital economy might shape competition policy in the future.

Keywords: Competition policy, competition cases, competition law, transition countries

Introduction

Competition policy aims to ensure free competition in the market. The EU competition policy regimes consist of a joint framework, complemented by national competition policy legislations that are characterized by diverse historical, institutional and economic backgrounds. Due to the expansion of the European Union in 2004 to 10 East European countries, one dividing line can be drawn between "old" competition policy regimes (e.g., Germany, France and Great Britain) and "new" ones from the Eastern member states (e.g., Slovenia, Hungary and Poland). Whereas the old regimes may be characterized by a long-standing experience in competition policy implementation, the new ones may benefit from the absence of status quo biases (Samuelson & Zeckhauser 1998; Cooper & Kovacic 2012) and the implementation of lean and efficient rules and proceedings.

"The competition policy is an expression of the current values and aims of society and is as susceptible as political thinking generally" (Wish, 2009, p. 19). Different countries have establish different competition systems of law with different concerns.

While the German tradition of competition policy played a special role in the implementation of many competition policy regimes (Mikek, Slebinger, & Mlinaric, 2004), the Slovenian competition law has recently been reformed. Before the reform, it was divided into two parts, the suppression of unfair competition and

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the law of prevention of restriction of competition. Through the latest amendment to the Prevention of Restriction of Competition Act, both areas are regulated by a single law.[1] In Germany, the Act against restraints of competition was most recently amended in 2013, while the ninth amendment is currently being discussed.

The aim of this paper is to provide a comparison of the Slovenian and German competition policy regimes. We assert that both regimes act as role models given the stated context. The German system has a long tradition, starting in 1958, and it influenced the institution building with the Eastern amendment of the European Union. In contrast, Slovenia is a small transition economy characterized by strong economic dynamics, whose competition regime in its current form was set up in 1993. While both countries are EU Member States, in this paper we determine the extent of similarities and differences in national legislation and case law, given the unified EU approach and the different historical backgrounds of the countries under review. To do so, we provide a comparative analysis of the institutional regimes, present selected case studies and statistics and provide an outlook to current issues in national competition policy regimes. We focus the analysis on the restriction of competition by private undertakings, especially the conclusion of cartel agreements and abuse of a dominant position. The cases are very diverse, and thus the analysis of all different forms of restrictive practices would be too extensive for the purposes of this paper.

A Comparative Analysis of Competition Policy Regimes

EU competition policy

Competition policy is one of the oldest common policy fields in the European Union. The EU competition rules are regulated by the Treaty on the Functioning of the European Union (TFEU) and several acts of secondary legislation, as well as other acts adopted by the EU institutions. Case law of the Court of Justice of the European Union also plays an important role. These rules are sector-independent and cover all areas of the economy.[2] While the suspension of unfair competition law has a minor effect on the liberalisation of infrastructure sectors, the law of prevention of restriction of competition, particularly in the communication and energetics sector, plays a significant role (Ferčič, 2015a).

The main provisions are Art. 101 (the provision of cartel prohibition and merger control) and Art. 102 TFEU (the prohibition of abuse of a dominant position).[3] These rules are quite general and are specified in regulations and guidelines. Regulations are directly implemented and common EU law in all member states, whereas guidelines give information on how the European Commission applies these rules.[4]

The most prominent regulation is Merger Regulation 139/2004, which is currently under revision. It sets the principles for ex ante merger control (Art. 4), gives thresholds for the procedure of obligatory notification to the European Union (Art. 1), defines the SIEC-test ("significant impedance of effective competition") as the standard of proof in merger control (Art. 2), and states potential outcomes of the merger control procedures (Art. 8). These provisions are complemented by guidelines that indicate how the commission applies these general rules. The "Horizontal Guidelines" state principles of merger control in horizontal mergers, whereas the "Non-Horizontal Guidelines" state such principles for vertical and conglomerate mergers. Also important are the guidelines on the definition of the relevant market, remedies and case referrals.[5]

With respect to cartel prohibitions, the European Commission has applied a leniency program since 2006. This program grants fine reductions up to full immunity under certain conditions if a cartel member initially reports a cartel to the Commission. The leniency program has the aim to destabilize cartels and provide incentives to report about them. Since 2015, there have also been provisions for settlement procedures with respect to cartel cases, which grant fine reductions in response to a cooperative cartel settlement procedure with the involved firms.

All EU Member States are required to abide by rules of this EU legal order, as the establishment of competition rules is necessary for the functioning of the internal market and an area of exclusive Union competence[6] The Member States are empowered by the European Union or for the

[1] In force since 24 October 2015. Official Gazette RS, No 76/2015. Until 2015, the suppression of unfair competition was regulated by the Protection of Competition Act, and theprevention and restriction of competition was regulated by the Prevention of Restriction of Competition Act.

[2] The special position of certain sectors like agriculture, transport, and atomic energy should be noted (Jones & Sufrin, 2008).

[3] We do not refer to state aid here, which is also a pillar of EU competition law.

