

## Challenges to Slovakia and Poland health policy decisions: use of investment treaties to claim compensation for reversal of privatisation/liberalisation policies

By  
David Hall<sup>1</sup>  
January 2010

<b>1.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>2.</b>	<b>EC AND INVESTMENT TREATY CHALLENGES TO SLOVAKIA HEALTH POLICIES.....</b>	<b>1</b>
<b>3.</b>	<b>THE COMPANIES.....</b>	<b>2</b>
3.1.	PENTA-HICEE-DOVERA-APOLLO .....	2
3.1.1.	<i>Penta Group</i> .....	2
3.2.	EUREKO-UNION .....	3
3.3.	THE EUROPEAN COMMISSION ACTION .....	4
3.4.	THE INVESTMENT TREATY: NETHERLANDS-CZECHOSLOVAKIA TREATY 1991 .....	4
<b>4.</b>	<b>SIMILAR CASES .....</b>	<b>4</b>
4.1.	EUREKO WINS €1.8 BILLION COMPENSATION FROM POLAND FOR NON-PRIVATISATION OF PZU .....	4
4.2.	PREVIOUS CASE: DOUBLE PROCEEDINGS AGAINST CZECH REPUBLIC.....	5
<b>ANNEXE 1.</b>	<b>LEGAL COMMENTARY BY SLOVAK LAWYER JULY 2009 .....</b>	<b>5</b>

### 1. Introduction

Investment treaties, and possibly the EU Treaty itself, are being used by multinational companies Penta and Eureko to try and force the Slovak government to pay compensation for reversing health privatisation and liberalisation policies. Similar action has been used against the Polish government by Eureko to win compensation worth nearly €2 billion Euros and a policy commitment to further privatisation.

### 2. EC and investment treaty challenges to Slovakia health policies

Private health insurance schemes were first introduced in Slovakia in 2004. A number of private companies set up to take advantage of this new market. In 2007, a new government changed the law to reduce the role of the private sector. Part of this law states that health insurance companies can only use their profits to reinvest in the health insurance business.

Slovakia is now facing three legal challenges to this:

- The European Commission has started to investigate if this breaches the fundamental principle of the free movement of capital within the EU;
- Penta, the private equity company which owns two of these insurance companies, is taking a case to arbitration to claim compensation for lost profits, under an investment treaty with the Netherlands;
- and private companies are also challenging the law as unconstitutional.

The 2004 legislation and its consequences were summarised by a Slovak lawyer (see Annexe 1 for full text, including an interesting commentary on the state's response to the legal challenge):

“the Health Insurance Companies Law No. 581/2004 enabled that health insurance companies were created as business entities – join-stock companies. The insurance market was made accessible to private capital and the insurance companies were allowed to pay off their profits in form of dividends which is typical for the private sector with competition... The objective of the legislator in 2007 was to re-establish the original character of

<sup>1</sup> Thanks to Scott Sinclair for telling me about this case.

the health insurance, this intervention changed the character of the health insurance companies' operation and in principle, they became non-profitable corporations.

It terms of the communitarian law, a member state may shape the system of its public health insurance autonomously. It may or may not include elements of competition into the system, it may combine competition and non-competition rules. However, a problem occurs when elements with impact on the private capital are introduced and subsequently, there is a will to remove such elements. It is not possible to do so without a negative impact on investors and it is very difficult to choose tools which are adequate to the purpose and aim. In essence, the intention was good as its purpose was to secure that the public funds paid by people to the insurance companies compulsory continue to serve for the benefit of people and not for the benefit of private persons. However, even such altruistic aim must be achieved in such a way that the rights acquired in good faith and the legal relations established in accordance with valid laws are affected as little as possible."

