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Suspensory Effects of Merger Notifications and Gun Jumping - Note by the Slovak Republic

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More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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Slovak Republic

1. Legal Background

1. The Antimonopoly Office of the Slovak Republic (hereinafter as "AMO SR") is empowered to investigate and prosecute any failures to notify mergers and gun jumping cases.

2. The legal background has been set up in the Act No. 136/2001 Coll. on the Protection of Competition (hereinafter as "the Act").

3. Article 10 para. 7 of the Act provides the obligation to notify any merger falling under jurisdiction before its implementation. This means that the Act does not set any period within which a merger has to be notified, the only milestone is its implementation. The Act also provides the possibility to notify the intention of any merger.

4. Article 10 para. 11 of the Act provides the general suspension from any implementation of notifiable merger before the merger decision issued by the AMO SR becomes legally effective. There are standard exemptions connected with offers in public tenders and with transaction at securities market.

5. The AMO SR is also empowered to grant an exemption from standstill obligation upon request whereby a requesting undertaking has to fulfil certain requirements (to show serious grounds, to limit the proposal only on inevitable acts, etc.). The decision on exemption must be issued within 20 working days from the proposal, details of procedure and criteria for granting an exemption are set in a soft law (specific Guidelines[1] of the AMO SR). This provision of the Act and related Guidelines became effective on 2014 July the 1st. The undertakings have not used this provision yet, the main reason is according to undertakings opinion the length of the period set for an assessment (20 working days), whereby the first phase in merger assessment takes 25 working days.

6. The sanctions for breach of the notification duty/the standstill obligation are also set in the Act (further see section below).

2. The policy and the approach to Gun Jumping/Failure to Notify

7. Abovementioned provisions mean that the AMO SR gets strong legal background with regard to duties of undertakings connected with notifiable mergers. The AMO SR is the only responsible body to monitor, investigate and prosecute possible infringements of these obligations.

8. In general the effort of AMO SR towards investigating of failure to notify/gun jumping has had an increasing drift in recent years. There are several reasons for that. One is the permanent struggle to increase awareness of undertakings at stake with merger control provisions. The second one concerns individual prevention issue, as the AMO SR has met several times with blatant violations of merger control provisions also in cases

[1] https://www.antimon.gov.sk/data/files/398_nove-usmernenie-protimonopolneho-uradu-slovenskej-republiky-o-podrobnostiach-udelenia-vynimky-zo-zakazu-implementacie-koncentracie-16092014.pdf

where the companies could get merger approval within a very short time. The third reason is more practical - the change of turnover criteria in 2012 toward more efficient control with local nexus oriented thresholds substantially reduced the number of notification and at the same time enabled AMO SR to focus more on ex officio investigation of infringement of merger provisions.

2.1. Prioritisation

9. However, according to the AMO SR experience it is not possible mainly due to capacity restraints to deal with all suspicions on gun jumping/failure to notify. As a result we have to prioritise cases.

10. There is no strict policy on prioritisation in this area. Nevertheless, in practice we try to intervene in all cases we can either conclude very quickly or there is a high need to prosecute the particular infringement from policy perspective – individual and general prevention.

11. Firstly, the AMO SR will intervene in cases when merger provisions are infringed by "negligence", the undertakings concerned come voluntarily with an issue of late notification and/or partial implementation of a merger (usually it is declared to the AMO SR within pre-notification talks or in the notification of concentration). Those cases are more straightforward so the AMO SR does not need to invest much capacity to it. Besides these simple cases, the AMO SR tries to investigate any potential infringement, in which it seems that the particular merger case would be a second phase assessment. In addition during recent years the AMO SR concentrated its effort also on apparent and flagrant infringements of merger provisions. In such scenario the particular merger is hidden by its participants and intentionally not notified (mainly hidden due to other than competition reasons).

2.2. Sources of information and tools used within investigation

12. The nature of the first indication about infringement varies from case to case. The AMO SR monitors important media, gets information from the market (customers, suppliers or competitors) and sometimes gets an indication of gun jumping from transaction documents or internal documents of the parties.

13. It is not much of a problem to find out evidence about an infringement regarding failure to notify/gun jumping when the parties committed it by negligence. There is usually enough information in media and other public sources (for example business registry) about the transaction in such a case and the undertakings concerned are usually more cooperative as it can result in a positive outcome when considering the amount of fine.

