Global Forum on Competition

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL:
CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from the Slovak Republic

-- Session I --

This contribution is submitted by the Slovak Republic under session I of the Global Forum on Competition to be held on 17 and 18 February 2011.
CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Slovak Republic --

1. General points

1. Concentration control is realized by the Antimonopoly Office of the Slovak Republic (hereinafter only „the Office“) pursuant to the Act No. 136/2001 Coll. on Protection of Competition (hereinafter only „the Act“).\(^1\)

2. According to this Act merging undertakings are obliged to notify the concentration which meets the notification criteria to the Office. Concentration being subject to the Office’s control must not be implemented.

3. However, based on the request of the undertaking, in legitimate cases the Office may enable the undertaking to exercise some rights and obligations resulting from a concentration according to the decision.

4. A concentration shall be subject to control by the Office if:

   a) the combined global turnover of the parties to the concentration is at least EUR 46,000,000 for the closed accounting period preceding the establishment of the concentration and at least two of the parties to the concentration attain a turnover of at least EUR 14,000,000 each in the Slovak Republic for the closed accounting period preceding the establishment of the concentration; or

   b) at least one of the parties to the concentration attains a total turnover of at least EUR 19,000,000 in the Slovak Republic for the closed accounting period preceding the establishment of the concentration and at least one other party to the concentration attains a total global turnover of at least EUR 46,000,000 for the closed accounting period preceding the establishment of the concentration.

5. According to special legislation, the concentration notification is tariffed by the sum of EUR 3,319.

6. Documents and information included into concentration notification are specified in Decree of the Office No. 204/2009, laying down details of particulars of a notification of concentration\(^2\).

7. Based on the request of undertaking in legitimate cases the Office may constrict the extent of information which the notifying undertakings are obliged to submit in the notification of the concentration.

\(^1\) http://www.antimon.gov.sk/files/30/2009/Act%20136-2001-novela-aj.rtf

\(^2\) http://www.antimon.gov.sk/files/30/2009/Vyhlaska%20c%20%2020%20%20nalez%20%20oznam%20%20koncent_en.rtf
The Office agrees with the request to constrict the extent of required information mainly if there is no significant horizontal overlap or no vertical combination of merging parties’ activities. Thus the Office reduces costs of merging parties involved in the notification of the concentration when this concentration does not have potential negative restrict conditions on effective competition.

8. The Office assesses whether the concentration does not create or strengthen a dominant position resulting in significant impediments to effective competition in the relevant market.

9. In the case of joint ventures the Office also assesses whether such a concentration does not result in coordination of competition conduct of undertakings.

10. Concentrations being subject to control by the Office and at the same time meeting the notification criteria set by Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter only “the EC Merger Regulation”), fall under the exclusive responsibility of the European Commission.

11. However, it is possible to use the so-called case referral system (Article 4(4), Article 4(5), Article 9 and Article 22 of the EC Merger Regulation), according to which the concentration is assessed by the competition authority which is more appropriate for carrying out a particular merger investigation.

12. Since 2004 the Office used the case referral system once. Based on the request of the Office the European Commission passed the part of concentration of undertakings Tesco/Carrefour, having been referred to the Slovak Republic, for the assessment by the Office. The concentration of undertakings Tesco/Carrefour created or strengthened dominant position of undertaking Tesco resulting in significant impediments to effective competition in the local relevant markets in the Slovak Republic. The Office therefore prohibited this concentration.

2. Specific questions

2.1 Co-operation among competition authorities

13. Cross-border mergers created 2 – 29 % of the total number of concentrations having been notified to the Office in years 2004 - 2010 (besides the Office, the cross-border mergers have been notified mainly to the competition authorities in Germany, Austria, the Czech Republic and Italy).