The potential problems of increased costs, reduced equity, and difficulties in regulating the companies due to the effects of EU laws, were also recognised by an OECD paper, which warned –correctly - that:

“the government must be careful to adjust its own expectations, and that of the public, to the actual potential it may fill. High expectations may lead to disappointment, particularly when there is cultural unfamiliarity with such markets. In addition, the complexity of the market and insurer activities may lead to confusion and dissatisfaction. It is therefore important that the government develops mechanisms to monitor the market, and that it has the administrative flexibility to intervene and attempt to correct problems, within the framework of permitted EU law.” [OECD Health Working Papers NO. 11DELSA/ELSA/WD/HEA(2004)2 The Slovak Health Insurance System And The Potential Role For Private Health Insurance: Policy Challenges. Francesca Colombo and Nicole Tapay 05-Mar-2004 <http://www.oecd.org/dataoecd/30/48/29878719.pdf> ]

### 3. The companies

#### 3.1. Penta-HICEE-Dovera-Apollo

The compensation claim is being made by companies owned by the Penta Group.  
The compensation is being claimed by a Dutch company HICEE which is owned by Penta Group.  
The claim is for the impact on two Slovakian private health insurance companies, Dôvera ( <http://www.dovera.sk/> ) and Apollo <http://www.apollo.sk/sk/> , which are owned by HICEE .

The action under the investment treaty is being pursued by <http://www.hicee.nl/index.php>

Hicee, being a part of the PENTA International Investment Group is focused on healthcare business in Central and Eastern Europe. HICEE has no operating subsidiaries except its shares in the two Slovak operating companies. Its presentation of its organisation lists only these companies: “HICEE holds, through its wholly owned subsidiary DÔVERA Holding, a.s., 100% of shares in the [Dôvera](#) health insurance company and 49% of shares in the [Apollo](#) health insurance company. Hicee has developed a business plan which deals in detail with further growth of investments in [former public] private held healthcare companies and the enhancement of the European knowledge team providing consulting services related to healthcare.” <http://www.hicee.nl/organisatie.html> ; [http://www.hicee.nl/nieuws.html?tx\\_news\\_pi1%5BshowUid%5D=16](http://www.hicee.nl/nieuws.html?tx_news_pi1%5BshowUid%5D=16)

The private health insurers Dovera and Apollo are also planning to merge in 2010, in response to Slovak government encouragement of mergers of health insurers. The resulting insurance company will have about 1.4mn clients.

##### 3.1.1. Penta Group

Penta is a private equity group, investing in a number of different sectors, but with a number of investments in healthcare in the Czech and Slovak republic.



*Penta founder Jaroslav Haščák knows that not everybody is going to be happy with what his firm does, unless, he says, Penta "buys a bakery and starts baking buns". photo: TASR*

The Slovak Spectator 30 Jul 2001 Penta Group's Haščák: Slovakia's corporate raider takes no prisoners  
<http://www.spectator.sk/articles/view/910>

Another investment by Penta was in SmVaK, the water company in Ostrava in the Czech Republic. It was already privatised, owned partly by Suez and partly by Anglian Water, from whom Penta bought the company in 2003-04 for €128m.. "At the time of acquisition, SmVaK had no debt", but Penta took out a Euro €70m. bank loan which created a debt to assets ratio of 30:1; it then extracted a dividend of Euro €90 million from SmVaK; it then repaid the original loan by issuing €80million of 10-year bonds at %5 fixed interest. In 2006 it then sold the company to FCC for €190m. Penta's total profit from the dividends and the sale were a profit of €175m. in 2 years.

[http://www.pentainvestments.com/uploads/tx\\_msprojects/Case\\_study\\_SmVaK.pdf](http://www.pentainvestments.com/uploads/tx_msprojects/Case_study_SmVaK.pdf) ;  
<http://www.pentainvestments.com/investments.html>

It has been suggested in Poland that Penta has concealed Russian connections and has links with former Czech communist secret service personnel:

"The Czech-Slovak investment group Penta is suspected in Poland of cooperation with Russian secret services and of having capital of an unclear and opaque origin, the Czech daily Lidove noviny (LN) writes today, citing Polish minister Aleksander Szczyglo. Szczyglo, head of the National Security Office, voiced the suspicion in connection with the privatisation of the Polish helicopter producer, PZL Swidnik, LN writes. He also challenged as "a very strange thing" the widely-known participation of General Alojz Lorenc, former head of the then communist Czechoslovak secret service (StB), in Penta's structures. "The Polish secret services are automatically obliged to monitor the privatisation involving strategic companies," LN quotes Szczyglo as saying. (CTK National Czech-Slovak investment group suspected of links to Kremlin-press CTK National News Wire [Wednesday, August 26 2009 http://www.allbusiness.com/government/government-bodies-offices-government/12751083-1.html](http://www.allbusiness.com/government/government-bodies-offices-government/12751083-1.html) )