14. More difficult scenario relates to those hidden mergers (e.g. one undertaking is the formal acquirer of control over certain target and real acquirer stays hidden). The AMO SR obtains broad range of powers to investigate failure to notify/gun jumping cases. According to our experience the internal documents made by undertakings can be a very useful tool. There is however a shortage in obtaining such internal documents as the undertakings concerned are often not willing to provide any internal documents or make a pre-selection before bringing documents upon request. The AMO SR can also use standard tools as a market research and all other investigative tools similar as in antitrust investigation, even a dawn raid mechanism as the strongest tool to obtain evidence.

15. The AMO SR has made a dawn raid three times up to now in connection with merger infringements during last four years. In one case (see examples below) the case has been concluded upon evidence obtained during dawn raid (mainly email communication). Observing this experience realizing dawn raid can be helpful in cases in which the merger has not been notified for a long time and all indications show intentional infringement of merger provisions, so we can't much rely on cooperation from undertakings concerned using less invasive tools .

16. Recently we have conducted a dawn raid in one case of a suspicion of tricky transactions with the aim to avoid merger control as there was some probability that merger assessment would lead to prohibition. The case is currently under investigation.

2.3. Fining policy and other results of infringement decisions

17. The consequence of finding an infringement of standstill obligation/failure to notify is the fine. If there is a conclusion of an infringement, the AMO SR does not have any discretion to impose a fine or not. The maximum level of fine is 10 % of undertakings turnover for the precedent year (for each of the infringements).

18. When setting the level of fine the AMO SR takes into account the gravity of the infringement and in case of gun jumping offence also the duration of the infringement. As to the gravity, by its nature both offences are serious infringements. It stems from a basic principle that a precondition for effective merger control preventing a permanent and irreparable distortion of competition is that the mergers are notified to AMO SR before implementation. The purpose is to prevent the implementation of the rights and obligations arising at a time when it is not clear what its impact on competition is.

19. As to the gravity of particular infringement, gun jumping as well as failure to notify, the AMO SR may take into account the result of the merger assessment itself (if it is possible and the merger assessment is done before an infringement procedure), either as mitigation or as an aggravating circumstance. The other common mitigating circumstance the AMO SR considers when setting a fine is a voluntary notification (the undertakings notify without the AMO SR having knowledge of the infringement unless they admit it or the early notification after starting an infringement procedure). In last practice the AMO SR also has taken into account other specific features of those infringements such as not clear date of duty of notification due to the consecutive purchase of assets (mitigating circumstance) or the fact that the undertaking belonged to multinational economic group with sufficient knowledge of competition rules (deterrence).

20. As from 2014, July the 1st the AMO SR has the possibility to settle the fine for infringements concerning merger control (gun jumping and failure to notify). The maximum level of reduction is 50 % of the envisaged fine. This instrument has been used widely, out of four cases held in last four years, three ended with settled fine.

21. If a decision finds a failure to notify, it should force the undertaking to notify the merger immediately. The AMO SR is not empowered to start any ex officio assessment of the merger, the procedure starts only upon a notification. The fine can be imposed repeatedly unless the merger is notified. As the infringement of failure to notify is bound with early implementation ("…the undertaking has to notify before it starts to implement a merger…"), the decision usually covers both infringements.

22. The Act does not speak pronouncedly that the acts constituting breach of the standstill obligation are void. But it can be challenged in private dispute before courts.

23. Besides sanctioning the AMO SR has the power to impose the duty to abstain from further implementation and the duty to annul unlawful state. We have not had any problematic merger in connection with infringement of merger rules yet. In cases of non problematic mergers the AMO SR would probably use this competence only rarely. The AMO SR would use this competence when there is a probability of worsening of competition condition, it means when the merger at first sight could lead to prohibition. In some cases when a longer time has passed from the merger creation and there was a full implementation, imposing such a duty might be a difficult task. Within this competence, the AMO SR could also impose a provisional duty of, for example, management of target by independent trustee for a period of merger assessment.

3. Examples

24. All the examples of infringements provided below had certain specific features the AMO SR considers important to mention.

