

THE APPLICATION OF EU COMPETITION LAW IN SLOVENIA

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ABSTRACT

The ultimate aim of this article is the identification of lessons of paramount importance derived from the Slovenian experience with the application of EU competition law, which can be useful for other (European) countries, in particular for those who joined the European Union in the year 2004 or even later. For this reason the author, firstly, offers a short introduction to EU competition law, secondly, he discusses its application in Slovenia with special focus on major shortcomings, and finally, the author offers a combination of several theses, practical suggestions and specific measures related to the competition policy.

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1. INTRODUCTION

1.1. MARKET COMPETITION, AND COMPETITION LAW AND POLICY: GENERAL REMARKS

Market competition and the model of market- or social market economy are two closely connected concepts. The modern market theories usually describe a market competition as an appropriate instrument for stimulation of efficiency of a given (relevant) market, which is organized according to the model of market- or social market economy,¹ and therefore as a kind of 'public good'.

However, in reality the existence of the desired market competition² is far from being a natural market situation. That is to say, it is not a stable market situation but rather a labile one, since it demands systematic public protection. What is more, in some cases there would be no relevant market competition without an appropriate public intervention. Of course, a certain rivalry between legally and economically independent undertakings, which follow the same goal which cannot be achieved at the same time or not in full extent, is a natural phenomenon and as such it can be anticipated. Yet, already a glance over a daily practice reveals (too) many cases where certain undertakings simply try to achieve better business result by practicing various unfair business practices or by excluding or substantially limiting competition,³ thereby affecting a (relevant) market or other market participants.

Thus, nowadays a market competition is the genuine public concern subject to the special law and policy. On one hand, the competition policy deals with the definition of aims and their ranking, considering also the trade-off, and on the other hand, the competition law comprehends a system of legal principles and rules aiming at the protection and in some cases even at the creation of market competition. Competition law, when observing it in a wide sense, comprehends legal principles and rules which aim at the prevention of the a) unfair and b) restricted competition. The former concept is usually absolutely prohibited, *i.e.* there is no exception as to the said prohibition whatsoever. On the contrary, the latter concept is merely relatively prohibited, since there are exceptions subject

¹ On the contrary, within the model of state planned economy a market competition is usually not an 'issue' and its role is merely marginal.

² Or to put more precisely, the existence of the desired type of market competition. Namely, in this regard one should distinguish at least between: 'perfect competition', 'workable competition', and 'efficient competition'. In addition, one can also consider the difference between: 'actual competition' and 'potential competition', 'competition within the market' and 'competition for the market', and 'intra-brand competition' and 'inter-brand competition'. Last but not least, one should also distinguish between: 'market competition' and 'tender- or bidding competition'.

³ Additional problem are restrictions of competition performed by public authorities.

to strict conditions. In addition, one should consider the difference between restrictions of competition made by one or more undertakings,⁴ *i.e.* restrictive co-ordination (agreements, decisions, concerted practices), abuses of dominant position, market concentrations; and by one or more public authorities or entities under their dominant influence or control such as public undertakings,⁵ *i.e.* state aids, and restrictive or contra-competition market regulations.

1.2. EU COMPETITION LAW: GENERAL REMARKS

EU competition law is traditionally considered as a highly important legal field within the corpus of EU law. Namely, from the very beginning of the European integration process the ‘system ensuring that competition is not distorted’ was largely considered as a precondition for the establishment and proper functioning of the common or internal market. The said function of competition and, as a consequence, of the EU competition law remains the same after the Lisbon treaty. Namely, although the latter did not include a ‘system of competition’ among values and aims of the European Union, the Protocol (No 27) on the internal market and competition explicitly lays down that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted. Furthermore, the Treaty on the functioning of the European Union (TFEU) contains rules on competition, *e.g.* in Articles 101 to 109, which are concretized by the comprehensive secondary EU law and, in addition, by the case law and so called soft law.

⁴ EU competition law employs the so-called functional approach to the definition of ‘undertaking’ according to which an undertaking is any entity engaged in at least one economic activity regardless of its legal status, way of financing and ownership. See for example cases C-180-184/98 Pavel Pavlov v Stichting Pensionfonds Medische Specialisten [2000] ECR I-6451.