### 3.2. Eureko-Union

Eureko is a Dutch company investing in health and life insurance and pensions. Following the merger (in 2005) between its Dutch operation, Achmea, and Interpolis, the insurance subsidiary of Rabobank,, its main shareholders are Achmea with 54,37 % of the ordinary shares and Rabobank with 39,47 %. With operations in eleven countries, the Eureko Group has more than 25.000 employees It has expanded through a long string of acquisitions, including Greek insurer Interamerican. It also owns 33% of Polish health insurance company PZU (see below)

The Netherlands, Luxembourg	Achmea
Belgium	Avero Belgium
Greece	Interamerican Greece
Ireland	Friends First Ireland
Slovakia	Union Slovakia
France	Imperio France
Romania	Eureko Romania
Bulgaria	Interamerican Bulgaria
Turkey	Eureko Sigorta

Cyprus	Interlife Cyprus
Russia	Oranta

<http://www.eurekosiporta.com/En/DisplayContents.asp?ContentId=56>  
<http://biz.yahoo.com/ic/101/101523.html>

### 3.3. The European Commission action

In November 2009 the EC Commissioner for Internal market and Services launched an action on this issue because the restriction on use of profits may conflict with the EU principle of free movement of capital. It wrote to the Slovakian government asking for a response within 2 months. A spokesman for the EC was quoted as saying: "It seems that the imposition of an absolute prohibition on privately owned public health insurance providers from using their profits other than for the provision of public health care in the Slovak Republic, constitutes an unjustified restriction on the freedom of capital movements". This action was taken following a complaint made to the EC in 2008 – presumably by the same companies bringing the action under the investment treaty. (Reuters 20 November 2009 EU probes Slovakia's action against health insurers <http://www.reuters.com/article/idUSLK686591>).

Other press reports state that the EC has also queried another Slovak rule: "that insurers which enter liquidation or otherwise leave the market must transfer their clients, without charge, to another health insurer", again based on a complaint by a Dutch company which owns Union, another private health insurer operating in Slovakia. (The Slovak Spectator 30 Nov 2009 EC challenges Slovakia over insurers' profit ban. [http://www.spectator.sk/articles/view/37243/3/ec\\_challenges\\_slovakia\\_over\\_insurers\\_profit\\_ban.html](http://www.spectator.sk/articles/view/37243/3/ec_challenges_slovakia_over_insurers_profit_ban.html))

### 3.4. The investment treaty: Netherlands-Czechoslovakia treaty 1991

The claim by Penta and Eureko is brought not under EU law but under the provisions of an investment treaty signed in 1991 between the Netherlands and Czechoslovakia. Czechoslovakia no longer exists, but the treaty was inherited by both the Czech republic and Slovakia. It was signed less than 2 years after the country had escaped from the old communist regime, through the 'Velvet Revolution', and 13 years before the two countries became full member states of the EU, alongside the Netherlands.

(Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic. Treaty number 011207 Date of conclusion 29 April 1991 Place of conclusion Praag Entry into force 1 October 1992. Netherlands Ministry of Foreign Affairs treaty database [http://www.minbuza.nl/en/Key\\_Topics/Treaties/Search\\_the\\_Treaty\\_Database?isn=011207](http://www.minbuza.nl/en/Key_Topics/Treaties/Search_the_Treaty_Database?isn=011207), [http://wetten.overheid.nl/BWBV0003005/geldigheidsdatum\\_15-12-2009](http://wetten.overheid.nl/BWBV0003005/geldigheidsdatum_15-12-2009).)

The arbitration is being conducted through the Permanent Court of Arbitration under UNICITRAL rules. Members of the tribunal have been appointed. **HICEE B.V. v. The Slovak Republic** [http://www.pca-cpa.org/showpage.asp?pag\\_id=1334](http://www.pca-cpa.org/showpage.asp?pag_id=1334).

