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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

### **Working Party No. 3 on Co-operation and Enforcement**

#### **JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES**

-- Note by the Slovak Republic --

**14-15 June 2016**

*This document reproduces a written contribution from the Slovak Republic submitted for Item 5 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.*

*More documents related to this discussion can be found at  
[www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm](http://www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm)*

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## SLOVAK REPUBLIC

### 1. Introduction

1. The Antimonopoly Office of the Slovak Republic (hereinafter “AMO”, “Office”) is an independent central body of state administration of the Slovak Republic for the protection of competition. The Office beside other activities controls mergers that meet the notification criteria. The legislation is to a great extent in line with the European law.

2. The AMO made substantive changes in relation to jurisdictional nexus issues in 2011. These changes were adopted by amendment to the Act on Protection of Competition. This process was prepared in line with the 2005 OECD Council Recommendation, in order to arrange effective merger control system without imposing substantial cost on competition authority and merging parties.

3. The criteria determining whether a concentration is subject to control by the Office, were redefined with the goal to eliminate the mandatory notification of concentrations in cases which do not have any impact on markets in Slovakia but had to be notified due to the global turnover of undertakings concerned.

### 2. Legal framework

4. Mergers meeting the turnover criteria set by the Article 10, par. 1, letter a) or b) Act on Protection of Competition are subject to ex ante mandatory notification – they fall under the control of the AMO.

#### 2.1 *Legislation before reform*

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

- 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
- **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.

#### 2.2 *Legislation after reform*

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

- the **combined aggregate turnover of the parties** to the concentration is at least **EUR 46,000,000** attained for the accounting period preceding the establishment of the concentration **in the Slovak Republic 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 accounting period preceding the establishment of the concentration; or

- **combined turnover** attained for the accounting period preceding the establishment of the concentration **in the Slovak Republic**
  - if it is a matter of concentration pursuant to the article 9, par. 1, letter a) **at least by one of the parties** to the concentration is EUR 14,000,000 and **simultaneously the global combined turnover** for the accounting period preceding the establishment of the concentration attained by **another party** to the concentration is at least **EUR 46,000,000**,
  - if it is a matter of concentration pursuant to the article 9, par. 1, letter b) by **at least one party** to the concentration **that is being acquired or its part is being acquired** is at least **EUR 14,000,000 and simultaneously the global combined turnover** for the accounting period preceding the establishment of the concentration attained by **whichever other party** to the concentration is at least **EUR 46,000,000**,
  - if it is a matter of concentration pursuant to the article 9, par. 5 at least by one of the parties to the concentration creating jointly controlled enterprise is at least EUR 14,000,000 and simultaneously the global combined turnover for the accounting period preceding the establishment of the concentration attained by another party to the concentration is at least EUR 46,000,000.

### 3. Critical points before the reform.

7. The combined global total turnover criterion meant that under control of the Office were also mergers, which often had minimal impact on the market in the Slovak Republic. On the contrary, some undertakings with significant activities in Slovakia did not meet global turnover, thus they were not obliged to notify a merger and these transactions were not covered by merger control regime.

8. Subject to merger review in the previous wording of the Act were also transactions, where the acquiree had not significant activities in Slovakia. Thus the AMO reviewed the amount of mergers without, or with minimal impact on the market in the Slovak Republic. Such mergers were reviewed due to the fact that the acquirer reached the set turnover threshold in the Slovak Republic and the acquiree reached the set global turnover threshold. Merger review in such cases created unnecessary burden on undertakings as well as on the Office.

### 4. Jurisdictional nexus in merger control

9. Criteria for determining whether the concentration is subject to control by the Office were adjusted in 2011 in new manner. The amendment newly setting the notification criteria regarded the relation to the domestic market, so called local nexus.

10. According to article 10, par. 1 point a) both the combined aggregate turnover of the undertakings concerned and the aggregate turnover of at least two of the undertakings concerned are linked to the turnover attained in the Slovak Republic and

11. according to article 10, par. 1 point b) the entity which must attain the aggregate turnover in the Slovak Republic is determined according to the type of merger and the other undertaking concerned must attain worldwide aggregate turnover in a given amount.