14. The table below presents the number of concentration notified to the Office, and the number of concentrations having been notified in more member countries each year:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of concentrations notified to the Office</th>
<th>- of which cross-border mergers</th>
<th>Share of cross-border mergers of total number of notified concentrations</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>78</td>
<td>3</td>
<td>4 %</td>
</tr>
<tr>
<td>2005</td>
<td>53</td>
<td>1</td>
<td>2 %</td>
</tr>
<tr>
<td>2006</td>
<td>44</td>
<td>5</td>
<td>11 %</td>
</tr>
<tr>
<td>2007</td>
<td>62</td>
<td>10</td>
<td>18 %</td>
</tr>
<tr>
<td>2008</td>
<td>74</td>
<td>10</td>
<td>14 %</td>
</tr>
<tr>
<td>2009</td>
<td>33</td>
<td>3</td>
<td>9 %</td>
</tr>
<tr>
<td>2010</td>
<td>34</td>
<td>10</td>
<td>29 %</td>
</tr>
</tbody>
</table>

15. The Office considers the cooperation with other competition authorities in the area of cross-border mergers to be necessary.

16. Presently, the cross-border mergers cooperation is realized within the platform of the European Competition Authorities (hereinafter only „ECA“), Marchfeld Competition Forum and the International Competition Network (hereinafter only „ICN“).
17. Cooperation within Marchfeld Competition Forum is based on establishment of case database including also cross-border merger operations. Within ECA the countries inform each other on cross-border mergers. Presently, the materials setting the rules of next cooperation within ECA are under preparation.

18. In the area of concentrations, the Office is actively involved in the work and deliberation of international organisations, for example in 2008 we have co-organized ICN Merger Workshop in Brno, Czech Republic. Basic information on concentration control in the Slovak Republic is available also at ICN web site 3.

19. OECD, ICN and the European Commission’s materials from the area of concentrations are inspiring and useful for the Office’s work, namely in the area of effective setting of concentration control principles and in the area of competition legislation application in concentration control.

20. Presently, the Office prepares the amendment to the Act and the particular institutes of concentration control are subject to in-depth analysis. For example, the Office used ICN materials on setting the notification criteria, as well as OECD materials on the substantive test to assess mergers and it proposes to shift from dominance test to SIEC test.

21. Regarding cross-border mergers the Office cooperates with other competition authorities on an informal basis and it comes out from the principles of mutual cooperation adopted by ECA. Currently, we have not entered into an agreement with other NCAs, as this type of contract is international and it should be only approved by executive and legislative bodies of the Slovak Republic.

22. Our legal system does not include a legal instrument which would enable to regard foreign interests when assessing cross-border merger operations.

2.2 **Jurisdictional issues**

23. Currently set notification criteria cause certain problems in practice, thus within the amendment to the Act we try to set these criteria more effectively. These changes aim at reducing the administrative load of undertakings.

24. The Office is independent without the possibility of political intervention. It acts within the Slovak Republic; it assesses cases which meet the mentioned notification criteria. As it has been mentioned before, the Office does not have a special system on cooperation and procedure for cross-border mergers control, and it even does not regard the special effects, like industrial or investment policy when assessing these operations.

25. The Office has been facing the problem of replies recoverability from the undertakings located outside our jurisdiction. For example, in the case of two main airports in Austria and in the Slovak Republic – Vienna Airport and Bratislava Airport there were only few airline operators at Bratislava airport. Therefore, it was indispensable to collect views on merger from operators that were present at Vienna Airport. We were not very successful. Our Austrian colleagues informally informed us about their results from their investigation process, but this information could not be used as the evidence in our proceedings.

26. Regarding the problems also in this case we feel the need for mutual cooperation and for setting the legal regime of such cooperation.

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2.3 Remedies

27. The Office is entitled to impose both behavioural and structural remedies. Since 2004 we have not imposed any remedies in cross-border mergers control, however, within the concentration Vienna Airport/Bratislava Airport, having been assessed also by the Austrian competition authority the Office rejected proposed remedies. In this case the proposed remedies were not sufficient to eliminate competition concerns of the Office. This concentration was prohibited by the Office.

28. Considering the recent practice, remedies enforced in cross-border mergers have never been monitored. However, we consider the cooperation of competition authorities in imposing and monitoring remedies within cross-border mergers to be necessary due to the need to ensure consistent outcomes.

29. The Office cooperates with other countries on an informal basis; however, we miss the legal basis setting and enabling formal cooperation. New amendment to the Act will introduce provisions which would enable cross–border mergers cooperation at the official level.

30. In this connection we welcome the establishment of a Merger Working Group within the European Commission enabling active discussions on the use of existing mechanisms and on the possible creation of new mechanisms for the effective cooperation within the EU member states.