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Competition in the Healthcare Sector – Contribution from the Slovak Republic

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More documentation related to this discussion can be found at: oe.cd/chthc.

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1. Challenges of Competition Law Enforcement Due to Regulatory Background

1. In Slovak Republic, the competition assessment is secured/provided through multiple instruments applied by the Antimonopoly Office of Slovak Republic (the "AMO") as a public authority that ensures the protection of economic competition in the territory of the Slovak Republic.

2. Firstly, the AMO applies competition assessment through merger control and competition enforcement. In addition to its power to impose fines on undertakings for abuse of dominance and cartel agreements, the AMO also has the authority to sanction public authorities for restricting competition while exercising their official powers (including cases where the municipalities regulate performance of economic activities through self-government regulations, etc.).

3. Second instrument is competition advocacy - the AMO can provide their opinions on legislative proposals and their impact on areas within their respective competences before the proposals are approved by the government. As part of its advocacy efforts, the AMO engages in discussions with other public authorities regarding specific regulations or broader activities aimed at promoting competition awareness. In such cases, the AMO identifies restrictions to competition through its competition assessment exercises and initiates a dialogue with the relevant authorities.

4. The existence of various tools and methods of competition authority to intervene and act to secure certain level of competition seems to have the more important role in some sectors than in others. The healthcare sector belongs to such segment mainly due to its characteristics, widespread regulation and the amount of public resources dedicated to this segment.

5. The role of the AMO to intervene using standard competition tools in the healthcare sector is limited to certain extent regarding mainly the healthcare insurance providers.

6. In Slovakia, there is a system of more healthcare insurance companies and people can choose once per year to change current healthcare insurance provider. One of these providers is a state-owned company (the biggest one), two others are privately owned. Based on the claim of one of the insurance companies on the state aid issue, the EU institutions have dealt with the question if the healthcare insurance providers in Slovak Republic could be considered as undertakings in the sense of competition law. After years of investigation the ECJ in its judgment no. C-262/18P and C-271/18P (hereinafter "judgment") decided that the healthcare insurance system in Slovakia is based on solidarity and that the healthcare insurance companies do not have sufficient room to compete for their clients as almost all aspects are regulated (they could provide individual benefits only to certain extent and all the rest scope is uniformly paid from the public funds made from healthcare insurance). As a result, they are not undertaking according to competition law.

7. This judgement had a decisive influence on the possibility of AMO to intervene in cases of possible mergers between healthcare insurance companies as well as to act against certain practices of healthcare insurance companies that could be normally investigated using standard competition tools. Since the healthcare insurance companies are not considered as undertakings, any action using tools of antitrust/merger investigations is excluded.

8. The judgment had also the important influence on how to assess the cases including healthcare providers that act in the different level of vertical chain, particularly those segments of healthcare, that are almost exclusively paid from the funds of healthcare insurance companies (mainly on patient ant outpatient care).

9. This issue was challenging the more that there is strong vertical integration along the whole chain – the owner of one of the health insurance providers also owns the broadest (or second broadest) privately owned chain of hospitals in Slovakia, as well as chain of outpatient cares, medical transport services, medical laboratories, the biggest chain of pharmacies and one of pharmaceutical distributors.

10. Since the judgment the AMO assessed several mergers mainly from the segment of hospitals (hospitals also usually provide also other mentioned services) by which this vertically integrated owner of healthcare insurance company acquired additional hospitals. The challenge was if and how to consider the vertical integration, that is the fact that the acquirer of hospital is at the same time the owner of healthcare insurance company – even if such company is not considered as undertaking. In the end the AMO considered the existence of such vertical integration as competitive advantage against its competitor in the segment of hospitals (and other relevant types of healthcare services). However, any "beneficial treatment" from the own healthcare insurance company has not been proven yet. The other way round the negative impact of merger towards using public sources that are divided via healthcare insurance companies was proven.