## 4. Similar cases

### 4.1. Eureko wins €1.8 billion compensation from Poland for non-privatisation of PZU

Eureko owns 33% of PZU, which operates a large part of the public health insurance and pension system in Poland, including managing pension funds and providing other financial services. It was 100% state owned until 1999, when the government agreed to sell 30% to Eureko. In 2001 the government planned to float the company on the stock exchange, in the course of which Eureko expected to obtain a further 21% of shares and so gain majority control. This flotation was cancelled, however, and subsequent governments refused to sell more shares to Eureko. Eureko claimed compensation through arbitration under the Netherlands-Poland investment protection treaty: "This allowed Eureko to get around a clause in the privatisation deal committing the two sides to adjudicate any disputes in Polish courts." (Reuters 17/01/2008 <http://www.reuters.com/article/idUSL174991720080117>) Eureko won arbitration awards in 2005, and again in 2007. In October 2009, to settle the dispute, the Polish government agreed a deal under which PZU paid a special dividend worth €1.85billion to Eureko. The Polish currency, the zloty, was affected by concerns that

Eureko would immediately convert its dividend into Euros, and also that PZU might sell Polish government bonds to finance the special dividend. The settlement also commits Poland to privatisation by flotation of PZU, before 2012 (although Eureko can force a postponement “if market circumstances are adverse”) and guarantees payments to Eureko if there is no flotation by this date ([http://www.eureko.net/sites/default/files/2009-10-02\\_presentation.pdf](http://www.eureko.net/sites/default/files/2009-10-02_presentation.pdf) ).

The state still owns 55% of PZU at the end of 2009. It is the biggest private health insurance company in central and eastern Europe, with large profits and assets of €16 billion. Because of the dispute it has not expanded much into other central European countries, but is now planning to invest €3 billion in expanding abroad, especially into Ukraine and Russia: it hosted a 2-day conference on the subject in November 2009.<sup>1</sup>

#### 4.2. Previous case: double proceedings against Czech republic

A previous case against the Czech republic highlighted the potential for multiple proceedings by companies registered in one country with owners registered in another. CME Czech Republic B.V., a Netherlands-registered company which lost a TV broadcasting license in the Czech republic, claimed compensation on the grounds that a Czech law restricting foreign ownership of media companies was in breach of the Netherlands-Czechoslovakia investment treaty. The case went to arbitration under UNICITRAL, in Sweden: and the company won. At the same time, a major shareholder in CME, an American named Ronald S. Lauder, also brought proceedings on the grounds that it breached a USA-Czechoslovakia investment treaty. This also went to arbitration under UNICITRAL, with a different panel, in London – which ruled in favour of the Czech republic. The two decisions came within 10 days of each other. The discussion of this ‘double jeopardy’ is now attached to the Netherlands-Czechoslovak treaty. (see annexe 2)

(IRIS 2001-10:2/1 UNCITRAL International Courts of Arbitration: Awards in TV Nova Case. Awards of the UNCITRAL Courts of Arbitration in London and Stockholm, 3 and 13 September 2001 <http://merlin.obs.coe.int/iris/2001/10/article1.en.html> )

#### Annexe 1. Legal commentary by Slovak lawyer July 2009

MARTINKOVÁ: Amendment to the Health Insurance Companies Law has weak points ([tvnoviny.sk](http://www.tnoviny.sk))

**Date:** 28.07.2009 14:06 **Author:** PALU **Category:** Public Health

<http://www.advocatus-law.eu/article-legislature?language=en>

Bratislava, July 28th (TASR) – TASR was talking with the attorney Jana Martinková about amendment to the Health Insurance Companies Law, lawsuits entered by the health insurance companies, arbitrations, defence of the Slovak Republic.

#### **What were the objectives of the controversial amendment to the Health Insurance Companies Law and what were the intended advantages?**

In terms of the constitutional right of each individual to health protection, the state is obliged to adopt such legal regulations that would ensure free health care for its citizens through health insurance companies. In my opinion, the intention of the legislator was good and in accordance with the social direction of our country which our citizens have chosen in the elections.

The Slovak health insurance system is a system of public compulsory social health insurance created on the principle of solidarity. In such environment, the Health Insurance Companies Law No. 581/2004 enabled that health insurance companies were created as business entities – joint-stock companies. The insurance market was made accessible to private capital and the insurance companies were allowed to pay off their profits in form of dividends which is typical for the private sector with competition... The objective of the legislator in 2007 was to re-establish the original character of the health insurance, this intervention changed the character of the health insurance companies’ operation and in principle, they became non-profitable corporations.