⁵ For more on the concept of the undertaking and on the related concept of single economic unit see for example: Jones, A., *The Boundaries of an Undertaking in EU Competition Law*, European Competition Journal, No. 8(2), 2012, p. 301-331; Jones, A., Sufirin, B., *EU Competition Law, Text, Cases, and Materials*, 4th ed., Oxford University Press, p. 124-141; Whish, R., *Competition Law*, 6th ed., Oxford University Press, 2009, p. 82-95; Quigley, C., *European State aid Law and Policy*, Hart Publishing, 2009, p. 33-41; Lübbig, T., Martín-Ehlers, A., *Beihilfenrecht der EU*, Verlag C.H. Beck, 2009, p. 59-61; Roth, P., Rose, V., *Bellamy and Child: European Union Law of Competition*, 6th ed., Oxford University Press, 2008, p. 92-107; Van de Castele, K., Hocine, M., in: Mederer, W., Pesaresi, N., Van Hoof, M., *EU Competition Law, Vol. IV, State Aid, Claeys & Casteels*, 2008, p. 247-251; Ferčič, A., Hojnik, J., Tratnik, M., *Uvod v pravo Evropske unije*, GV Založba, 2011, p. 181-184.

⁵ See Art. 2(b) of the Commission Directive 2006/111 of 16 November 2006 on the transparency of their financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ EU, L 318, 17. 11. 2006, p. 17.

Already a brief examination of the Chapter ‘Rules on Competition’ within the TFEU reveals that its provisions aim at the prevention of unlawful restrictions of competition, while there are no B2B-rules against unfair competition. However, this is not to say there are no rules against the unfair competition whatsoever within the corpus of EU law. In principle, it is possible relatively credibly to assert that individual directives or more generally the secondary EU law here and there contains rules against the unfair competition. More disputable is, if such rules exist in the primary EU law. According to some legal theorists the EU unfair competition law already exists on a primary law basis having their foundation in the general provision demanding the ‘system ensuring that competition in the internal market is not distorted.’⁶ What is more, according to those theorists a clear confirmation of their assertions can be found within the case-law. Yet, despite the judicial practice of the Court of Justice of the EU in the field of unfair competition law the said practice is unable to achieve genuine harmonization, since the latter is only possible by means of the legal acts of the EU.⁷ As a matter of fact, vivacious debates of whether there is the EU law against unfair competition speak for themselves. There are no such debates as regards the EU law against unlawful restrictions of competition.

I think the EU law does not offer a system of rules, which would systematically regulate the unfair competition. Contrary to what was said for the rules against unlawful restrictions of competition, the existing (secondary) EU rules only partially regulate the unfair competition.

Of course, there is nothing to prevent Member States to adopt or maintain their own competition rules, however, these rules shall be strictly in line with the EU law, including with the principle of supremacy or primacy. Yet, for some anti-competition practices the said principle is further developed or concretized as follows.

Special rules for the relationship between the antitrust rules of the EU and of Member States provides Article 3 of the 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 (now Articles 101 and 102 TFEU),⁸ which explicitly states, firstly, where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the

⁶ See for example Glöckner, J. in: Hilty, R.M., Henning-Bodewig, F., *Law Against Unfair Competition – Towards a New Paradigm in Europe?*, Springer, 2007, p. 77-109.

⁷ See for example Henning-Bodewig, F., in: Hilty, R.M., Henning-Bodewig, F., *Law Against Unfair Competition – Towards a New Paradigm in Europe?*, Springer, 2007, p. 111.

⁸ OJ EU, L 1, 4. 1. 2013, p. 1.

meaning of Article 101(1) TFEU which may affect trade between Member States within the meaning of that provision, they shall also apply Article 101 TFEU to such agreements, decisions or concerted practices, and where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 102 TFEU, they shall also apply Article 102 TFEU. Secondly, the application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) TFEU, or which fulfil the conditions of Article 101(3) TFEU or which are covered by a (block exemption) Regulation for the application of Article 101(3) TFEU. Member States shall not under this Regulation, *i.e.* the Regulation 1/2003, be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings. And finally, without prejudice to general principles and other provisions of the European Union law, paragraphs 1 and 2 of the Regulation 1/2003 do not apply when the competition authorities and the courts of the Member States apply national merger or market concentration control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU.