[4] For detailed discussions of the theory of competition policy and descriptions of the EU institutional framework, compare, for instance, Belleflamme and Peitz (2015), Bishop and Walker (2010), Motta (2005), Russo, Schinkel, Günster, and Carree (2010), Schmidt and Schmidt (2006), Van den Bergh and Camesasca (2006).

[5] All relevant information provided http://ec.europa.eu/competition/mergers/legislation/legislation.html.

[6] Article 3(1)(b) TFEU

implementation of Union acts[7] Details are set in regulation 1/2003, which determines the competencies of the European Commission and the member states and provides procedures for cooperation. Council Regulation (EC) No 1/2003[8] of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU abolished the centralised scheme and increased the links between national competition authorities in line with the principle of subsidiarity. In accordance with the provisions of Paragraph 1 of Article 3 of Regulation 1/2003/EC, the monopoly of the European Commission (hereinafter the Commission) was eliminated regarding the decisions on exceptions from prohibition of agreements restricting competition and provided, at the same time, a basis for more effective private enforcement of EU competition law rules before national courts. "Given the central role of national courts the success of decentralised competition law enforcement depends to a large extent on the national court's ability to apply the law accurately and consistently" (Blanco & Jorgens, 2013, p. 92-93). The Commission, through its numerous notifications and guidelines, and the Court of Justice through its case law (where the institute of reference for a preliminary ruling is particularly important), ensure the uniform application of EU competition rules. As courts are independent national authorities, the cooperation between them and the Commission is established in the form of non-binding assistance of the Commission as *amicus curiae*—that is, the court is neither obliged to seek the Commission's assistance or to take it into consideration after receiving it.[9]

Slovenian competition policy

The Constitution of the Republic of Slovenia,[10] hierarchically the highest norm in Slovenia, guarantees in its Article 74 free economic initiative, which means that individuals can freely decide to pursue economic activities in the market. In doing so, they should take into consideration specific constraints, referring primarily to their legal and organisational status, as they are allowed to operate only in one of the legally available forms and in accordance with the public benefit. Secondly, individuals must respect competition when acting in the market. According to this provision, "[u] nfair competition practices and practices which restrict competition in a manner contrary to the law are prohibited.".[11]

Accordingly, the area of competition law is divided by the Constitution into two sub-areas or constitutional categories. We refer to the competition policy rules in the following, as these are the relevant provisions for the abuse of a dominant position and cartel prohibition.[12]

Until its amendments entered into force in 2015, the Competition Act was considered the central regulation on the restriction of competition in the Slovenian market. As its name indicates, it prohibits practices that prevent, distort or restrict competition in the market, for which, in theory, a simplified term is used—namely, practices having as their object the restriction of competition. Therefore, this act governs restrictive practices, concentration of companies, restriction of competition by the state or governmental agencies, and actions for the prevention of restrictive practices and concentrations that significantly impede effective competition, when they produce or may produce effects in the territory of the Republic of Slovenia.[13] Furthermore, the Competition Act lays down the body (Slovenian Competition Protection Agency; hereinafter SCPA), responsible for supervision of the implementation of this Act and the implementation of Articles 101 and 102 of the Treaty on the Functioning of the European Union. According to the Competition Act, the SCPA has two functions: it operates as an administrative authority and as a minor offence authority. When exercising its competence as an administrative authority, the SCPA focuses mainly on procedures regarding restrictive agreements and concentrations, whereas as a minor offence authority it sanctions those who infringe the provisions of the competition law. In practice, therefore, a situation may arise in which the SCPA simultaneously acts in two capacities and carries out two procedures at the same time. It is debatable whether this approach is efficient and contrary to legal predictability, thus raising concerns (Bratina, 2009).

From the perspective of the entities interfering in the restriction of competition in the market, it is possible to differentiate between the restriction of competition by state or government, when the competition is restricted by public authorities and organisations as well as individuals exercising the powers, and the restriction of competition by private undertakings, when companies and individuals performing economic activities are involved in restrictive practices (Repas, 2010). Traditional forms of restriction of competition by private undertakings

[7] Article 2 (1) TFEU.

[8] Official Journal of the EU L No 1, of 4 January 2003.

[9] Adopted from Repas, ibidem, p. 105.

[10] Official Gazette RS, No 33/1991, as amended.

[11] Paragraph 3 of Article 74 of the Constitution of the Republic of Slovenia.

[12] The unfair competition was first regulated in a separate law (Protection of Competition Act). With the amendments in 2015, that area was moved to the Competition Act, and the Protection of Competition Act was repealed on the ground that both the unfair competition acts as well as acts that restrict competition affect the functioning of the market and competition (The bulletin of the National Assembly of the Republic of Slovenia "Poročevalec" on 18 June 2015).