In terms of the communitarian law, a member state may shape the system of its public health insurance autonomously. It may or may not include elements of competition into the system, it may combine competition and non-competition

rules. However, a problem occurs when elements with impact on the private capital are introduced and subsequently, there is a will to remove such elements. It is not possible to do so without a negative impact on investors and it is very difficult to choose tools which are adequate to the purpose and aim. In essence, the intention was good as its purpose was to secure that the public funds paid by people to the insurance companies compulsory continue to serve for the benefit of people and not for the benefit of private persons. However, even such altruistic aim must be achieved in such a way that the rights acquired in good faith and the legal relations established in accordance with valid laws are affected as little as possible.

### **What are the weak points of the amendment and what problems has it caused?**

The weakest points of the amendment are the following: retroactivity – the Slovak Republic is a legal state, its attribute is a legal security, including the guarantee that the legislator will not adopt retroactive enactments that would withdraw rights acquired in good faith and in accordance with valid laws from legal entities – this amendment expressly interferes with the existing legal relations; non-observance of the principle of proportionality in sense of Article 13, section 4 (when restricting the health insurance companies, their essence and sense must be taken into account) representing preservation of the equitable balance between the needs of the public (general) interests of society and protection of the lawful rights of individuals = the intervention into the health insurance companies must be appropriate, necessary and adequate – the state has the right to amend its legislation but it must always follow a lawful objective and to choose adequate means to achieve such objective; restriction of ownership rights without a compensation - the amendment removes lawful expectations of the health insurance companies for materialization of the values that have a character of property without paying the aggrieved entities real value of that part of investment they have been indirectly deprived of as a consequence of the amendment.

### **What will be the arguments of the shareholders of the health insurance companies – claimants?**

The claimants, the shareholder of Dôvera and Apollo HICCE B.V. and the shareholder of UNION z.p. EUREKO B.V. will defend themselves against the legislative interference in an arbitration proceeding as some articles of the Investment Protection Agreement have been violated. On basis of that, the investors will claim compensations for deflated investments. These are defined in the above mentioned Agreement rather widely which will influence the amount of compensation in the event that the arbiters fail to adopt the argumentation of the Slovak Republic. The proceedings in respect of compliance of the controversial amendment with the Constitution will be indirectly supported by a motion filed by a group of MPs at the Constitutional Court. If the Constitutional Court finds out that the Law No. 530/2007 and the law No. 594/2007 is not in compliance with the Constitution and international agreements, it will have an impact on the loss of effectiveness of the Law and indirectly, it will also influence the course of the arbitration.

### **What will be the arguments of the state?**

The state will try to persuade the arbiters that the compensation claimed by shareholders of the health insurance companies is not justified as the health insurance companies (HIC) are not entrepreneurs and the purchase of the health care by the HIC is not an economic operation oriented to profit. For example, it will use the arguments that the HIC fulfil tasks in the public interest, that they are established for the purpose of performing the tasks of the state in fulfilling its social functions, that they may not carry out operations other than those specified by law, that they are not free to differentiate the amount of premiums (inputs), that the amount of premiums is precisely defined and may not be increased, decreased or waived, that the source of their funding (inputs) are insurance contributions having the character of an additional „tax“ (the perceptual rate and its base is fixed) through wage deductions and non-payment of such contributions is an offence, that the calculation of premium payers is fixed, that they have a contracting obligation set by law – the obligation to conclude contracts with providers in specified network of providers, that the insured are obliged to enter into a public health insurance contract with a health insurance company (beginning and end of the public health insurance for the insured is ex lege, that the mechanism of redistribution applies to them etc.

The Slovak health insurance system is a system of public compulsory social health insurance created on the principle of solidarity. The health insurance is a service in public interest with the aim to satisfy the rights of individuals and HIC are only mediators for the state in fulfilling its obligations towards its citizens, or administrations of public issues on basis of lawful authorization. Health insurance is not undertaking, although HIC are joint stock companies, it is mutual assistance. The competition between individual insurers is also rather limited as they may not influence the amount of inputs and outputs, they may compete among themselves only in application of their marketing strategies. They may use real competition only in private insurance.

The principle of solidarity on which the public health insurance is based means that the health insurance is financed by contributions that are proportional to income of the insured and the insured with very low income are exempted for

paying contributions... Solidarity means that the income is redistributed among those who are better off in terms of both their financial situation and health condition and those who would be otherwise deprived of the health insurance coverage due to their financial situation and health condition - i.e. the healthy ones pay for the sick).

