

Competition Flash

July 2019

European Commission changed its preliminary view on the inspection in Slovak rail company ZSSK and closed the infringement proceedings

On 25 September 2018, the European Commission ("Commission") published a press release that it sent a statement of objections to Slovak rail company ZSSK for obstruction during an inspection. After precisely 10 months, the Commission has stated that it is closing the proceedings against ZSSK without any sanction for ZSSK. HAVEL & PARTNERS acted as an external counsel of ZSSK in the proceedings. In this release of Competition Flash, we would like to address this rare case and its circumstances.



In its statement of objections, the Commission presented its preliminary view that ZSSK obstructed the Commission's inspection. The Commission had concerns that ZSSK may have provided incorrect information on the location of the laptop of one of its employees. Following the Commission's concerns, ZSSK may also have failed to provide the requested data from the mentioned laptop by allowing its re-installation, leading to an irrecoverable loss of stored data. In this regard, Margrethe Vestager

(commissioner in charge of competition policy) said: "Companies have the obligation to provide correct information when we investigate. Also during inspections. They should not tamper with the requested data in any way. Such behaviour would threaten the integrity and effectiveness of our investigations. We want to make sure that companies comply with our rules."¹ ZSSK therefore faced potential fines of up to 1 percent of its annual revenue.

Following the public announcement of the Commission's preliminary view, ZSSK stated it was surprised by the preliminary view of the Commission. In its opinion, it fully cooperated with the Commission during the whole inspection. As ZSSK stated, it did not own the mentioned laptop at the time of the inspection, as a former member of the board of directors had ended his activities in ZSSK and bought the laptop before the inspection began.²

This was a key argument used in ZSSK's reply to the statement of objections. In addition, the company claimed that its procedural rights had been breached, and it had not been properly instructed by the inspectors. On 29 January 2019, ZSSK presented its view on the case in Brussels at an oral hearing.

On 25 July 2019, the Commission announced a change in its preliminary view and closed the proceedings, not imposing any fine on ZSSK.³ The Commission stated that it carefully assessed all the evidence, ZSSK's reply to the Statement of Objections and the oral hearing and decided not to further pursue the case. ZSSK welcomed the decision of the Commission and declared that it always has respected and will continue to respect its obligations related to competition law including procedural provisions.⁴

¹ Press release of the Commission available at: http://europa.eu/rapid/press-release_IP-18-5905_en.htm.

² Referred reaction of ZSSK available at (only in Slovak language): http://195.46.72.16/free/jsp/search/view/ViewerPure.jsp?Document=.%2F.%2FInputText%2Fonline%2F18%2F09%2Ftbtbds9p1uh.dat_173700.1%40Fondy&QueryText=

³ Press release of the Commission available at: http://europa.eu/rapid/press-release_IP-19-4671_en.htm.

⁴ Press release of ZSSK available at (only in Slovak language): <https://www.slovakrail.sk/sk/aktuality/zssk-vita-rozhodnutie-europskej-komisie-uzavriet-pripad-suvisiaci-s-inspekciou.html>.

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HAVEL & PARTNERS, as a representative of ZSSK in the proceedings, also welcomes this decision of the Commission. From the practitioner's point of view, the Commission's step back is proof that it accepts reasonable explanations of behaviour that may initially seem problematic. A duly prepared reply to a statement of objections and a presentation at an oral hearing are therefore not simply formalities, but important tools to protect the rights of any undertaking facing an investigation in a competition matter.

According to publicly available information, this is only the fifth case out of more than 60 antitrust cases since 2008 which the Commission fully closed without imposing any

fine or commitments after it issued a statement of objections. Therefore, it could be considered a rare occasion.

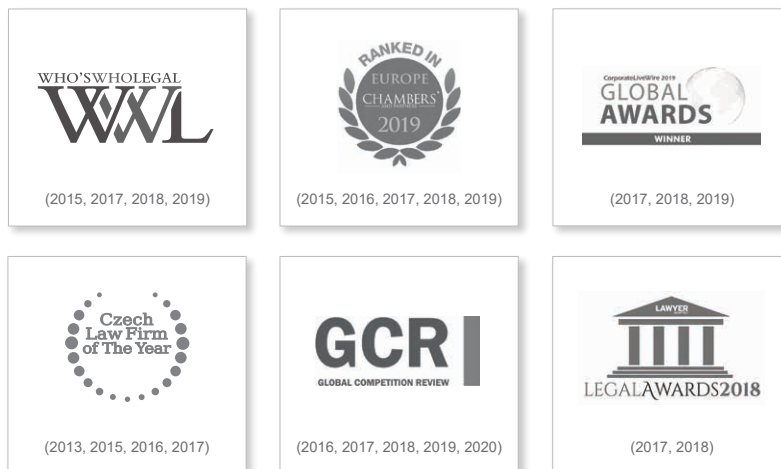
Despite the ultimate success in the case at hand, it is however necessary to remember the words of Commissioner Vestager and minimise the scope for potential errors during dawn raids by competition authorities. It is highly recommended to have external legal counsel with experience in competition law be present during a dawn raid. Also, adequate preparation of employees for a dawn raid is a key element to prevent any issues and ensure that the rights of a company can be duly protected. Our competition law experts are at your disposal for any competition law issue.

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