[13] Paragraph 1 of Article 1 of the Competition Act.

mainly include, firstly, restrictive practices in the form of agreements, decisions by associations of undertakings and concerted practices[14] (cartel agreements[15]) as well as abuses of a dominant position;[16] and secondly, concentration of undertakings[17]or restrictive associations. All types of cartel agreements and abuse of a dominant position are prohibited, whereas, as regards concentrations of undertakings, only those concentrations are prohibited which substantially impede effective competition in the market.[18] When carrying out the supervision, the SCPA operates *ex post* in the case of cartel agreements and abuses of a dominant position, which means that it assesses practices that have already been carried out or are still ongoing, whereas it operates ex ante in cases of concentrations of undertakings, in order to prevent the restriction of competition in the market in advance (Repas, 2010). The SCPA is the central competition regulator in Slovenia. When carrying out its regulatory function, it cooperates with other national authorities, local authorities, institutions and individuals.[19] It was established on the basis of the amendment to the ZPOmK-1 from 2011[20] to carry out its tasks and powers in accordance with the Competition Act. It took over the tasks and powers of the previous authority, the Slovenian Competition Protection Office. By setting up the SCPA, the legislator also wished to stress its autonomy and independence and (unlike the Office, which used to be a body within the Ministry) to separate it from the Ministry of Economy and Technology. Moreover, a change in the status of the competition protection body was necessary in view of a high degree of state ownership in large corporations, requiring greater autonomy and independence of the authority, without any political pressures when assessing the practices of the companies in the market (Mitić, 2011). Independence (organizational, legal, functional and financial) of the SCPA is a necessary condition for its professional work (Ferčič, 2015b).

The SCPA has different competencies as set out in the Competition Act. First, it monitors the application of the provisions of the Competition Act and of Art. 101 and 102 TFEU.[21] Within this function, the SCPA mainly monitors any infringements of the provisions related to restrictive agreements, abuses of a dominant position and concentrations. It exercises control by monitoring the situation in the market by means of information published in the media, on the basis of reports about disputed practices of companies or through own activities, such as sectoral research or requests for information. However, the SCPA is not competent for the control over acts of unfair competition and does not act as an administrative or minor offence authority in such matters, as the overall legal protection of unfair competition was given to the judicial authorities by the amendment to the Competition Act in 2015.[22] In addition to the monitoring of the restriction of competition by private undertakings, the SCPA also monitors the restriction of competition by state or government agencies. However, the SCPA acts only as a consultative body (Bratina, 2009). While not binding, it forwards its assessment to the competent authorities regarding the necessary actions to eliminate restrictions in competition resulting from statutory or other provisions.

Second, the SCPA acts as an administrative authority when the information obtained shows the likelihood of infringements of the law. The SCPA initiates ex officio a procedure carried out in accordance with the provisions of the Competition Act with the subsidiary application of the provisions of the General Administrative Procedure Act (hereinafter the ZUP).[23] While it always initiates a procedure on its own motion (ex officio) when detecting restrictive practices, this occurs only exceptionally in the case of concentrations, as the procedures of the appraisal of the concentration are normally initiated on the basis of a notification. The matters brought before the SCPA are specific and differ, by reason of their legal nature, from other (normally) administrative matters decided upon by the competent authorities by applying the provisions on general administrative procedure.[24] The control procedure, in which control measure are also imposed in the form of acts set out by the Competition Act, refers to the restrictive practices and to the concentration procedures.

Third, the SCPA acts as a minor offence authority regarding the infringements of the provisions of the Competition Act and the provisions of Art. 101 and 102 TFEU. It conducts the proceedings in accordance with the law governing minor

[14] Governed by Article 6 of the Competition Act and Article 101 of the TFEU.

[15] For a more accurate distinction between the two types of restrictive practices, a decision was made to use the term "cartel agreements" for all types of restrictive agreements; in this context, the term "cartel" refers to all types of restrictive agreements, both horizontal and vertical, even though in competition law theory a cartel agreement means agreement only between entities of the same type of position (between competitors).

[16] Article 9 of the Competition Act and Article 102 of the TFEU.

[17] Article 10 of the Competition Act.

[18] Paragraph 1 of Article 11 of the Competiton Act.

[19] Article 14 of the Competition Act. To avoid exceeding the scope of this paper, the focus below will be on the presentation of the SCPA. As far as other authorities are concerned, the role of courts and the European Commission will be presented in brief for the sake of gaining a wider perspective.

[20] Official Gazette RS, No 26/2011.

[21] Paragraph 1 of Article 12 of the Competition Act.

[22] Paragraph 3 of Article 12 and Article 63.b of the Competition Act.

[23] Official Gazette RS, No 80/1999, as amended.

[24] Extracted from the grounds for the judgment of the Supreme Court of the Republic of Slovenia, No VS4001813 of 27 September 2011.

offences (the Minor Offence Act),[25] unless stipulated otherwise by the Competition Act. The SCPA decides on infringements regarding restrictive practices and concentrations. It imposes fines on infringers, amounting to up to ten percent of the annual turnover of the company in the previous financial year, whereas the fine on the responsible officer of the undertaking ranges between 5,000 and 10,000 Euros.[26] Regarding the restrictive agreements and concentrations of undertakings, the SCPA is responsible, if any infringements have been found, to impose fines as well as to submit applications requiring from competent courts a civil sanction for the breach (i.e., seeking to establish the invalidity of the restrictive agreements and anti-competitive merger or acquisition practices).[27]

Fourth, with the adoption of the amendment to the Agriculture Act,[28] the SCPA has additional competences to govern the relationships within the food supply chain. The amendment to the Act sets up a monitoring authority (i.e., a food supply chain relationships ombudsman), who will monitor the conduct of the food supply chain participants and notify the SCPA, *inter alia*, of any illicit practices.