The activity based on the principle of national solidarity justifies exclusion of the compulsory health insurance from competition and therefore, it should be non-profitable.

Another reason for exclusion of the public health insurance from competition is the fact that in principle, HICs provide to their clients identical benefits the extent of which does not depend on the premium amount but arises from the Law No. 577/2004. The insurance companies have no possibility to influence either the amount of contributions or the extent of coverage to which the insured are entitled. Thus, they do not perform activities of an economic character, they are not subject to the rules of competition as other business companies and therefore, they may be regarded as enterprises according to Articles 81 and 82 of the EC Agreement.

### **Why do health insurance companies sue the Slovak Republic in an arbitration and not in any other proceedings, e.g. before an international court?**

The obligation to submit to the award of an arbitration court arises from the Agreement on Encouragement and Reciprocal Protection of Investments concluded between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic in 1991 which was acceded by the Slovak Republic. According to this Agreement, each party has to appoint one arbitrator who will then together appoint the presiding arbitrator. In the event that they fail to agree about the person of the presiding arbitrator, the presiding arbitrator shall be appointed by the Chairman of the Arbitration Court of the Chamber of Commerce in Stockholm.

The arbitration court compiled in this way shall be governed by the procedural rules of the United Nations Commission on International Trade Law (UNCITRAL). The arbitration court shall take into account other factors including, but not limited to the valid law of the parties, provisions of the Agreement stated above, provisions of individual investment agreements and the general principles of international law.

What we know about the course of the arbitration between the Slovak Republic and Dutch shareholder HICEE BV (a 100% shareholder of Dôvera, a 49% shareholder of Apollo z.p.) is that by the notice of arbitration delivered to the Ministry of Finance and the Prime Minister on December 22, 2008, the arbitration proceedings were commenced, the counsel of the claimant is the American company Sidley Austin LLP (Washington). Both parties appointed an arbitrator, (the claimant appointed Mr. Charles N. Brower and the respondent appointed Mr. Peter Tomka) and both arbitrators appointed the third arbitrator, Sir Franklin Berman as the presiding arbitrator.

As a compensation for the damages caused by violation of the Agreement in connection with changes in legislation 2006, 2007 (limitation on the disposal of positive economic result of health insurance providers and reduction of a cap on their operational expenses (Article 3, sections 2,4 and 5, Article 4, Article 5), the claimant claims from the Slovak Republic € 750 mil.

### **What obligations arise for the Slovak Republic from the Agreement on Encouragement and Reciprocal Protection of Investments concluded between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic?**

Article 3 – to ensure full protection and security of investments of the contracting parties; to ensure fair and equitable treatment to the investments of investors of the other contracting party, without any unreasonable or discriminatory measures that might impair the operation, management, maintenance, use, enjoyment or disposal thereof by those investors; to accord to such investments full security and protection which in any case shall not be less than that accorded to investments of its own investors; to observe the obligations in relation to the investments of the other contracting party; preference of more favourable rules (from the system of law of the state or from an international contract) for a more convenient treatment of investments than are provided for by the Agreement; Article 4 - to guarantee transfers of payments (profit, interests, dividends, amounts for purchase of raw materials, development of investments.... the proceeds of sale or liquidation of the investment...) Article 5 - not to take any measures depriving, directly or indirectly, investors of the other contracting party of their investments unless the following conditions are complied with: the measures are taken in the public interest and under due process of law; the measures are not discriminatory; the measures are accompanied by provision for the payment of just compensation representing the genuine value of the investments affected.

**Has it been possible to avoid the arbitration, who is responsible for the faults of the state?**

In my purely personal opinion, the initial fault occurred in 2004 when the legislative changes in the area of health insurance and health insurance companies partly introduced market elements into this sector and space for private investments participation was opened. The legislator tried to change this situation in 2007, though not very luckily. Of course, it is much more difficult to find a solution when you want to introduce public elements into the sector with „private capital“, or when you want to replace „the market“ system by a non-market one. From this point of view, the situation was simpler for the legislator in 2004. To change the set rules of game now and not to impair the investor is a task for Solomon, but it is not impossible. In any case, it is not possible to deprive an investor, directly or indirectly, of his investments without paying him an equitable compensation.

