Organisation for Economic Co-operation and Development

DAF/COMP/WD(2017)77

Unclassified

English - Or. English

23 November 2017

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Hearing on Common Ownership by institutional investors and its impact on competition - Note by Slovenia

6 December 2017

This document reproduces a written contribution from Slovenia submitted for Item 6 of the 128th OECD Competition committee meeting on 5-6 December 2017.

More documents related to this discussion can be found at www.oecd.org/daf/competition/common-ownership-and-its-impact-on-competition.htm

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JT03423514

Slovenia

1. Institutional investors and their degree of common ownership

1. Slovenian market is dominated by domestic investors, which account for the majority of value of investments in the market; on top of that, there are several international investors present.

2. The major domestic institutional investors are government pension and state's capital asset management funds (SSH[1] and KAD), which are a sort of sovereign wealth funds. The situation in Slovenia may be quite specific in comparison with other countries because the state holds stakes in most undertakings present on the market. There are basically two large asset management funds, entirely owned by the state, whose role is to manage state's capital stakes in accordance with State's capital assets strategy.

3. The pension fund KAD together with its daughter company Modra zavarovalnica, which manages almost exclusively public employees' second pillar pension scheme is responsible for the management of compulsory and supplementary pension schemes in Slovenia.

4. Slovenian Sovereign Holding (SSH) is a fully state-owned company, which has the largest portfolio of state capital assets in Slovenia and on top of that manages the state's ownership interests in over 98 companies. Its portfolio covers a broad spectrum of industries in Slovenia of which the largest share represents the following sectors: energy, finance, transport and infrastructure.

5. The classification of state assets into individual types of assets (portfolio investments, important holdings and strategic assets) determines the development policies of the Republic of Slovenia in the role of a shareholder of companies together with individual strategic objectives pursued by the Republic of Slovenia concerning each asset classified as strategic asset.

6. As regarding the managing of capital assets, goals differ according to the classification of a company and state assets in strategic, important or portfolio assets. Fundamental goals pursued by SSH in managing state capital assets may be of economic nature only, of national and strategic nature or a combination of both types of goals may be pursued.

7. One of the most important (additional) goals of SSH operations in regard to the management of capital assets is to achieve such level of corporate governance which would contribute to the attainment of better performance results of companies in which SSH and the Republic of Slovenia hold important stakes. Within the scope of asset management, SSH carries out among others also the following duties and activities: it participates at General Meetings exercising voting rights and accreditation, nomination and selection of candidates for members of Supervisory Boards.

[1] SSH is the Slovenian Sovereign Holding, KAD is a fully state owned pension fund, Kapitalska druzba.

8. The basic activity of KAD is the provision of additional funds for pension and disability insurance through the management of its own assets and the management of the Compulsory Supplementary Pension Insurance Fund.

9. In the meaning of the competition law SSH and KAD are part of a single economic unit. The direct or indirect extent of government ownership and control in different companies is a sum of the government investments and the investments of the two largest state funds in the same companies.

10. Together via their ownership interests, they own at least a blocking minority in many undertakings on the market; sometimes these undertakings are active in the same relevant markets.

11. In industries where there are significant common minority shareholdings or cross-shareholdings among the market participants, the standard competition tools for assessment of the concentration levels post-merger cannot be adequate anymore.

12. Instead, other qualitative measures should be applied. Furthermore, the Slovenian Competition Protection Agency (CPA) stresses the importance of the qualitative evidence together with the quantitative evidence in the analysis of the impacts of the minority shareholding merger cases as it has done in its recent merger case.

2. Benefits and harm of common ownership by institutional investors

13. The CPA can examine minority shareholdings in the case that it existed prior to the transaction, i.e. the notifying parties already had a minority share in another undertaking (a competitor) of either one or the other undertaking involved in the transaction. The merger legislation in Slovenia covers only transactions, which cause *de iure* or *de facto* change of control over a target company. The legislation does not give to the CPA the competence to review the minority shareholding. However, the assessment of minority shareholding can be more effectively done under the *ex-ante* principle that under *ex post*, since under the antitrust law possible anticompetitive unilateral effects cannot be assessed.