Finally, as regards the implementation of the supervisory function, the role of judicial authorities must be highlighted. The courts cooperate with the SCPA in investigation procedures: they issue investigation orders on a proposal from the SCPA and decide on the existence of privileged communication (communication between an investigated company and a lawyer).

Moreover, judicial authorities carry out redress procedures. It is impossible to lodge ordinary appeals against the SCPA's decisions; nevertheless, legal protection is provided through judicial remedy. In a judicial redress procedure, the decisions are made by the Administrative Court of the Republic of Slovenia, when that refers to the decisions given in an administrative procedure.[29] Judicial protection against the SCPA's decisions made on minor offences is provided by the Ljubljana District Court as the court with exclusive jurisdiction.[30]

German competition policy

German competition policy goes back to 1958. The introduction of the Act Against Restraints of Competition (ARC) foresaw the prohibition of an abuse of a dominant position and the prohibition of cartelization. The second amendment of 1973 introduced the ex ante merger control procedure.[31] The current form of regulation goes back to the eighth amendment of 2013, while the ninth amendment is currently under discussion.

The Bundeskartellamt implements the ARC as an independent higher federal authority assigned to the Federal Ministry for Economic Affairs and Energy (Bundeskartellamt, 2011). It is the most important (but not the only) competition enforcer in Germany. It only has competences in cases that do not lie within the power of the European Commission. The general provisions of Regulation 1/2003 specify details, and there are special rules with respect to referrals in specific cases, for instance in merger control procedures. Moreover, it is not the only competition authority at the national level. Each federal state may also have a state competition authority, which is usually implemented in the form of departments of the state economic ministries. Moreover, the minister of economics may act as a competition authority under certain conditions in merger control procedures.

In Germany, the federal cartel office is the sole implementing institution with respect to merger control procedures. With respect to cartel cases and abuse control procedures, the state authorities may also conduct cases. A case falls under federal authority if the conduct affects at least two federal states within Germany. If it is restricted to a single state, the state authority has the competency to conduct the case.

As in many jurisdictions, the federal cartel office has discretion with respect to proceedings in cartel and abuse control cases. With respect to merger control, the thresholds of Art. 35 ARC define whether the authority needs to be notified of a merger. The tresholds are defined in terms of turnover values of the involved firms, so there is no discretion available for the authority to step back from seemingly unimportant cases or open a merger proceeding if the thresholds are not met. Whereas this approach has not received much attention in the past, recent mergers in rapidly growing industries like internet-related markets or bus transportation services (a fast-growing industry in Germany due to recent deregulation) raise important questions. Some of these mergers did not meet the thresholds for obligatory notification, even though they were considered economically important. As a consequence, the Federal Cartel Office did not have discretion to open proceedings, and the mergers were implemented without notification. Due to these incidents, the current ninth amendment of the ARC discusses the extension of the notification thresholds (compare Section 3.3.1).

[25] Official Gazette RS, No 7/2003, as amended.

[26] In detail in Articles 73 and 74 of the Competition Act.

[27] Paragraph 4 of Article 12 of the Competition Act.

[28] Official Gazette RS, No 26/14.

[29] Article 48 of the amendment to the Courts Act, Official Gazette RS, No 63/13.

[30] Paragraph 5 of Article 214 of the Minor Offence Act.

[31] The sixth amendment of 1999 introduced rule on the legal protection in award procedures for public contracts, which is not the focus of this paper.

A very important issue in practical competition policy implementation is the role of independent decision making procedures and the risk of regulatory capture. In order to minimize this risk, any decision by the Federal Cartel Office is made by a group of at least three civil servants.[32] From an organizational perspective, the office is divided into twelve decision-making units, with nine organized subject to the industries they cover and three specialized cartel units. This organizational structure supports the accumulation of sector-specific knowledge and assures consistency in decision-making procedures. Decisions are made within these decision units, which are independent of any political influence. The president of the Federal Cartel Office has a mere representative function and no decision-making power. With respect to independence from political influence, two aspects play an important role: as the decisions are made within the authority by civil servants in the decision units, influences from outside, politics or administration usually do not play important roles.