3.1. Retail chain case – consecutive purchase of assets with market presence

25. In 2015 the AMO SR issued the decision by which it imposed a fine to one retail chain provider for violation of duty to notify/standstill obligation.

26. The investigation started with the anonymous motion that all shops of one regional retail chain provider have been substituted by the brand of the other retail chain provider within few months. The target, who was a retail chain provider, had only local presence in certain parts of the country. The presence of the acquirer was more of regional nature. This infringement has been found after longer period (almost five years of a full implementation of merger) and no any general purchase agreement existed (or was not found). The evidence was only individual invoices on assets concerning individual shops together with lease agreements on individual shops. Together with the fact that the acquirer continuously followed with target activity this mix of evidence enabled the AMO SR to establish that there was a merger between retail chains.

27. The defence from the acquirer was based on the argument that only assets without market presence had been bought. However, it was clear from the documents (invoices) that the assets were of such a nature that it represented assets with market presence (de facto almost whole business of target was purchased through partial purchases). The acquirer was able to open its shops with the transferred assets in the premises of the target company and using the employees of the target company.

28. The AMO SR concluded that the acquirer did not fulfil the obligation to notify the merger which was subject to control by the AMO SR and grounded in acquisition of exclusive control over the part of the target. Merger emerged in the end of 2010 by transfer of assets relating to retail and wholesale activities of target undertaking based on oral sales contract.

29. The AMO SR also proved that the acquirer exercised the rights and obligations resulting from a concentration before the AMO SR issued a valid decision, namely by exercising the proper and continuous control over this part of the enterprise since the end of 2010 till 2015.

30. Violation of the undertaking´s obligation to notify concentration in this case represented the serious form of Act infringement by its nature but less serious in the view

of its real impact on the market (regarding the fact that the AMO SR issued a decision approving the subjected merger as there was almost no overlap between catchment areas of shops). The AMO SR also regarded the fact that it was less standard form of concentration, assets have been transferred gradually within certain time and it was hard to determine the specific time of establishment of concentration. In setting the fine for breach of standstill obligation in this case the AMO SR considered the fact that the acquirer has been using the transferred assets from the beginning for its business activity, thus it was not only the exercise of partial acts but the proper and continuous control over this part of the target. On the other hand, assessing the seriousness of this misconduct the AMO SR took into account that it issued a decision approving the subjected concentration, since it did not specify negative impacts on market as a result of this concentration. In this case the violation of the Act lasted almost 5 years. Assessing the aforementioned factors the AMO SR imposed a fine totalling approx. EUR 80 000 for both violations. Based on request the AMO SR held a discussion on settlement during the administrative proceedings and the acquirer admitted both its participation in infringement as well as liability for it. Based on these facts the settlement was accepted and the AMO SR reduced a fine by 50 %. Final amount of the imposed fine following the settlement was approx. EUR 40 000.

3.2. Dispute on the time in which duty to notify and the gun jumping arose

31. Early this year the AMO SR issued a decision by which imposed a fine in the amount of EUR 18 000 on the undertaking active in energy sector for the failure to notify and breach of standstill obligation with regard to acquiring of control over the supplier of industrial boilers.

32. The acquirer has had before the merger very small minority shares in the target without controlling rights. There was a decision on capital increase in the target which was financed by the acquirer and by such way he became the major shareholder of the target with controlling rights. The AMO SR concluded that he acquired shareholder's rights in the target by the day of the registration of capital increase in the business register.

33. Initially the acquirer argued on the date when the duty of notification arose. He argued that only the registration of his shares at the securities depository is decisive for the moment of the emergence of merger and second he brought forward the agreement with current minority shareholder enabling to the minority shareholder to decide on strategic decisions for certain time (unless the acquirer would buy the rest of shares). Accordingly it argued that he had not implied decisive influence. However the mere fact that the shares were already owned by the acquirer together with the fact that the acquirer needed to be present at certain meetings of the target bodies so there was free and uncontrolled access of the acquirer to all strategic information of the target was sufficient to prove the failure to notify and gun jumping.

34. In imposing the fine, the AMO SR came out mainly from the gravity and duration of the infringement (in the case of the implementation of the merger in question). In the context of gravity, among other things, it took into account the fact that the AMO SR ultimately issued a decision approving the merger and, in the case of a breach of the standstill obligation it took into account the extent of acts committed by acquirer (there was no strategic decision adopted).