**The Ministry of Finance addressed several law companies in an effort to find a counsel in this dispute. In this connection, the companies Teynier Pic & Associés, KŠD Štoviček, Konečná & Šafář, s.r.o., Winston & Straw and the law office of David A. Pawlak have been mentioned. Do you know them?**

The name of the first company reminded me of the investment arbitration proceedings held in the years 2004-2007 by the Dutch investor Eastern Sugar B.V. who was represented by Skadden, Arps, Meagher & Flom versus the Czech Republic, The investor claimed violation of the same Agreement on protection of investments. The Czech Republic, represented by Eric Teynier from the French company Teynier Pic & Associés was not successful. Therefore, this choice surprises me a bit.

Winston & Strawn is a large American company but in the worldwide law firms ranking, it does not belong even to the top thirty. It is difficult to say what range of expertise the above mentioned law firms may provide in arbitration lawsuits as the reliable accessible worldwide statistics (Chambers & Partners) deal only with the 25 most successful law offices and the selected four ones are not among them.

**What is your opinion about the law office that will represent the shareholder of the health insurance companies Dôvera and Apollo (HICEE B.V.)?**

The American company Sidley Austin belongs both by its size (7th in the worldwide ranking) and success to the top law offices in the world and only a narrow range of law offices may compete with it with regard to their wide experience in similar disputes. Therefore, the main criterion for the Slovak Republic in selecting its counsel should be the fact that the legal representation of the state has at least equally strong position in the worldwide ranking of law offices, supported of course by the range of experience and percentage of success.

**How long have you been dealing with these problems?**

For more than a year. The main impulse for that is my inner belief that as far as the public funds collected from the insured in form of contributions within the public health insurance may represent a potential for securing the right of citizens for free health care and medical devices guaranteed by the constitution, the legislator should take such legislative measures that would guarantee such constitutional rights. When preparing the standpoints for the international law firms that have showed their interest to represent the Slovak Republic in this dispute, I was led by this idea, as well as by the prospect of success.

**Can you reveal the names of these companies?**

They are law firms belonging to the top five in the world (The List: Top Law Firms 2008). One of them was the American company Baker & McKenzie, but the cooperation with this firm was quitted when it had been ascertained that the company had conflict of interest. Simultaneously, the cooperation with the company Skadden, Arps, Slate, Meagher & Flom (Europe) LLP. was developing.

**Why do you cooperate in particular with this company?**

One of the reasons is also the fact that this company lost none of approximately 50 investment arbitrations in which it provided legal services.



### **Does selection of a law firm for the state require a public tender?**

The Public Procurement Law relates to the activities (orders) listed in Annexes to the Law and for which a contract is concluded. Law services belong to the non-priority services listed in Annex No. 3 to the Law (No. 25/2006 Z.z.) In selecting law services, the procedure depends on the expected value of the order. If the value is equal or higher than € 6,000,000.00, the procedure of placing under-limit orders apply, if the value is lower than € 6,000,000.00, the procedure of placing under-threshold orders apply, i.e. in each case, the provisions of the Public Procurement Law shall apply, in particular its basic principles: the principle of equal treatment, non-discrimination of applicants, transparency, efficiency and effectiveness.

In terms of the European legislation, the procedure in placing public orders for services, including legal services is regulated by the Directive 2004/18/EC which relates to provision of services in the area of legal counselling under the condition that the value of the order exceeds € 249,000.00. Similarly, also arbitration disputes and settlement proceedings are exempted provided that the selection relates to the person of an arbiter. It sets out an obligation to the procurer to treat all participants of the public competition non-discriminatory and transparently. Obviously, the Directive stated above was not implemented into the Public Procurement Law correctly. Also the ESD judicature (e.g. the Judgement C-231/03 Rn 21), as well as the reports of the Commission 2006/C 179/02 stated in agreement that in the inter-market tasks, "the company with its registered office in another member state must have access to adequate information about an order before it is placed so that it may show its interest to get the order". Therefore, publication of a sufficiently accessible notice is essential and the following criterion applies: the more interesting the order is for potential applicants from other member states, the wider it should be communicated. A formal invitation for tenders is not necessary, it is enough to describe individual items of the order and the placement procedure briefly, observing the following principles: non-discriminatory description of the subject of order – an equal access for applicants from all member states; a transparent and objective formulation. I don't know how the Ministry of Finance made this order for providing legal services public but if it published it only on its website, although it was in accordance with the Public Procurement Law, the EU Directive which should have been and was implemented in the Public Procurement Law might have been thereby violated.