14. The minority share of a given undertaking in another company or in many undertakings that are competitors on one or more relevant markets may have adverse effects on effective competition on the market, despite the fact that the share in the capital in the target firm does not permit to the shareholder the exercise of control over it.

15. The CPA agrees that even a passive minority share, in which an undertaking does not have a right to appoint its representative in the target's company's bodies, may be problematic in terms of access to sensitive business information.

16. In the case of an active minority shareholding, which is related to the membership of the management or supervisory board of the target company, a high degree of transparency of business information can be achieved, since it enables the access to the information about the competitor's pricing policy, business strategy, other commercially sensitive information, all of which can result in an increased possibility and the likelihood of corporate coordination or the issue of the independence of business decisions in both companies.

17. The unilateral and coordinated effects depends on the share of target's profit the acquirer is entitled to given its share of equity in the target and on its ability to influence

the behaviour of the target and in particular its strategic decisions. The higher the minority share and with it the financial interest, the higher harm can be caused on the effective competition.

18. As already mentioned, Slovenian Competition Protection Agency (CPA) has recently dealt with a merger case involving the problem of common minority shareholding existence. The parties to the transaction had pre-existing structural links to competitors of the target company.

19. The notified concentration constituted the acquisition of the joint control of a holding company Sava by the above mentioned state' investments funds SSH and KAD and by an international investment fund, York, specializing in distressed investments. York acquired the target's debt.

20. The problems of minority shareholding and indirect interlocking boards of directors arise due to the fact that the parties, especially SSH and in minor part also KAD and York, have pre-existed minority interests in many competitors of the target's daughter company, Sava Turizem, which is the biggest provider of hotel accommodation services in Slovenia spas. These minority shareholdings range from 16 % to 66 %, but indeed almost all those shares are active shareholdings that give to SSH and KAD additional rights, such as at least a representative in supervisory boards. Often the duties of members of the supervisory boards, in which the parties have their representatives, include also the determination or the approval of the business policy of the targets, the appointment of the managing directors, the approval of the business plans including major investments and financial plans etc. These rights in the opinion of the CPA surpass the usual veto rights, which protect the minority shareholders and give to the owners the possibility to actively influence the strategic behaviour of the competitors. Furthermore, due to the low attendance rates at the shareholdings meetings of some targets companies these minority shareholdings de facto represent a majority in the voting rates and thus give to their owners the possibility to exercise control.

21. Furthermore, indirect interlocking directorates are present in the above-mentioned merger case. Members of the management and supervisory boards of the SSH and KAD or their employees are at the same time also present in the supervisory bodies of the competing companies of company Sava Turizem. In this regards the acquirers have the access to the competitors' business information, which can cause anticompetitive coordination effects.

3. Potential responses to competition problems of common ownership

22. In cases where the acquisition of a minority shareholding does not lead to control, the CPA is not authorised to investigate it. Its effect on the competition can be assessed only when it receives a merger that involves a pre-existing minority shareholding in a competitor. At the same time, the interest of a competition authority is to intervene only against those acquisitions of minority shareholdings that raise competition concerns.

23. From the competition point of view, it would be helpful if a competition authority would have a competence to assess transactions of minority shareholding, which would create structural links between competitors. At the same time, the concept of competitors should not require a detailed antitrust analysis of the relevant product and geographic markets, but it should rather mean companies that are active in the same sectors and in the same geographic markets.

24. Since the theories of harm associated with the acquisitions of minority shareholdings are similar to those arising in the acquisition of control (horizontal and vertical), the application of the significant impediment of effective competition that is used in merger control should be more appropriate that the tests applied in 101 and 102 TFEU.

25. Finally, in the case that ex ante anticompetitive effects have been identified remedies can be adopted to eliminate the competition concerns. Although structural remedies better address the concerns caused by minority shareholding, behaviour remedies can also be appropriate in some cases.

26. Besides competition remedies there could be some also non-competition remedies or limitations for the institutional investors in order to minimize the competition concerns when investing in concentration markets. These limitations can provide that investors invest only in one competing company and thus that investments are diversified across all industries.

27. Institutional investors could have an option to refrain from exercising their voting rights when they decide to make horizontal investments, but this option for many reasons can be less desirable and efficient than refraining from making investments in competing firms.