Second, there is a peculiarity in German competition policy with respect to merger control. The ministerial allowance procedure gives the minister of economics the right to overstate a prohibition decision by the Federal Cartel Office in special cases. The underlying idea is that the competition authority is restricted to the assessment of competitive effects of a merger in its case decision. However, if the case affects issues of general overall importance, the merging parties may call the minister of economics to overrule the prohibition decision of the Federal Cartel Office for reasons beyond competitive concerns. In this procedure, the minister is not allowed to overrule the competitive assessment of the Federal Cartel Office per se, which he has to accept. However, in addition, he may consider aspects beyond the purely competitive assessment and may thus grant ministerial allowance. This is the case if the overall economic benefits of the proposed merger outweigh its competitive harm, or if there is an outstanding general interest in the implementation of the merger (Art. 42 ARC). Ministerial allowance procedures are rarely employed in Germany, with this one being only the 22nd in the last four decades. Moreover, the majority of cases have been rejected (BMWi 2016). In the proceedings, the minister conducts investigations, hears the affected parties and is obliged to receive a non-binding statement of opinion of the monopoly commission (an independent advisory board to the government in the field of competition policy and regulation). It is generally accepted that this separation of powers supports the office's independence in decision making, because it enables it to focus on the competitive assessment in its decisions without being obliged to take political considerations into account.

[32] From a practical experience, important cases are often discussed by the whole decision-making department.

Competition Policy in Practice

Case statistics

This section provides summary statistics on the activities of the Slovenian and German competition authority. We start with a representation of the most important sectors in terms of cartel case law and abusive behavior. Next, we describe some important cases in more detail. The section concludes with a discussion of important current issues in national competition policy regimes.

Germany

Table 1 lists the number of abuse control, cartel and merger cases for the ten sectors with the highest number of case proceedings over the period of 2005-2015. The data indicate that abuse control and cartel cases play the most important role in the energy sector. It is very likely that this unusually high number of cases reflects activities of the German energy industry during the process of market liberalization, the transformation of the energy markets towards renewables, the market opening and the introduction of competition. With respect to the other industries, cartel cases and abuse control proceedings show no particular patterns. The small number of abuse control cases in many industries might indicates that these industries show at least some degree of competition, such that market dominance—a prerequesite for abuse control cases—tends to be of less importance.

Table 1: Case statistics for the ten most frequent sectors in Germany for 2005-2015

	Cartel cases	Abuse control	Merger cases	Sum
Energy	30	36	15	81
Media	1	0	12	13
Hea lth care	7	1	26	34
Construction	4	1	12	17
Chemicals	4	1	26	31
Food	0	2	11	13
Machine construction	0	0	21	21
Waste disposal	3	0	7	10
Telecommunications	5	1	7	13
Financial services	1	0	8	9
Sum	55	42	145	242

Source: Bundeskartellamt.

Table 2: Case statistics for cartel cases, abuse control cases and merger cases for 2005-2014

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	Sum
cartel cases	2	4	14	8	5	17	1	4	4	3	62
Abuse control	1	2	1	13	6	14	5	5	1	1	49
Merger cases	1687	1829	2242	1675	998	987	1108	1127	1127	1188	13968
of which: l st phase	1663	1795	2213	1660	976	977	1101	1113	1118	1178	13794
of which: 2nd phase	24	34	29	15	22	10	7	14	9	10	174

Source: Bundeskartellamt

Table 2 provides information about the case development over time. The table clearly indicates that merger control cases make up the majority of proceedings at the Federal Cartel Office. Usually only 1 to 2 percent of these cases enter the second phase of investigation, and the vast majority are cleared after the initial investigation in the first phase. This indicates that there is room for improvement with respect to the notification system in Germany. The allowance decisions in first-phase investigations bind substantial resources in the administration, which cannot be allocated to more important and labour-intensive proceedings. However, this is not a peculiarity of German competition policy and can likely be observed in other jurisdictions (DG Comp, 2017). Moreover, it is important to note that the seemingly low number of other cases reflects a disproportionately high amount of manpower allocated to these cases, as abuse control and cartel cases very often bind substantial resources over long periods of time.

Slovenia

With respect to Slovenia, Table 3 provides data referring to restrictive practices of undertakings over the 2005-2014 period. We looked at how many decisions referred to the conclusion of cartel agreements and how many to abuse of a dominant position. Furthermore, the number of all decisions issued by the SCPA during that period was identified. In addition to the quantitative scale of the SCPA's activities, we focused on the area of the infringement; to this end, the decisions were broken down by sectors of the economy.

Table 3: Slovenian decisions on the infringements related to restrictive practices during 2005-2014

	Restrictive agreements	Abuse of a dominant position	Total
Telecommunications	0	6	6
Energy sector	2	2	4
Trade	2	1	3
Healthcare	3	0	3
Pharmacy	2	0	2
Funeral services	0	2	2
Maritime agency services	2	0	2
Other	11	8	19
Total	22	19	41

Source: SCPA

Most decisions indicated in Table 3 refer to infringements related to restrictive practices in the Slovenian market, while 15 infringements referred to restrictive practices in the EU market, 7 decisions were issued on the basis of Article 101 of the TFEU (Article 81 of the EC Treaty), and 8 decisions were issued on the basis of Article 102 of the TFEU (Article 82 of the EC Treaty).