Special rules for the relationship between the market concentration control rules of the EU and of Member States provides Article 21 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings,⁹ which states, *inter alia*, no Member State shall apply its national legislation on competition to any concentration that has the so-called European Union dimension.¹⁰

On the contrary, in the field of state aids and restrictive or (*ex ante*) contra-competition market regulation there is no such detailed special regime regulating the collision or relationship between conflicting national and supranational rules, and consequently, the said collisions, when they occur in practice, are 'only' subject to the general regime as defined by the principle of primacy. At this point it is also worthy to mention, that all restrictive practices conducted directly by public bodies or indirectly, *i.e.* by their 'agents', are mainly regulated by the EU rules, however, with one very important difference, namely, the EU state aid control rules are for the most part directly applicable, while the EU liberalization rules are usually not since they are mainly included in directives (a harmonization tool) which must be implemented or incorporated into the Member States' legal systems by national legislative acts.

⁹ OJ EU, L 24, 29. 1. 2004, p. 1.

¹⁰ The same Article contains limited exceptions to this rule.

Last but not least, the introductory chapter briefly considers the sphere of application of the EU competition law explained from the substantive (*ratione materiae*), personal (*ratione personae*) and territorial (*ratione territoriae*) point of view.

The EU competition law regulates restrictive practices of: a) single undertaking, *i.e.* an abuse of dominant position, b) undertakings, *i.e.* restrictive coordination (agreements, decisions and concerted practices) and market concentrations, c) one or more public authorities or public bodies, *i.e.* state aids and restrictive or contra-competition market regulation.

The said corpus of competition law binds: a) undertakings, both private and public, and b) public authorities. In principle, rules preventing unlawful restrictive coordination, abuse of dominant position and market concentration are addressed to undertakings, while rules preventing unlawful state aids or state aids incompatible with internal market, and rules preventing restrictive or anti-competition market regulation are addressed to Member States' public authorities (yet, in some cases, the said rules are also addressed to various entities under a dominant public influence or control). Furthermore, it is also worthy to mention that the competition law – in a wide sense – also covers rules aimed at the creation or establishment of market competition, in particular in the network sectors, such as telecommunications, postal services, energy and transportation sectors, where until the mid-eighties or even later the competition was excluded or significantly limited due to the specific political considerations in the name of a public interest.

The EU competition law shall be applied and enforced within the European Union or to put it more precisely, within Member States including also their dislocated units according to Article 52 TEU and 355 TFEU. However, in certain cases the EU competition law shall not be enforced only by relevant public authorities of Member States (and institutions of the European Union), but due to the doctrine of extraterritoriality also by non-member states' organs.

2. THE APPLICATION OF EU COMPETITION LAW IN SLOVENIA: SELECTED ISSUES

2.1. THE SLOVENIAN MARKET AND SLOVENIAN LEGAL FRAMEWORK

The Slovenian market has undergone a significant transformation. The said process started at the beginning of the nineties when a complex shift from the state planned economy, where protection of competition was not 'an issue', to the social market economy, which favours a market competition, began.

Of course, the said shift was conditional to the prior change of the Slovenian Constitution and derived legislation.

In this regard various constitutional provisions were essential,¹¹ in particular guarantee of private property,¹² guarantee of free economic initiative or conduct,¹³ and establishment of a system ensuring undistorted market competition.¹⁴ In addition, a comprehensive corpus of legislative acts was adopted,¹⁵ regulating a general protection of market competition and sector specific issues in the so-called network sectors, *e.g.* energy, transportation, telecommunication and postal services. In these sectors, a market competition was excluded or at least significantly limited for almost a half of a century and therefore it was necessary to employ a proper liberalization policy aiming at the gradual introduction of competition. Of course, the EU-membership has brought a further impetus.

2.2. SLOVENIAN COMPETITION PROTECTION AUTHORITY, SECTORAL REGULATORS AND OTHER MARKET 'GUARDIANS'

It is, however, perfectly clear that even a superior legal framework by itself cannot deliver desired competition, since the latter has to be efficiently enforced in

¹¹ Of course, these provisions are still essential for the organization of the Slovenian market.

¹² Article 33 of the Slovenian Constitution: 'The right to private property and inheritance shall be guaranteed.'

¹³ Article 74(1) of the Slovenian Constitution: 'Free economic initiative or conduct shall be guaranteed.'

¹⁴ Article 74(3) of the Slovenian Constitution: 'Unfair competition practices and practices, which restrict competition in a manner contrary to the law, are prohibited.'