3.3. Dawn raid based case and the highest fines yet

35. The very recent case has concerned the change from sole to joint control over the target company active as retail chain. The decision has not became valid yet[2].There are several important issues to emphasise.

36. Firstly the length of the investigation, procedure and tools used. The first notion about infringement of merger provisions came from public sources via monitoring of media. This information connected the acquisition of the target with particular company (hereinafter as "real acquirer") different to the official acquirer of shares. After that the AMO SR was searching for additional information on the acquisition. Several requests were sent to the target company as well as to the official owner of shares, without much success. The AMO SR made also market research among competitors with the result partly supporting the suspicion of false acquisition. Some personal and proprietary relationship were find in public sources. Based on the mix of suspicions we conducted an unannounced inspection in business premises of two undertakings in 2015. The inspection was carried out upon reasonable suspicion that the obligation to notify merger was infringed and that the standstill obligation was breached. During the dawn raid the AMO SR seized huge amount of emails and other documents. Further search and handling of documents took almost one year. The AMO SR started an official procedure on infringement on March 2017, which then took year and a half.

37. Second important feature of the case was the character of evidence on which we based the conclusion on infringement. Emails and other documents found during the dawn raid showed the intensive interaction between the undertakings concerned including the real acquirer. There were several groups of evidence concerning financial background of the acquisition, personal relationships, information exchange about everyday business and about strategic issues and some synergy issues of the target with the group of companies owned by real acquirer. Based on such mix of evidence the AMO SR found that the official acquirer was only a formal one and the joint control over target was acquired by real acquirer.

38. As the acquisition consisted in change from sole to joint control, also the previously solely controlled parent was held responsible for failure to notify and gun jumping. Different position of both undertakings were taken into account when considering the level of fine. With regard to the fine imposed to previously solely controlling parent the AMO SR took into account the fact that at the beginning of the dispute he could not know for sure which company/natural person would be the real acquirer and so if the notifiable merger would arose. Besides that, the fine against him was reduced to 10% legal maximum. Regarding the fine imposed to the real acquirer the AMO SR considered the deterrence effect, as the acquirer is in the lead of an economic group with sufficient knowledge on competition rules. The AMO SR presented its finding of infringements and on possible amounts of fines in the statement of objection to both undertakings. After statement of objection both undertakings admitted infringements as well as liability for it. Based on these facts the settlement was accepted and the AMO SR reduced fines by 50 %. Final amount of the imposed fine following the settlement was EUR 600 000 for the real acquirer and EUR 7 000 for the other jointly controlling undertaking (former solely controlling undertaking).

[2] Information can be amended during meeting

4. Conclusion

39. The AMO SR sees several challenges for its future practice. We have not had many opportunities to deal with pure exchange of information between undertakings before merger/during merger assessment. We have covered this issue partially in the abovementioned cases in that sense, that exchange of information has been a part of evidence of gun jumping infringement. However, in these examples the undertakings have had a full approach to all information about target.

40. The question to what extent the exchange of information falls within gun jumping and what is allowed, has not been solved in a complex way yet, just on case by case if such question has been raised during pre-notification consultation.

41. Several trends and conclusions can be drawn from last investigations.

42. First is the recent shift of AMO SR toward more intense control and investigation of possible infringement in order to secure better prevention. The gradual increase of fines is also a movement, with huge fines imposed in case of blatant violation of merger provisions.

43. Using of dawn raids may contribute to the effective enforcement of merger control.

44. The possibility to settle the amount of fine in combination with higher fines imposed serve as a strong incentive to admit the infringement and as a useful tool for effective application of competition rules.

45. The undertakings have several possibilities how to avoid gun jumping/failure to notify, among which also pre-notification talks play an important role. The AMO SR strongly recommends using the option of pre-notification consultation even focusing on only partial question. The AMO SR consults often only the question of jurisdiction. Pre-notification consultation is of informal nature, the procedure is covered by soft law only but the undertakings can get the official position of the AMO SR whether certain transaction is/is not a notifiable merger.[3]

[3] https://www.antimon.gov.sk/data/files/421_guidelines-of-the-antimonopoly-office-of-the-slovak-republic-on-the-pre-notification-contacts-in-the-procedure-of-merger-assessment.pdf