The data show that the number of decisions issued by the SCPA referring to restrictive practices is relatively low (slightly less than one-ninth of all of SCPA's decisions) compared to its decisions related to concentrations of

Table 4: Slovenian decisions during 2005-2014

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	Total
Testrictive agreements	2	4	2	2	1	2	1	3	3	2	22
Abuse of a dominant position	3	1	3	2	2	1	2	2	2	1	19
Other (concentrations)	54	47	50	41	18	20	25	18	25	25	323
Total	59	52	55	45	21	23	28	23	30	28	364

Source: SCPA

undertakings. The majority of infringements in connection with restrictive practices occured in the telecommunications sector (6 cases of abuses of a dominant position), energy sector (4), trade and healthcare (3), funeral services and maritime agency services (2).

The SCPA issues the decisions within the scope of administrative proceedings. The decisions are mainly of a declaratory nature. In the light of effective protection of competition, their biggest problem is that they contain no sanctions for infringers. The SCPA imposes sanctions within the scope of minor offence proceedings. Procedural duality brings about duplication of judicial protection (see section 3.2), and both greatly reduce the possibility of a successful completion of the SCPA's procedures with the payment of a fine. The SCPA's Annual Report provides information indicating that, on the basis of the statistical estimation of the success of the available remedies, the probability of the ultimate payment of a fine is only 20 percent.

Case studies

Germany

We provide two examples of important cases in Germany. The first refers to a merger case in the German interurban bus market. This market developed only recently in Germany, as it was prohibited by law until 2012 to provide coach services.[33] After initial and lively activities with the beginning of liberalization in 2013, the market soon started to consolidate and finally led to the merger of Flixbus and MeinFernbus in 2016, the two most important players. The merged entity is reported to have a market share of about two thirds of the whole market, so it is likely that this merger leads to the establishment of a dominant player. However, the Federal Cartel Office had no means to investigate this case.[34] Even though the estimated turnover in the interurban bus industry is supposed to be substantial and the merged entity comprises a vast part of it, the turnover of Flixbus and MeinFernbus was below the notification thresholds due to the business model the companies employ. As in many internet-related industries, the firms act merely as intermediaries between their end customers (the travellers) and small logistics companies that physically operate the busses. In doing so, they provide the software platform for travel planning and booking and does centralized route planning for its subcontractors. Through the uniform booking platform, their marketing activities and the established brand names, the merging companies act as coach operators, yet theirrevenues comprise only the commission for ticket sales as a percentage of the total ticket price. Revenues are a fraction of the total revenues for coach services in Germany, and despite the seemingly important role of the companies in the interurban bus market, the combined turnover of the involved entities stayed below the notification thresholds of the ARC. As will be discussed in Section 4, this and other comparable cases led to a discussion about the revision of competition law in the digital economy.

Another important recent case was the prohibition of the merger between Edeka and Tengelmann in 2015.[35] Both companies are food retailers ("supermarkets") with a strong position in various regional German markets, including Berlin, Munich and North Rhine-Westphalia. According to the decision, the merger would significantly impede effective competition in the food retail markets against its customers, as well as in the procurement markets vis-à-vis manufacturers of branded products. With respect to the upstream procurement markets, Tengelmann would disappear as an independent purchaser, thus undermining the bargaining position of the remaining cooperating companies. With respect to the end customer markets downstream, there is a substantial horizontal overlap between the merging parties in several regional and local retail markets, which reduces consumers' choice and increases the merging parties' market power. According to the Federal Cartel Office's decision, the merger would lead to substantial overlaps in these regional markets, reduce competitive pressure and leave the merging firms with a higher degree of market power against their end customers.

In the follow-up to this decision, the parties initiated a ministerial allowance procedure, while at the same time they filed an appeal against the prohibition decision before the Court. As discussed in Section 2.3, the ministerial allowance procedure is a peculiarity in the German competition policy regime, granting the Minister of Economics the right to act as a competition authority under special circumstances. In this particular case, the minister issued an approval decision in 2016. However, competitors of the merging firms filed an appeal procedure against this ministerial allowance decision before the Court. In a first assessment, the Court signaled that the stated reasons in favor of the allowance decision might not pass scrutiny. As a consequence (after intermediation by former Chancellor Gerhard Schröder), the merging firms and their competitors negotiated an agreement that allocates a specified number of supermarkets to one of the outside

[33] Historical exemptions from this rule include the provision of bus transportation services to and from Berlin, as well as other minor exemptions (Dürr &Hüschelrath 2016a, 2016b).

[34] The market definition and competitive assessment need to take modal competition into account, so the mere indication of market shares in the interurban bus markets might be misleading.

[35] The description of this case follows the exposition in Polk (2015).

competitors and compensation payments to the others. After abandoning their claims before the Court due to this agreement, the merger was finally implemented in late 2016.