¹⁵ In order to illustrate the intensive legislative activity the following, non-exhaustive list of relevant legislation is included in this article:

- 1993: Protection of Competition Act, amendments: 2;
- 1994: Slovenian Post Office Act, amendments: 1;
- 1997: Telecommunications Act, amendments: 7, Postal Services Act: amendments: 1;
- 1999: Prevention of Restrictions of Competition Act, amendments: 2, Energy Act, amendments: 8; Railway Transport Act, amendments: 11;
- 2000: State Aid Control Act, amendments: 2;
- 2001: (new) Telecommunications Act, amendments: 2;
- 2002: (new) Postal Services Act-1, amendments: 2;
- 2004: Electronic Communications Act, amendments: 5; Monitoring of State Aids Act, amendments: 0;
- 2008: (new) Prevention of Restrictions of Competition Act, amendments: 6;
- 2009: (new) Postal Services Act-2, amendments: 1;
- 2012: (new) Electronic Communication Act-1, amendments: 1;
- 2013: Energy Act-1, pending.

practice. For that reason various specialized bodies were established,¹⁶ *i.e.* the Slovenian Competition Protection Agency, the Market Inspectorate, the State Aid Monitor (Ministry of Finance) and various sectoral regulators.

The Slovenian Competition Protection Agency for the most part monitors and analyses the Slovenian market, it assesses alleged antitrust¹⁷ practices, *i.e.* it assesses the lawfulness of such practices and issues proper administrative acts, and following receipt of a notification, it examines whether a concentration is compatible with the rules on competition, and after the procedure is concluded, it approves, prohibits or conditionally approves the concentration. In addition, it issues opinions on existing or proposed legislative and administrative acts which may restrict the desired competition contrary to the real public interest. In principle, the agency's jurisdiction is extended over all (economic) sectors, including over those regulated by sectoral regulators. In this regard no significant collisions or tensions have occurred, however, this can be either a good or bad sign, namely, if there has been no tension due to the inactivity of one or both institutions this certainly cannot be a positive finding. Since the agency performs vital market functions, it shall enjoy a legal, functional and financial autonomy. For that reason the Slovenian competition authority has been transformed from an 'office' organized within the ministry of economy or of economic development and technology, to an independent 'public agency' organized as a self-standing institution existing outside the governmental structure. By achieving this long-awaited aim the undesired political influence on the said authority has been reduced.

The Market Inspectorate is another all-sectors market institution operating within the ministry of economy or of economic development and technology. Its tasks are not limited only to the protection of market competition but rather to the general protection of the Slovenian market. It is also worthy to mention that the Market Inspectorate, when protecting competition within the Slovenian market, deals only with the unfair business practices meaning that there are no activities of the Market Inspectorate in the area of prevention of restrictive (business) practices and, as a consequence, there is no overlap of tasks entrusted to the Market Inspectorate and to the Slovenian Protection Competition Agency.

¹⁶ In addition to classical executive bodies and courts.

¹⁷ It has also certain obligations in accordance with the 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 (now Articles 101 and 102 TFEU), OJ EU, L 1, 4. 1. 2013, p. 1. In this regard the agency, *inter alia*, cooperates with the European Commission and with other national competition authorities.

The State Aid Monitor is organized as a department within the Ministry of finance. Its mandate is quiet limited, *i.e.* predominantly of formal or procedural nature, since it shall: a) handle and assess a notification of state aid across all sectors and forward it to the European Commission, b) handle, assess and provide an opinion on state aid that entails a block exemption and aid under the *de minimis* rule, c) collect, process and monitor information on state aid and on aid granted under the *de minimis* rule, and administer records of such information, d) draw up an annual report, and e) advise managers of state aid.

The sectoral regulators are organized, *inter alia*, in network sectors, such as telecommunications, postal services, energy, and transportation sectors.¹⁸ Alike the Slovenian Competition Protection Agency various sectoral regulators are organized in the form of self-standing and independent public agencies. In this regard Slovenia had no real choice, since the EU (liberalization) law explicitly demanded such independent regulatory bodies within the said network sectors,¹⁹ what is a rather rare exception from the principle of institutional autonomy.²⁰ The existence and well-functioning of such independent and highly specialized bodies is crucial, considering their regulatory role within the market economy. As already said, in the network sectors or parts thereof there has been a long-term exclusion or at least significant limitation of competition and, as a consequence, various regulatory measures shall first of all establish or introduce a market competition as far as possible. By doing this one should, *inter alia*, carefully consider the important difference between '*de iure*' and '*de facto*' access to the network or infrastructure, and the difference between the competition within the market and competition for the market.