12. The criteria for mandatory notifications in cases of acquisitions have changed significantly, since pursuant to the new wording the acquired company must attain the turnover in the Slovak Republic. The AMO assumption was that this could result in elimination of obligatory notification of

mergers in which the acquired company had met only the criterion of worldwide turnover and had no significant participation in competition in the domestic market.

13. These changes reflected private sector complaints and also conformed to international rules. This reform, including the process of setting thresholds was based on the ICN principles, 2005 OECD Council Recommendation, examination of individual sectors in economy in Slovakia, the size of these industries and whole economy, the amount of sales achieved by companies in individual sectors, benchmark based on past experience as well as comparison to the notification criteria in countries with a GDP similar to that of the Slovak Republic. Also the results of the public consultation were taken into account in the process of adopting new legislation.

14. The basic approach for thresholds setting was to look back at several years of previously notified transactions and examine how change in notification thresholds would have affected the sample of previous notifications and review. During this process we have also considered the size of domestic markets where anticompetitive effects of mergers could be a particular concern.

15. The goal of the notification criteria reform was to allow the Office to focus only on the most serious economic combinations of undertakings and to reduce the number of obligatory notified concentrations that even potentially could not have negative impact consisting in substantial lessening of competition in markets involving the Slovak Republic. The AMO concluded that thresholds should be better targeted to result in a greater number of notifications of mergers with domestic reach without increasing the total number of notifications. The AMO intended by these new criteria to avoid unnecessary transaction costs as well as the commitment of competition agency resources without any enforcement benefit. Before this legislation came into force, the AMO dealt with ca. 23 cases in 2011, around 25 % were cases without any potential impact on competition in the Slovak Republic.

16. As a result of reforms the number of notifications remained constant and almost all these cases had the local nexus in SR.

17. The AMO also complemented local nexus issue in 2011 and 2014 Amendments to the Act on Protection of Competition by other changes to determine costs and burdens of a merger control review system, such as a two phase process merger review, or short form of notification system.

## **5. Problematic issues**

18. Even that the criteria were changed with intention to set them at a level calculated to minimize the number of transactions that must be notified that are unlikely to raise competitive concerns, without allowing transactions that raise concerns to fall outside the notification requirement, some questions remain open and unsolved.

### **5.1 *Over-control-notifications with no competition concerns***

19. The data above show, that the main goal – to reduce notifications of mergers with no local nexus - was fulfilled. Despite that fact there is one type of mergers, within which, even under current notification system, we can find cases without any local nexus. The AMO dealt with approximately 4 such cases in 2012 - 2016.

20. These are cases notifiable under current notification as cases of joint ventures created by at least one parent company with activities in Slovakia (turnover threshold met in Slovakia) and by the other parent company, which fulfilled global turnover threshold and at the same time their JV is active/will be active solely abroad.

### 5.1.1 *Construction companies' case*

21. Two construction companies created joint venture for the rental of construction equipment and maintenance work in Nordic countries. One of these parent companies was active in Slovakia, but the other one was not, even this JV was not. But this concentration failed under AMO review according to Article 10, par. 1, letter b) 3 of the Act on Protection of Competition.

### 5.1.2 *Publisher case*

22. Two Swiss companies publishing newspapers and magazines created new joint venture for magazine publishing which had to be active only in France. These companies had also the joint venture in the Slovak Republic (turnover thresholds met in Slovakia), and they also fulfilled global turnover threshold, but the activity of JV was aimed at other local market. It fell under AMO review according to the same Article as the case above.

### 5.1.3 *Airport Chile case*

23. One airport services provider and one construction company created joint venture for providing airport reconstruction and airport operation in Chile. The construction company provided construction services with significant turnover also in Slovakia (Slovak turnover threshold), the other parent company fulfilled global turnover threshold and the activity of JV was solely outside the Slovak Republic.