Slovenia

Abuse of a dominant position on the television advertisement market

Administrative procedure

On 24 April 2013, the SCPA adopted an administrative decision stating that PRO PLUS had abused its dominant position on the television advertisement market since 1 January 2003 by requiring exclusivity (a 100% advertising share) from advertisers who advertise on TV or by offering them conditional discounts for loyalty in order to discourage them from placing their ads with PRO PLUS's competitors, thereby driving the competitors from the market or restricting their market access and growth in the market.

PRO PLUS brought an action challenging the administrative decision, and the Supreme Court of the Republic of Slovenia dismissed that action in December 2013. The SCPA's administrative decision thus became final.

Minor offence proceedings

On the basis of the final administrative decision, the SCPA also carried out minor offence proceedings and issued a decision on 21 July 2014, imposing a (minor offence) fine for a dominance abuse case on PRO PLUS and its officers—specifically, it imposed a fine of EUR 4,994,491 on the legal entity. When determining the amount of the fine to be imposed on PRO PLUS, the SCPA took into account the severity and duration of the infringement of the prohibition of abuse of a dominant position by PRO PLUS, which was committed over a period of 10 years and 3 months (i.e., from 1 January 2003 to the date of the adoption of the administrative decision), which is a very long period. Regarding the seriousness of the offence, the SCPA took into account the nature of the infringement, the economic power of the company that had committed the infringement, the geographic scope of the infringement, the impact on the market and the duration of the infringement.

The infringement or violation of prohibition of abuse of a dominant position through the practice of exclusive contracts is one of the most serious violations of competition rules. The business practice was aimed at tying the clients (advertisers), whereby PRO PLUS intended to restrict their free choice of various providers and to prevent competitors from accessing the market and growing in the market or to drive them from the market. The geographic scope of the infringement referred to the whole territory of the Republic of Slovenia, and the SCPA identified an infringement of Article 102 of the TFEU, since the identified abuse of the dominant position also affected the trade between the EU Member States (SCPA, 2014).

Judicial protection

PRO PLUS and its officers brought judicial review proceedings against the SCPA's decision, and the Ljubljana District Court issued a judgment on 3 November 2014, ruling that the facts indicated in the operative part of the SCPA's infringement decision in the PRO PLUS case was no infringement. The District Court considered that the operative part of the decision should include specific conduct of the parties responsible (the legal entity and its officers). As a result, the District Court derogated from its usual practice regarding the wording of the operative part of its decisions, which was followed by both the SCPA and the courts. The SCPA appealed against the judgment, but the High Court dismissed its appeal by judgment VSL0066204 of 18 September 2015 on the following grounds:

Even though the minor offence authority (the SCPA) is bound by its own final administrative decision that does not mean that mere reference to it in this (infringement) procedure is sufficient for the manifestation of the elements of an infringement. Therefore, the court of first instance is correct in the conclusion that the constituent elements of an infringement (in this case they include a dominant position of a legal entity in the market of the Republic of Slovenia and the EU as well as the abuse of that dominant position) must be manifested or described in the operative part of the decision. It is not sufficient to refer to a previously issued final administrative decision in this case, given that the procedure for imposition of administrative penalties requires concrete expression of the infringement in the operative part of the infringement decision.

Current Issues in Competition Policy

Germany

This section deals with two important issues that currently play a role in German competition policy. The first relates to the forthcoming ninth amendment of the ARC (BMWi 2016b). It addresses open questions with respect to fines

in cartel and abuse control cases and extends the scope of merger control. First, the amendment implements Directive 2014/104/EU, which addresses private litigation in cartel cases. With respect to fines in public enforcement cases, the amendment extends liability to the parent company if the parent and subsidiary act as an economic unit during the time of infringement. It is also valid if the parent company was not actively involved in the cartel infringement. Moreover, it intends to close a loophole that enables firms to escape fines from cartel infringements through restructuring.[36]

The second issue relates to the growing importance of internet-related markets, which the federal cartel office subsumes under the term "digital economy" (Bundeskartellamt, 2015; European Parliament, 2015, Monopolkommission, 2016) The growing importance of internet-related markets and their special characteristics make it necessary to check whether the current competition rules address these markets appropriately. For instance, internet-related markets often exhibit strong growth, and past and current turnovers are imprecise indicators of expected future profits and the economic importance of the firms in a merger case. This puts the approach of focusing on past revenues for the definition of merger control thresholds into question. The amendment introduces additional thresholds as to which mergers have to be notified if the value of transaction exceeds 350 million Euro in special cases, even if the turnover of a single unit may be very low.[37]

Finally, as many services in the internet sector are provided free of charge (and in exchange for information and personal data), the role of prices, turnovers and what constitutes market power is under scrutiny in these markets. The ninth amendment for the first time reflects these issues and explicitly states that an economic market might also exist if a service is provided free of charge. Moreover, network effects, complementarities in consumption, scale effects and the access to data are considered important aspects in two- or multi-sided markets. These provisions are closely linked to the growing importance of economic platforms, which facilitate market monopolization in the long run. The ninth amendment indicates in which direction competition policy regimes might adapt to developments in the digital economy in the future; however, it is only a first step. In order to better understand new questions arising with the digital economy, the Federal Cartel Office set up a "task force" to track developments in these fields (Bundeskartellamt, 2016, p. 8).