¹⁸ As for example the Agency for communication networks and services of the Republic of Slovenia (please note: until 22 of January 2014 known as the Agency for Electronic Communications and Postal services), the Energy agency of the Republic of Slovenia and the Public agency of the Republic of Slovenia for railway transport.

¹⁹ See for example Art. 35 of the Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ EU, L 211, 14. 8. 2009, p. 55), Art. 39 of the Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ EU, L 211, 14. 8. 2009, p. 94), Article 1(20) of the Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services (OJ EU, L 52, 27. 2. 2008, p. 3).

²⁰ See for more on principle of institutional autonomy in Jans, J. H., de Lange, R., Prechal, S., Widdershoven, R., *Europeization of Public Law*, Europa Law Publishing, 2007, p. 18-22.

2.3. PUBLIC AND PRIVATE ENFORCEMENT OF (EU) COMPETITION LAW

In principle, it is possible to credibly assert that public enforcement of the (EU) competition law in Slovenia is more developed than private one and further, that the enforcement of rules preventing restrictive business practices is more developed than the enforcement of rules preventing restrictive public authority's practices. More precisely, according to my personal opinion nowadays²¹ the public enforcement of the antitrust is relatively good, however, on the other side of the scale there is public enforcement of state aids granted by local authorities and public undertakings, while in the middle of the scale there are market concentrations and state aids granted by various state authorities. However, when it comes to private enforcement of rules preventing restrictive practices even today there is unfortunately relatively little to be proud of. Probably the least poor is situation with the private enforcement of antitrust rules, since there can be found some positive signs in the sense that the number of damages actions is modestly rising and also the legal argumentation of lawyers and judges is getting better and better.²² According to my personal opinion, one of the main problems for the said situation is ignorance or lack of knowledge of competition law in a daily practice.

As already said, in the times of the state planned economy the competition law was certainly not 'an issue', at least not an important one. The legal education defined by the curricula did not pay much attention to competition law and, as a consequence, nowadays those who have studied law approximately twenty years ago or even earlier often do not possess sufficient knowledge of competition law.

Therefore, in a daily practice there is a lot of unintentional violations and, what is even more problematic, even those undertakings who are significantly affected by the violation of the competition law often do not know they can lodge a damage action in this regard. Thus, a well-considered public action offering a proper training would be highly welcome.

²¹ However, few years ago the situation was rather different, since one could easily get impression the national competition authority has marched throughout the market with eyes closed.

²² At least to certain extent this is also a merit of trainings of national judges in the EU competition law which are co-financed by the European Union. In this regard in particular the Slovenian Supreme Court judges attend the said trainings, what is of particular importance.

2.4. MAJOR SHORTCOMINGS OF THE SLOVENIAN COMPETITION POLICY

Considering what was just said, one can easily perceive biggest shortcomings of the Slovenian competition policy.²³ It is reasonable to start with (too) soft institutional support, since appropriate support is fundamental by its very nature. Namely, until recently the Slovenian competition authority was organized merely as an ‘office’ within the ministry. Not surprisingly, it lacked real autonomy and, also problematic, it significantly lacked staff or officials capacity. Probably the best way to illustrate this problem is the fact that at the time of the Slovenian entry into European Union approximately only one third of the staff needed was available within the then competition authority or ‘office’.²⁴ Nowadays the situation is better from the organizational point of view since the competition authority is organized as a self-standing institution outside the governmental structure. However, although the staff deficit has been gradually reduced, but unfortunately not completely suppressed, it still exists and I believe the said fact can, at least to a certain extent, affect the quality of public enforcement of the competition law.

Further deficiency in the institutional support has been insufficient proficiency of general courts of first instance. Unfortunately, there has been no adequate public action, since the training of national judges in the EU competition law has been predominantly offered by non-governmental bodies mainly within the context of the EU (co-)financed projects. Nowadays, the situation seems to be a little bit better at least as regards the application the antitrust law, however, at the moment it is hard to estimate the situation as regards state aids law since before the Slovenian courts there are still no cases regarding unlawful state aids within the meaning of Article 108(3) TFEU (in connection with Article 107(1) TFEU).