### 5.1.4 *Multifunctional objects/business centre case*

24. One construction company, specialized in construction of business centres, and one financial institution, both Finnish companies, created joint venture for construction and operation of business centre in Nordic countries. Construction company fulfilled Slovak turnover threshold, financial institution fulfilled global turnover threshold and again, the JV was intended to operate solely outside Slovakia. Both of these cases fell under AMO review according to the same Article as the case above.

## 5.2 *Under control – anticompetitive mergers outside of notification requirement*

25. Contrary to the previous section, there are some situations, where some mergers with potentially anticompetitive effects which would require in-depth analyses could escape mandatory notification system.

26. These situations arise in case of merger of undertakings operating only in local markets in Slovakia. It can happen that such companies do not achieve the turnover criteria set out in law, but still their concentration would require in depth analysis of potential anticompetitive effects on competition on local markets. The Office does not have the power to control such concentrations under current legislation.

### 5.2.1 *Waste animal product case*

27. Two major carcass disposal plant operators active on the local markets asked the Office for the opinion, whether the transaction, by which they create joint venture/or merge certain activities to another company would constitute a concentration. Although the precise form or the transaction has not been clear at that time, 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.

28. After certain period of time, the Office received some incentives that these two players active on the highly concentrated market for veterinary sanitation started to coordinate their conduct through their 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 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 for them the increase of prices for provision of sanitation services for certain categories of animal by-products of up to 100%. At the same time, the market was virtually divided because, since the foundation of the company joint venture this undertaking was the only entity to decide which of the two carcass disposal plants would process animal by-products from the individual producers, and in what volume.

#### 5.2.2 *Tourist industry case*

29. Two companies providing the same type of tourist business concentrated their activities. Both companies provided their services on local markets, with territorial overlaps. The type of services provided is characterized by very high barriers of entry due to limited natural resources. Though we assumed the negative effects mostly on price competition we were not able to review this merger in depth, because these undertakings did not fulfil thresholds set by law.

30. Bearing in mind such scenarios from the past, the AMO considered obtaining the ability to review transactions that fall below notification thresholds.

31. In case of any potentially anticompetitive merger that does not fulfil turnover criteria, the AMO prepared draft of legislation proposal according to that the Office should invite the parties to notify the merger, if the concentration would significantly distort competition in the relevant market mainly due to the creation or strengthening of dominant position or the coordination of competitive behaviour was inconsistent with law. Such possibility was set for 9 months, after the concentration has arisen. According to that rule the parties would have to notify the merger within 30 working days following the delivery of the AMO request. On the other hand, the parties had to have the possibility of voluntary notification of such concentration (also with pre-notification contacts use). This system was prepared as part of the 2011 Amendment. Due to massive objections sent to the Office through consultation with stakeholders and interministry comment procedure, this system did not become part of the Act on Protection of Competition. Most of criticism was connected with concerns about the lack of legal certainty and unpredictability of such system.

## **6. Conclusion**

32. There is no doubt, that ideal system of merger notification would be reasonably effective and efficient. Opposite of this ideal is unduly burdensome notification system. The AMO revises merger notification system on a regular basis to seek improvement in order to achieve that effective objective and convergence towards recognised best practices. The abovementioned examples demonstrated that past revision in relation to the jurisdictional nexus in merger control was important part of these changes. On the other hand, even current setting contains some gaps. Above cases could serve as an example that sometimes notification criteria, upon which the local nexus is set, are insufficient.

33. Despite the fact that the law tradition in the Slovak Republic is connected with mandatory ex ante turnover criteria merger notification system, the possibility of ex post notification in some cases in future is not definitely excluded. However, it is necessary to consider the additional costs and uncertainty associated with such a solution.

34. Despite the abovementioned examples, however, we are not yet at a stage when we would propose any changes to the wording of the Act, especially with regard to ex post notification issue. In particular, the experience of other competition authorities may be beneficial to us to consider possible legislative changes.