- Example[1]

11. *The acquirer was private equity company having broad portfolio of activities – owner of health-insurance company, hospitals, outpatient service providers, pharmacies, medical transport services etc. The acquirer was gradually building its presence in healthcare segment by individual acquisitions of regional hospitals or other types of healthcare services. In this merger, the acquirer bought one regional hospital and relating outpatient care, together with other related services belonging to target such as medical transport service executed in the region. When assessing the effects of the merger, the AMO found out, that the position of the acquirer in the market for providing medical transport services has significantly increased since last time assessment was made by the AMO (this was due to several acquisitions of medical service providers made consecutively and that such acquisitions had not met notification thresholds).*

12. The AMO has been investigating the effects of the economic advantage stemming from ownership of health insurance company in relation to the control of the acquirer over the portfolio of activities in healthcare sector together and in relation to individual types of activities (hospital care, outpatient care, medical transportation service etc. individually) calculating the proportion of payments for the specific segment of care paid by insurance companies to individual provider. Both scenarios were under investigation, this means whether the health insurance company of the acquirer could exclude or restrict competition in relation to competing health care providers and whether the healthcare providers owned by acquirer could require more advantageous conditions from the health insurance companies (in such a way that other health care providers could be put into competitive disadvantage). The initial threshold was 10% of expenses given by individual healthcare insurance companies to the network of providers owned by acquirer (and divided according to different types of care). The findings in the market for providing medical transport services was that the position of the acquirer reached the critical point at the market for

[1] Decision of the AMO no. 162/2017/OK-2017/FH/3/1/008 from March 1, 2017, https://www.antimon.gov.sk/4809-en/mergers-amo-sr-approved-of-group-penta-taking-control-over-topolcany-hospital-under-conditions/?csrt=13660693474715752228

buying of such services by health insurance companies. At the same time, it was not for sure that this critical point was reached by this merger or even earlier by previous serial acquisitions. The conclusion of the AMO was that this acquisition further increased this position of the acquirer. However, the remedy was imposed only regarding specific medical transport service that was part of the target (carve out remedy with subsequent acquisition by the competitor) together with behavioural remedy of not to entering that particular regional market imposed on specific time period.

13. Further challenge when applying standard competitive tools in healthcare segment came with the massive re-construction of on patient care in Slovakia, so called "Optimisation of hospital network". The main goal of such reform was to create optimised network of categorised hospitals ensuring higher quality of provided healthcare for patients by creating also the pressure on the hospitals to continually improve. According to this law, in 2024 hospitals were categorised in five categories, each with defined boundaries containing the scope of services they can provide. Level 1 for example provides only basic services mostly at local level (for example long term community care) and level 5 offering more complex and/or specific services for the whole country. The scope of each category was based on multiple criteria (the catchment area, the minimum number of treatments and expected demand). Also quality indicators and personal and technical requirements were defined for every category to guarantee the best quality. The hospitals can then ask for the revision of their categorisation once per year or ask for providing some additional types of care from higher category. As 2024 was the first year of the implementation of the reform and only in summer 2025 the hospitals started to ask for re-categorisation, the system is still rather new and categorisation not definitive. The whole process is very demanding and complex.

14. The AMO needs to assess mergers of healthcare providers in this new and changing environment. This caused on the one side new approach to the migration of patient's data analyses (as the types of care were completely re-built and re-grouped to other systematic categories).

15. On the other hand, the question of the role of AMO came with such a reform – on whether there is room for considering revision in approach how to use competition tools. More specifically the question was if the hospitals in Slovakia still compete and what are the basic parameters of competition. Nowadays there are various opinion relating this topic. Although all arguments have some relevancy, it should be noted that from the data there is still visible rather strong migration of patients between hospitals out of their catchment areas, in the elective care the patients have complete freedom of choice of the hospital. Naturally the hospitals are motivated to seek to provide the more treatment to obtain more payments, as the higher quantity of treatment may mean the possibility of re-categorisation of the hospital to higher category (where the payment for the same type of treatment is higher). However, the debate on this topic is currently still ongoing.

2. Standard Competitive Assessment in the Sector

16. Beyond this dispute, The AMO standardly intervenes through antitrust investigation or merger assessment in other segments of healthcare in which regulation is not present or does not play such a crucial role as in the case of healthcare insurance or on patient care. In such cases mainly classic theories of harm occurs. From the past practice we can find several cases for example of investigation of cartels among medical laboratories, mergers between laboratories or pharmacies.

17. However, the question is if the healthcare segment should be approached differently when it comes to the assessment of individual cases. This can bring several challenges.

18. As there are more examples from the mergers practice, the following concerns primarily the merger assessment.

19. Firstly, especially in case of roll up acquisitions of pharmacies, but also in other healthcare segments the challenge is especially on how to assess usually small increment made by the specific merger and if and how to take into account all increments from the other previous acquisitions that often had not met notification criteria.