[36] This loophole has been extensively used by the Germany meat processor ClemensTönnies Group, which escaped fines summing up to 128 million Euro from a cartel investigation by restructuring (Bundeskartellamt, 2016).

[37] Compare the description of the merger between Flixbus and MeinFernbus in Section 3.2.1.

Slovenia

In the period between 17 June 2016 and 17 July 2016, public consultation was held in Slovenia for the draft Prevention of Restriction of Competition Act (ZPOmK-1G), prepared by the Ministry of Economic Development and Technology, together with the SCPA. As a result of the proposed amendment, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 (on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union) will be implemented, regulating the following: the right to compensation for harm caused by an infringement of competition law; the effects of decisions by national competition authorities of the EU Member States; joint and several liability for the harm caused by the infringement of competition law; the limitation period; and other legal concepts regulated by the Directive. Furthermore, amendments are proposed at the initiative of the SCPA to its investigatory powers, a more detailed definition of the SCPA's investigation activities actions, whistle-blower rewards, processing concentration of procedures, adoption of decisions on the basis of an admission of an infringement, introduction of a simplified concentration notification procedure, to mention just a few.

The response of the legal profession concerning the proposed draft amendment to the Competition Act was significant, as illustrated below. The Administrative Court of the Republic of Slovenia notes that the draft proposal establishes a new regime of administrative sanctions, whereby the proposed solutions do not provide a clear distinction between administrative sanctions and rules of criminal and minor offence law. The Chamber of Commerce and Industry of Slovenia and the Bar Association of Slovenia raised the question, inter alia, of an excessive expansion of investigatory powers of the SCPA. The proposed provisions of the new Article 27 a allow the SCPA to obtain, when necessary, any information on alleged violations of the Competition Act and Articles 101 and 102 of the TFEU directly at the undertakings. As part of the data collection at the premises of an undertaking, the authorised person of the SCPA may (even) seal such business premises and business documents on the basis of a special decision of the SCPA without an order issued by a competent court for a house search. In this way, the SCPA is granted powers that are not in proportion to the system of criminal investigation law in Slovenia.

In view of the considerable response of legal professionals, which is diverse in terms of the representation of various interest groups, we expect that the proposed draft amendment to the Competition Act will be subject to further modifications and changes. These are necessary in order to

eliminate any alleged systemic imbalances, which undoubtedly would be caused by its implementation.

Conclusions

This paper compares the Slovenian and German competition policy regimes and puts them into an EU context. It discusses particularities of the institutions as well as recent developments and cases.

We show that the development of case law and competition policy practice plays an important role, even though the extent of this role differs in the different regimes. Compared to Germany, there are fewer cases in Slovenia due to the "young" character of the Slovenian authority and the size of the economy. However, given steady economic growth and increasing per capita incomes, we indicate the role that national competition policy implementation might play in the future. Also, the relative low thresholds for merger control cases in Slovenia and the discretion of the authority to open proceedings may work in favour of the advancement of case law in Slovenia. At the same time, the institutions differ with respect to the federal system in Germany, which gives some competencies to the competition authorities of the federal states. Regarding the ministerial allowance in Germany, a comparable procedure does not exist in Slovenia. However, there is room for discussion regarding whether this procedure is beneficial or harmful. Given the economic assessments of the monopoly commission, the degree of transparency in the decision-making process, the potential for bargaining solutions behind closed doors and the negative public attention of recent allowance decisions indicate that this might be an issue worthy of further investigation.

Second, the growing importance of the internet economy might make it necessary to develop more flexible rules, such as rules for notification procedures in merger control cases. The Slovenian regime follows a different approach compared to Germany, and Art. 42 of the Competition Act provides flexible rules. However, due to the lack of cases in Slovenia and experience with the proposed amendment in Germany, it is too early for an assessment of appropriate approaches. This notwithstanding, we believe that an institutional comparison is helpful for the advancement of competition policy rules and its appropriate implementation.

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Sistem konkurenčne politike v Sloveniji in Nemčiji: primerjalna analiza

Izvleček

Z institucionalnim pristopom analiziramo razlike in sorodnosti med sistemoma konkurenčne politike v Sloveniji in Nemčiji. Najprej ugotavljamo, katere razlike prevladujejo pri implementaciji konkurenčnega prava Evropske unije v nacionalno pravo, upoštevajoč enovit okvir konkurenčne politike Evropske unije. V naslednjem koraku razpravljamo o nedavnih praktičnih primerih iz obeh držav in ugotavljamo, kako zgodovinski razvoj in ekonomski dejavniki vplivajo na odločanje in sodno prakso. Obravnavamo tudi nedavne spremembe nacionalnih sistemov varstva konkurence in ugotavljamo, kako bo digitalna ekonomija vplivala na sistem varstva konkurence v prihodnje.

Ključne besede: konkurenčna politika, praktični primeri, pravo varstva konkurence, tranzicijske države.