### **Has the law been violated?**

I can't answer this question because I don't have enough information how the Ministry of Finance actually proceeded in this matter, which basis the Public Procurement Authority used and I don't know the reasons for its decision. I can't use the information published in media as their extend is insufficient for a legal standpoint and moreover, I don't follow all medial sources.

**What is your opinion about the statement of the MF spokesman according to which: „According to §1, section 2, subsection i) of the Public Procurement Law No. 25/206 Z.z., the obligations arising from this Law do not apply to arbitration proceedings“. These were his reasons why the selection of a law firm is not subject to the Public Procurement Law.**

If this is actually the opinion of the Ministry of Finance, then it is clearly an incorrect and unprofessional interpretation of the above stated provision. It is true that the Public Procurement Law does not apply to arbitration proceedings, but an order for the legal services listed in Annex No. 3 and provided by counsels or law firms does not represent an exemption from the Law. The exemption relates to selection of an arbiter who may be a counsel but who, within an arbitration proceedings, provides services other than those provided by law offices, i.e. an arbiter is not a counsel, he does not represent the Slovak Republic in the proceedings. An arbiter has the status of a judge. That is why the exemption stated above is mentioned. Such interpretation is expressly supported also by the EU Directive 2004/18/EC, by the Report of the European Commission 2006/C 179/02 and last but not least, by the ESD judicature.

**So what is your opinion about the published statement of the Public Procurement Authority according to which “within arbitration proceedings, specific services are provided by institutions selected in the manner to which the rules for placing orders specified in the Public Procurement Law cannot be applied“?**

This formulation seems to me very vague. The Public Procurement Authority should specify the services it has in mind and what institutions provide such specific services. As far as I know, in an arbitration proceeding, the same legal services are provided as in an lawsuit and only counsels or law firms are authorised to provide such services. Therefore, I think that this must be an misunderstanding between the journalist and the authority stated above because this statement may be an answer to the question about selection of an arbiter in the arbitration proceedings.

**In October 2008, a group of MPs filed a motion at the Constitutional Court demanding that the provisions „prohibiting profits“ to HICs are declared not to be in compliance with the Constitution. What decision do you expect?**

Due to the fact that after receiving a proposal for further proceedings on February 25, 2009, the Constitutional Court has not suspend the effectiveness of the contested provisions, it is probably not persuaded that continued application of these provisions in practice may jeopardize basic rights and freedoms or human rights and basic freedoms arising from international contracts, or that their application would result in a massive economic loss or any other severe and irreparable consequence.

In the event that according to the findings of the Constitutional Court, the contested provisions are in conflict with the Constitution, with the Convention for the Protection of Human Rights and Fundamental Freedoms (and additional Protocol ), the Constitutional Court will suspend its effectiveness and the legislator will have the term of 6 months to amend the valid legislation so that it would be in accordance with the Constitutional Court findings.

**When you know which mistakes have been made in amending the health insurance companies law, do you also know how should the legislator proceed to avoid them?**

Of course, we have been dealing with these problems long enough to be able to offer a solution which would take into account the intended objective, but with minimum interventions into the rights of investors.

**What legislative solution have you in mind?**

The amendment to Health Insurance Companies Law is not the only nor the most important one.

---

<sup>1</sup> Sources include:

<http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=2159401> ;  
<http://www.eubusiness.com/news-eu/1201113121.88/> ;  
<http://www.reuters.com/article/idUSL2662202020080626> ;  
<http://www.reuters.com/article/idUSWAR01096420091002> ;  
<http://www.reuters.com/article/idUSL174991720080117> ; <http://www.eureko.net/press/eureko/235>  
<http://www.eureko.net/press/eureko/236> ; <http://www.eureko.net/sites/default/files/2009-10-02.pdf> ;  
[http://www.eureko.net/sites/default/files/2009-10-02\\_presentation.pdf](http://www.eureko.net/sites/default/files/2009-10-02_presentation.pdf) ;  
<http://www.genevaassociation.org/Program/WarsawProgramme.pdf> ;  
[http://www.cabrnoch.cz/media/Program\\_AN.pdf](http://www.cabrnoch.cz/media/Program_AN.pdf) .