20. By the law the AMO must look at each single transaction as standalone and link the possible competition risks only to the specific single transaction. It is challenging to evaluate, that the (often negligible) increment to the position of the undertakings concerned brought by the merger is that one decisive to conclude that there is anticompetitive harm. However, to certain extent it is possible to consider the overall strategy of the acquirers. If the AMO found the series of previous acquisitions in the same sector in past made by the same acquirer, this should be considered as one of the factors contributing to the conclusion that here is a constant strategy of the acquirer to significantly increase the market power. The argument could be useful especially in cases with small increment brought by the merger and may then contribute to the overall conclusion of competition risks or might be evaluated when considering appropriate remedy. Unless, if previous acquisitions are not public, the AMO has not reliable source on the existence of such serial acquisition's strategy.

21. The other considerations relate to the possibility to consider each small increment to the overall market position in a stricter way as in other sector. This could be reasoned also by the fact that each such increment at local level means also gradual achievement of buying power at buying markets, that are often nationwide, or gaining significant competition advantage in procurements, if the market is specific with procurement techniques.

22. To put in more generally, the considerations is on how to assess individual factors in each merger concerning healthcare segment and pharmaceuticals. If due to the specific features of such system, broad regulation within it and at the same time high public cost to this segment and whole sensitivity of products and services provided, the intervention of the competition authority should be stricter. The question stands if in this sector due to all its characteristics the assessments of individual factors should be more related to those overall characteristics (in a way stricter approach).

- Example

23. The recent case in which the AMO has approved the merger by which the vertically integrated player in health care sector Penta acquired the distributor of pharmaceuticals Medical GROUP SK[2]. The AMO established its approval mainly on the fact that event the Penta acted as the largest retail chain of pharmacies in Slovakia, it had had not any vertical integration towards pharmaceutical distributor. At the same time, the acquired company had only smaller market share, while the market of pharmaceuticals distribution is characteristic by the presence of several strong multinational players with strong market position. The acquired company has not had any specific exclusive rights to distribute certain specific products. In that scenario, the competition harm was not found as it seemed that pure existence of vertical integration on the smaller distributor is not sufficient to prove the existence of competition harm caused by the whole vertical chain.

[2] Decision no 2022/KOV/SKO/3/08 from 10.02.2022

24. The other challenge comes with the increasing necessity to establish solid theory of harm based on the decrease in quality in case of mergers between healthcare providers, mainly in that case, where price competition is not working. This may have more importance in the context of the hospital reform, while the hospitals of certain level are paid equally for the same treatment. As was mentioned above, also the indicators of quality of hospitals were set by the legislation, however up to date there are no exact methodologies set up on how to measure those quality indicators. Based on this, it will be up to the AMO when assessing individual cases to develop a solid theory of harm based on the decrease in quality and to prove it in each individual case. To this end, also the sector study that is in preparation (see below) could serve.

3. Other Activities of AMO in this Segment

25. There are also other tools that AMO uses to intervene in this sector.

26. First tool is the careful study of each legislative proposal (in las past years of the related to the reform of hospitals and following reforms in preparation). This results in regular contributions of AMO to such drafts with its comments within interministerial comments procedure.

- Example

27. *The draft act proposed certain criteria for creating a network of hospitals, and such criteria e.g. in the case of geographical accessibility or the number of insured persons in the hospital's area, were proposed very strictly. For example, in the case of tertiary care hospitals, if the geographical accessibility criterion is not met (a decrease of even 0.1% of insured persons), the hospital would not meet the inclusion in the network of hospitals at the tertiary care level. The AMO also has doubted the fulfilment of the travel distance criterion, in terms of currently existing hospitals that are likely to aspire to be included in this level. If, for example, one of such hospitals was in Bratislava, the travel time of up to 300 minutes may not be sufficient for insured persons from eastern Slovakia. The aim of the proposal was apparently not to move such highly qualified facilities from existing ones to other locations. The AMO proposed to set a more flexible system, for example to set minimal criteria in form of a range.*

28. Example

29. *The act proposed a new provision, according to which the health insurance company, if contractually agreed with the healthcare provider, is entitled to pay the provider a flat rate payment for the agreed period (capitation) for a person with whom the provider has a valid agreement, even though the provider did not have to provide the person with any healthcare or medical services during the agreed period of time. The AMO Arguments: inequality in bargaining power - Given the significant disparity in the bargaining power of health insurance companies compared to health care providers, it can be assumed that this will de facto be a decision of the health insurance companies; Risk of discrimination between providers - the provision may lead to unequal access of insurance companies to different providers; threat to the financial stability of providers - if the reimbursement is dependent on the agreement, some providers may lose capitation, which may cause them to leave the public health insurance system; change of the system without sufficient justification.*

30. At the same time, the AMO sees the overall changed situation at the level of hospitals markets, open questions in this connection, the reforms which are in preparatory phase and changing environment due to the gradual introducing of DRG payments in the

healthcare system. Due to such changing conditions the AMO understands the necessity to obtain further in-depth information to analyse the whole sector from competition point of view (or critical part of it) to be able to intervene in individual merger and antitrust cases with the best knowledge of the segment, effectively and in timely manner.

