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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Slovak Republic --

25 February 2014

This note is submitted by the Slovak Republic to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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1. Pre-merger notification regime

1. Pursuant to the Act on Protection of Competition, if a transaction constitutes a concentration within the meaning of the Act and meets the jurisdictional thresholds set by the Act, the notification is mandatory.

2. Following the notification, parties are prohibited to implement. The Act does not set any particular period; the ban to implement applies until the final decision in the merger is adopted by the Office.

3. The prohibition to implement a concentration is general, it means that any concentration subject to control by the Office must be notified to the Office before any rights and obligations resulting from the concentration are executed and an undertaking may not exercise the rights and obligations resulting from a concentration before the decision on the concentration becomes legally valid. This ban to implement the concentration shall not preclude the right of a selected bidder in a public tender to make their bid, provided that the acquirer does not exercise their voting right arising in connection with the implementation of the bid.

4. A ban to implement the concentration shall not preclude the realization of an acquisition bid or realization of more transactions with securities at the securities market through which a control pursuant to Act is acquired from various subjects provided that:

- such a concentration is immediately notified to the Office and
- acquirer of the control does not exercise its voting rights connected with these securities or it only does so to maintain the full value of these investments based on the exemption granted by the Office.

5. At the request of an undertaking, the AMO shall issue a decision granting an exemption from the ban to implement the concentration if there exist serious reasons for this. The AMO shall issue a decision on the granting of or non-granting of an exemption within 25 working days following the delivery of the request. This time limit shall begin on the day following the day of delivery of a complete notification of concentration at the earliest. When deciding on the exemption, the AMO shall also take into account the effects of suspension of the concentration on the parties to the concentration and third parties. An exemption may be granted subject to conditions in order to ensure effective competition.

6. In the draft amendment to the Act the regulation of this institute will be changed. According to the draft the request for the exemption from the prohibition to exercise certain rights and obligations resulting from concentration can be filled also in the pre-notification phase, i. e. it is not bound with the notification of concentration itself and the AMO will have a deadline 20 working days for a decision.

2. Review of mergers falling below notification thresholds

7. There are not any specific exemptions from the notification requirement for some transactions according to Act on Protection of Competition. Transactions that do not meet the notification thresholds are not subject to merger control of the AMO. AMO can assess any concentration only based on the notification from the parties; the ex officio principle is excluded in merger control.

8. Mergers, that do not fulfil the criteria for control of concentration, could be assessed according to the agreement restricting competition provisions.

9. From the recent AMO's practice, one case related this topic can be mentioned. Two major carcass disposal plant operators active on the market asked the Office for the opinion, whether the transaction, by which they shifted certain activities to new created joint venture would constitute a concentration. Based on the turnover criteria, the Office could conclude that in any case the turnover criteria were not fulfilled, so the transaction would not constitute the concentration which should have been notified.

10. After certain period of time, the Office received some complaints that these two players active on the highly concentrated market for veterinary sanitation started to coordinate their conduct through this joint venture, particularly in the price area towards their customers – producers of animal by-products. Following the completion of investigation, the Office initiated administrative proceedings and imposed fines on both companies for agreement restricting competition. The unlawful behaviour consisted in forcing their customers to conclude new contracts with the joint venture (which had the exclusive power to negotiate contracts and business conditions given from its parent companies) and the producers had no other possibility but to conclude contracts, they were forced to accept the determined business conditions, which meant the increase of prices for provision of sanitation services for certain categories of animal by-products. At the same time, the market was virtually divided because, since the foundation of the joint venture, this undertaking was the only entity to decide which of the two carcass disposal plants would process the animal by-products from the individual producers.

3. Review of mergers that should have been notified but were not

11. If the parties fail to notify a merger that was subject to mandatory notification provisions, the AMO shall impose on an undertaking a fine of up to 10% of its turnover for the preceding closed accounting period and a fine of up to EUR 330,000 on an undertaking that achieved a turnover of up to EUR 330 or achieved no turnover, or on an undertaking whose turnover cannot be calculated. With regard to the absence of the period for notification the AMO shall impose a fine on an undertaking that has violated the prohibition to exercise the rights and obligations resulting from a concentration, unless the AMO has granted an exemption. This penalty can be imposed repeatedly and should motivate the undertakings to notify the merger (to avoid additional penalties). The AMO has not the power the review merger ex officio, without undertaking's notification.

12. The AMO may impose fines within four years from the commencement of proceedings. However, it may impose these fines within eight years from the violation of the provisions of the Act; in the event of a continuing administrative offence or lasting administrative offence, the time limit shall begin on the date on which the violation last occurred.

13. If the rights and obligations resulting from a concentration were exercised prior to the issuance of a decision prohibiting the concentration, or after the issuance of a legally valid decision prohibiting the concentration, the AMO may impose on the undertaking the obligation to restore the level of competition that existed prior to the establishment of the concentration, especially an obligation to divide a company or transfer rights. The AMO may impose on the party to the proceedings another obligation aimed at ensuring the fulfilment of said obligation.

4. Subsequent review of previously cleared and consummated mergers

14. The AMO could assess concentration only after notification by undertaking. If a merger was approved with remedies, the Office shall modify or reverse a decision on concentration on its own initiative if an information provided by an undertaking, which was decisive for issuing the decision, was incomplete or false; or the concentration has arisen in a way other than notified. Incorrect assessment of the Office shall not constitute the opportunity to re-assess concentration. Beside this options set by the Act, also general remedies stipulated by the Administrative Code can be taken into account. The Administrative Code provides for annulment/change of an administrative decision, which has become legally valid, but it is contrary to law and there is public interest in annulling or changing it.

15. The AMO shall modify a decision approving concentration with remedies at the request of a party to the proceedings if the situation in the relevant market has substantially changed and no longer justifies the fulfilment of the condition or the obligation related to the condition imposed on a party to the proceedings or prior to the expiration of the time limit set in the decision for the fulfilment of a condition or an obligation related to the condition, a party to the proceedings applies to extend this time limit because it is impossible to adhere to it for a valid reason.