

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

Suspensory Effects of Merger Notifications and Gun Jumping - Note by Slovenia

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This document reproduces a written contribution from Slovenia submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

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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1. Gun jumping can effectively render merger control pointless and is thus prohibited by both EU and Slovenian national legislation. Due to the serious consequences that the finding of a breach of the legal obligation to notify a concentration may have, it is therefore very important for the National Competition Authority to properly assess the situation in which are merging entities, and to consider whether the obligation to notify the concentration occurred.

1. Legal provisions

2. The protection of competition in Slovenia is governed by the Prevention of Restriction of Competition Act (hereinafter: the Act) and the Slovenian Competition protection Agency (hereinafter: the Agency) is responsible for the implementation of the Act.

1.1. Deadlines for notification

3. Companies that are obliged to notify the concentration must pay attention to the fact that they do not miss the deadline for notification, since the concentration should be notified to the Agency before the start of its implementation, but no later than 30 days after the conclusion of the contract, the announcement of a public offer, the acquisition of a control or a possible call Agency if the companies do not reach the thresholds from the previous paragraph. The deadline begins with the first of these events, which means that the deadline for notification of the concentration with the occurrence of the concentration (the acquisition of a control) or before it (the conclusion of the contract, the announcement of the public bid) begins.

1.2. Notification and acquisition of control

4. For gun jumping, notification upon acquisition of control may be the most interesting. The acquisition of control can take place on a legal or factual basis, and the acquisition of control can be exclusive or common. At the same time, it must be borne in mind that the concentration or acquisition of control is already sufficient to exert a decisive influence. It is therefore important, that we know the types of control over companies.

1.2.1. Exclusive control

5. An exclusive control is acquired by a company that has the ability to exercise only a decisive influence over the company. This can happen if the company has the ability to determine strategic decisions of the company, which usually means that it holds the majority of voting rights, or if the company has the veto power to take strategic decisions, which means that it has a negative exclusive control, that allows the company to block the adoption of strategic decisions. It should be emphasized here that the acquisition of exclusive control in a newly established company does not constitute a concentration. The simplest and most common form of acquisition of control is the acquisition of most of the voting rights (over 50 %). In this case, the majority-owned company has the option of

making strategic decisions in the company, since it is usually common for companies to adopt strategic decisions. In this case, this is about gaining control on a legal basis.

6. An entity may acquire most of the voting rights also based on sales contract or after a successful takeover bid. This means that in this case there will be an event that is the basis for the start of the deadline for notification of the concentration already before the acquisition of the control.

7. Exclusive control can also be obtained on the basis of the acquisition of a minority interest, such as the right to appoint more than half of the members of the supervisory board or administration or special corporate governance rights and business policy determination. In some cases, the minority share may provide a negative control to the entity on a legal or factual basis, provided that it gives it the possibility to prevent the adoption of strategic decisions.

8. An entity with a minority interest can also be acquired exclusively by the control on an actual basis, provided that its minority interest with a high degree of probability ensures a stable majority in the taking of strategic decisions.

9. The Agency shall verify when the notifying entity obtains, based on the acquired interest, the right to decisively influence the adoption of strategic decisions in an undertaking on the basis of regulations, special rights, statutes or facts. Due to the need to analyse the preliminary situation and to anticipate future behaviour, it may be particularly difficult to determine the actual existence of exclusive control.

1.2.2. Joint control

10. The issue of gaining control is even more difficult in the case of obtaining joint control when two or more persons together have the possibility of exercising decisive influence. As a rule, this is a joint control, if several companies have the opportunity to prevent the adoption of strategic decisions, and they must actually reach an answer and participate in deciding on business decisions of the company.

11. The simplest form of joint control is given in the case of two companies with the same share in the joint venture or with the same rights (for example, the right to appoint an equal number of members of the supervisory and management bodies, the right of veto). In this case, no agreement can be reached without the cooperation of both companies. Joint control is also possible in the case of minority share. If the company with a minority share has special knowledge, experience, assets or other attributes that depend on the performance of the activities of the joint venture, therefore companies will need to cooperate to adopt any strategic decision. In addition, if several minority companies have additional rights that allow them to prevent the adoption of decisions that are essential to the business of a joint venture, they share a total negative control.

12. A joint control may also be acquired by minority shareholders who together have a majority of voting rights and exercise them jointly because of a legally binding agreement or on an actual basis.

13. The least clear, and thus the most unpredictable, is the possibility of obtaining joint control on an actual basis, which can only occur exceptionally. The Agency must prove strong joint interest of companies, which leads to the situation that they will not work towards each other. The possibility of creating such joint control is lower in a larger number of companies.

14. The determination of when the actual deadline for notifying the concentration on the basis of the acquisition of joint control begins to run, can therefore be a very demanding issue. In the case of joint control, however, the obligation to notify the concentration arises even if there is a change in the composition of the undertakings that carry out the joint control. It is essential for the emergence of joint control that these companies must reach an agreement on the adoption of strategic decisions, which means that the identity of the companies themselves is important.