4. Pharmaceutical Vertical Chain

31. The AMO has not had lot practical experience with the interventions in the segment of pharmaceuticals producers and medical tools producers and/or its distribution. The almost only experience in this field related to the investigation of classic public procurement cases regarding procurement of medical devices to hospitals.

32. On the other side the AMO has investigated several cases of mergers by which vertically integrated company acquired either pharmaceutical's distributor (see example above) or chain of pharmacies/pharmacy.

- Example

33. *In 2023 in one of few cases in which had the AMO competence to assess such a merger[3] the acquirer was Penta group with largest chain of pharmacies across Slovakia. The acquirer aimed to buy a chain of pharmacies with local overlaps with its current activities in several areas. The initial assessment has shown several problematic areas and competition risk aiming at loss of competitive pressure due to horizontal overlaps at local level. After communicating this conclusion to the acquirer, he decided to carve out problematic pharmacies from the transaction itself (these remained to be active in the market and controlled by the original seller). However, the competition risk of subsequent acquisitions falling out of merger assessment remained. With the aim to limit such subsequent serial acquisitions in problematic areas, the AMO approved the transaction (without those pharmacies carved out before closing the deal) only with the additional remedy suggested by acquirer. The remedy was behavioural one and consisted in obligation that acquirer would not acquire back these pharmacies in identified problematic areas for certain period.*

34. The AMO sees the enforcement gap in this sector as lot of mergers are not caught by actual notification criteria and are not exposed to merger control. The result of this scenario is the increased consolidation happening at various level of pharmaceuticals chain, especially at the retail level of pharmacies. The Slovak Republic does not have any limitation on the ownership of pharmacies (such as some countries do) nor is regulated the possibility to own pharmacies as vertically integrated company. At the same time this sector is specific with the existence of local markets and smaller turnover of individual pharmacies that is the turnover cap necessary for notification.

35. At the same time the AMO has the power of ex ante assessment of mergers that meet determined notification criteria only. Otherwise, it does not have any direct competence based on the law to interfere in case of small acquisition, even if this forms a set of several serial acquisition.

36. In this connection the AMO has made several attempts to introduce an alternative notification criterion to catch also problematic transaction that do not meet notification

[3] Due to the notification criteria see below.

criteria[4]. Last formal attempt was made when adopting the new Act on Protection of Competition in 2021. The part of the proposal was the new competence of the AMO to request notification in certain cases upon its preliminary evaluation of the possibility of significant lessening of competition. The competence had to be limited to certain time after implementation of the merger. Finally, due to massive objections the Act has been approved without this correction notification mechanism.

37. Nowadays with the increasing number of different jurisdictions adopting various alternatives to fill in the enforcement gap, the AMO again tries to find out the way on how to approach to this enforcement gap in a most effective way. Seeking this goal this year the AMO prepared the first version of possible draft of legislative amendment with call in option and with various open questions. This draft was presented to the competition experts at official workshop this September and subsequently the public consultation was launched with the invitation to get feedback to the draft and proposals to improve the draft. The feedback is expected till the end of December 2025, subsequently the AMO is going to analyse all answers and prepare the more acceptable version of possible change in notification criteria.

38. To sum up, there are some possibilities how to improve the competition enforcement in this field.

39. First, the legislative change about the merger notification criteria based solely on turnover could be one way on how to address the existing enforcement gap and to control mergers that potentially cause competition problem in this sector.

40. Also, only the in-depth analysis and the practice shows if legal substantive test allows for stricter approach to assess small increments made by individual transactions and maybe consideration on the scope of remedy set up in connection with such approach (to ask for further notifications of any acquisitions as a part of remedy deal).

41. The overall knowledge on the sector obtained through the sector study would be also helpful to set up appropriate parameters and indicators of possible competitive harm based on qualitative criteria.

[4] This was not aimed only at healthcare/pharmacy sector, the idea was broader to catch potentially problematic acquisition that do not fall within standard notification mechanism due to various reasons (start ups, killing acquisitions, local markets, low turnover segments).