With regard to the major shortcomings of the competition policy executed by the Slovenian competition authority I would like in particular to point out the soft approach dominated, at least until the present financial and economic crisis, to the cartelization and market concentrations. The cartelization was most problematic within the public procurement of infrastructure projects of a high value. Bid rigging was probably most deeply rooted within public works procurement, *e.g.* construction of highways, tunnels and viaducts. However, it

²³ As considered in the wide sense, including not only aims and measures of competition authorities but also aims and measures of legislator and government.

²⁴ According to non-official data.

seems that these conducts will be properly assessed.²⁵ Similar can be said for the detected cartels in the banking and energy sector. On the other hand, comparable soft approach dominated in the field of market concentrations establishing or preserving oligopoly structures in various relevant markets. The said approach or policy is by its very nature problematic since the Slovenian market is small and prone to oligopolies. It is commonly accepted and undisputable that oligopolies are in principle undesired since they encourage cartelization and, what is more, they make difficult for competition authority or competitors to prove cartels because of the oligopoly defence.²⁶ In addition, I believe more could be done in order to improve the relatively modest use or take of the leniency programme.

When it comes to the policy preventing public restrictions of competition one could easily recognize problems in the field of state aids granted by local authorities and public undertakings.²⁷ Generally, the Slovenian public sector's understanding of the state aid law is thrillingly low, and I believe additional powers of the Slovenian state aid monitor and its stricter (*ex officio*) control, accompanied by training of officials or employees could improve the said shortcoming. It is safe to assume the costs of such public activity could be lower than costs caused by the mass unlawful state aids or state aids which are incompatible with the internal market. Furthermore, the liberalization policy should be improved. First of all, Slovenia shall timely and properly implement the 'outstanding' directives to avoid (further) actions or procedures before the Court of Justice of the European Union.²⁸ In addition, more or less all sec-

²⁵ The Competition Protection Agency's administrative procedure is already finished, while not all possible judicial procedures (in this regard) are. Namely, consider the (possible) administrative dispute procedure, damages procedure and criminal procedure.

²⁶ For more on oligopoly defence see Jones, A., Sufrin, B., *EU Competition Law, Text, Cases, and Materials*, 5th ed., Oxford University Press, 2014, p. 712; Middleton, K., Rodger, B., MacCulloch, A., Galloway, J., *Cases and Materials on UK and EC Competition Law*, 2nd ed., Oxford University Press, 2009, p. 211.

²⁷ This is, however, not to say there are no problems with state aids granted by state authorities. Let us take for example the recapitalization of Elan, i.e. European Commission's decision from 19 of September 2012 (SA.26379 (C 13/2010)), at the moment pending case before the General Court (T-27/13).

²⁸ Consider for example the following cases:

- C-627/10 European Commission v. Republic of Slovenia [2013] not yet published [rail sector],
- C-8/13, European Commission v. Republic of Slovenia, pending [energy sector: electricity], and
- C-9/13, European Commission v. Republic of Slovenia, pending [energy sector: gas].

^{At} this point one should also consider several European Commission's actions concerning the implementation of the directives regulating rail and electronic communications sectors which have been withdrawn.

toral regulators could do more in order to achieve efficient competition within 'their' markets.

Last but not least, there are also some reserves in the field of preventing unfair competition or business practices.²⁹ As one could anticipate from the above-mentioned facts and explanation, the private enforcement is relatively modest. What is more, also public enforcement seems to be less developed than desired. Namely, the prosecution of unfair business practices is reserved for the Market inspectorate. Its powers are not limited to the protection of competition only but rather to the general protection of the market, and sometimes it seems the protection of fair competition is not among its priorities. Without prejudice to thorough (non-existing) analysis I believe it would be appropriate to consider the possibility to change the division of powers between the Slovenian Competition Protection Agency and the Market Inspectorate in a manner that also the unfair competition would be entrusted to the former, of course, under the crucial condition that the agency would acquire sufficient staff capacities.