2. Consequences of a breach of the notification obligation

15. If a company fails to notify a concentration that is subordinate to the provisions of the law, it may have a number of consequences.

16. The company (legal entity and sole proprietor) shall be fined up to 10 % of the annual turnover in the undertaking, participating in the concentration together with other companies in the group, both in the case that no concentration is notified to the Agency at all or if it is not notified in time. The Act prescribes a fine for responsible persons of legal entities and sole proprietors, which can range from 5.000 € to 30.000 €. The obligation to notify a concentration applies also to a natural person who manages at least one undertaking. Shareholders (natural persons) in controlled companies by them, must, when obtaining control in other companies, notify the concentration to the Agency. The fine in the case of an omission of this obligation may range from 3.000 € to 15.000 € per stakeholder.

3. Minor offences proceedings as an issue in Slovenia

17. Under Slovenian law, competition law fines are imposed in minor offences proceedings. Slovenian minor offences law provides for secondary responsibility of the legal persons, which is derived from the responsibility of the responsible natural persons, whereby the majority of undertakings in competition law cases are legal persons.

18. Let me point out that suspects in minor offences proceeding have quasi-criminal law protections, whereby protections afforded to suspects in minor offences proceedings may be different (higher) than in administrative proceedings.

19. In the experience of the Agency, breaches of the Act usually include acting in breach of both the notification requirement and the standstill obligation. Breaching the standstill obligation means acts such as appointing a director and/or voting at the general meeting of stakeholders. It seems that undertakings either follow the law fully or fully disregard it. As a result case-law as to what would constitute gun jumping is not nuanced. Further, gun jumping cases are not especially difficult from a legal analysis point of view. The majority of the work is on detection of non-notified concentrations.

20. Because the fines for gun jumping are imposed in minor offences proceedings and because of primary responsibility of natural persons, the Agency occasionally faces difficulties with regard to serving of documents abroad.

21. When serving documents in minor offences proceedings abroad, the serving Authority (such as our Agency) needs to show proof that the documents were served personally, whereby in case-law it is not certain that serving directly by post necessarily fulfils this condition.

22. The administrative proceedings law provides that persons abroad be served directly or through diplomatic channels, unless otherwise provided by a treaty. Such a treaty for Member States of the European Union is the Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, which significantly helps with serving.

23. Additionally, one problem that may be an issue while serving documents abroad is finding the addresses of natural persons. As a rule, addresses of legal persons are public and available in the register of companies. Finding the addresses of natural persons, on the other hand, may be more difficult although not impossible, nevertheless, it can be very time consuming.

4. Monitoring the markets and thus mergers

24. The Agency acquires information on concentrations and activities on the market in several ways.

25. Most frequently, the Agency obtains information from the concentration's notifying party itself; it obtains from the received documentation the information on the occurrence of the concentration, i.e. whether it is an intended or already valid concentration, and thus determines if the notification was in time by the law.

26. The second source of information is reports obtained by the Agency based on the Law on Acquisitions. In accordance with this Act, the acquirer must notify the Agency prior to the announcement of the takeover bid that it intends to provide such an offer (takeover intention). The acquirer also has to provide notice of the outcome of the takeover bid and evidence of the issued authorizations of the relevant bodies for the transfer of shares, and the Agency is informed by the securities market regulator in the event that the takeover bid is omitted. The acquirer who fails to perform the required information activities to the Agency is fined by the regulator of the securities market¹.

27. The third source of information is the media. On a daily basis, the Agency acquires clippings from all media in the Republic of Slovenia (TV, radio, print and online media), and in this way regularly monitors activities in the field of economy.

5. Ongoing case

28. In a recent ongoing case, the Agency was informed of a non-notified merger (by the merging parties more than a year after the merger). The conclusion that the parties notified too late was not difficult, however, we have had some challenges with serving the documents. The case has to be conducted in (at least) two jurisdictions; Slovenia where the merger should be notified, and in a different member state of the EU where the undertaking and the responsible natural persons work. As of now, it may not be excluded that natural persons acting within a third country (not a member state of EU) are also involved.

29. Because natural persons were acting outside of Slovenia, we had to establish their responsibility under the law of this jurisdiction. This took us some time, as we had to wait

¹ From 4.000 to 40.000 EUR.

to obtain a legal opinion on the relevant legal questions from the authorised body of the country. There are also time-consuming issues regarding serving, whereby the actual serving is not a problem in itself (remember that we can serve via the Convention), but we had some problems finding addresses of natural persons.

6. Future changes in Slovenian competition legislation

30. An amendment to the Act is now in the process, which may make fining easier. If the amendments will be passed fines shall be imposed in the administrative proceedings (thus not in minor offences proceedings). This change shall apply only to legal persons, however since we run the vast majority of our cases against legal persons, we do not see this as an important issue. The problem of serving personally abroad shall remain, however, not dealing with natural persons and finding their addresses should ease our work.