In short, unfortunately the Slovenian competition policy – although one can recognize certain improvements – has been proved as one having substantial shortcomings, mainly due to lack of experience with the social market economy. However, today there should be no more excuses in this regard since Slovenia has more than twenty years of experience with the model of social market economy, and ten years of experience with the European Union and its law. Namely, the said shortcomings directly or indirectly affect various groups of persons, like for example consumers in terms of price and performance; competitors or honest undertakings; our market or competitiveness of the Slovenian economy in comparison to other economies; and last but not least, our public finances and, consequently, the Slovenian taxpayers. Thus, I believe there are more than enough reasonable grounds to take the competition law and policy far more seriously in the future (starting now).³⁰

²⁹ For general overview of the unfair competition law in Slovenia see for example Grile, P., in: Hilty, R.M., Henning-Bodewig, F., *Law Against Unfair Competition – Towards a New Paradigm in Europe?*, Springer, 2007, p. 221-231.

³⁰ If a certain state chooses the model of social market economy it should more or less follow its 'logic', otherwise the model will not deliver desired results. Of course, a state, at least theoretically, can instead of the model of market economy or social market economy choose something else, namely, a model that is not founded on market (forces) and competition or at least not significantly, however, this article is not intended to discuss such models and their logic.

3. CONCLUSION: LESSONS LEARNED FROM THE CASE OF SLOVENIA

The case of Slovenia or its competition policy is instructive since it offers some useful lessons and experience.³¹ In general, it demonstrates the importance of legal, functional and financial autonomy of national market institutions since proper institutional support is a condition *sine qua non* for an efficient application of the competition law. This thesis is of particular importance in times of the present financial and economic crisis since widely accepted austerity measures aim, *inter alia*, at the reduction of public administration. Of course, staff reductions within institutions which are responsible for the market protection and development can cause more costs than savings,³² therefore all measures in this regard should be carefully considered on a case-by-case basis.

A further thesis having general and all-sectors nature is that a private enforcement shall be effectively stimulated. Due to their limited resources, in a daily practice, public institutions cannot deal with all breaches of the competition law. To be accurate this is even not their mission since they protect public interest. Moreover, one should distinguish the concept of penalty from that of restitution damages.

In the field of antitrust law special attention shall be dedicated to the cartelization and in particular to public procurement in order to prevent bid rigging. However, not only a bid rigging but also each public procurement as such shall be carefully considered and performed since it means a market intervention capable to distort the market competition, which is different from the tender- or bidding competition.³³ In this regard among disposable types of procurement procedures, one should favour the most competitive types. Further emphasis in the said field shall be on an efficient leniency programme. For this reason a well-recognised, trustworthy and transparent system shall be established.

³¹ Some of them are discussed within this article, however, this is not to say other practices, not mentioned in the article, are not problematic.

³² Similar can be said for a reduction of wages since this can lead to undesired loss of experts. What is more, a levelling of wages in public administration is highly questionable since not all entities or units of public administration are equally important for proper functioning of the state or society. The model of social market economy demands efficient market institutions and quality of their work is closely connected with the professional capacity of public employees who work within such institutions.

³³ See for example Graells, A.S, *Public Procurement and Competition: Some Challenges Arising from the Recent Developments in EU Public Procurement Law*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206502, 2013, p. 1-39.

In the field of market concentrations generally the oligopoly structures shall not be created or maintained. This is in particular true for small economies like Slovenia, which are in principle prone to oligopolies by the very nature, and therefore even more careful structural policy is needed.

In the field of the liberalization law, I would particularly like to point out the importance of the new paradigm. Namely, the state's ownership role should be left behind in favour of the regulatory role. This is certainly not to say the former role shall be completely abandoned,³⁴ since the Article 345 TFEU is neutral as regards the public property meaning that, *inter alia*, public undertakings as such are not automatically incompatible with the EU law. However, they shall in principle act according to a common business logic or better to say, according to normal market conditions and to the EU legal framework.

And finally, in the field of the state aid law a proper monitoring at the national and local level seems to be essential. The said state aids monitoring shall also embrace state aids granted by local authorities and public undertakings,³⁵ not only those granted by the state in the narrow sense, and the said monitoring shall consider more than just subsidies; it shall also embrace state aids granted through classical market transactions such as recapitalizations, privatizations, public procurements, loans, guarantees, *etc.*

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³⁴ This is in particular true for the network undertakings where privatizations shall be particularly well-considered on case-by-case basis.

³⁵ The concept of public undertaking is defined in the Commission Directive 2006/111/EC of 16 November 2006 transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ EU, L 318, 17. 11. 2006, p. 17.

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