Organisation for Economic Co-operation and Development

DAF/COMP/WD(2022)39

Unclassified

English - Or. English

3 June 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Disentangling Consummated Mergers – Experiences and Challenges – Note by Slovak Republic

23 June 2022

This document reproduces a written contribution from Slovak Republic submitted for Item 6 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges.htm

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03496877

Slovak Republic

1. LEGAL FRAMEWORK

1.1. Ex ante notification system of merger control

1. The Antimonopoly Office of the Slovak Republic (hereinafter as "AMO" or as "Authority") is the independent central body of state administration of the Slovak Republic responsible for the protection of competition. Besides other competences, the AMO has the power of ex ante assessment of mergers that meet determined notification criteria. The legislation is to the great extent in line with the system of merger assessment as set up in the EU Merger Regulation.

2. Substantive changes with regard to the system of merger assessment and the notification system itself were enacted in Slovak competition law above all in 2011 (introduction of local nexus to the turnover notification criteria). The criteria determining whether a concentration is subject to control by the Authority were redefined with the goal to eliminate the mandatory notification of mergers without any impact on markets in Slovakia. The new Act on Protection of Competition (hereinafter as "the new Act") in 2021 brought the second substantive legislative change.[1] The new Act enacted the abolition of the separate notification criterion for joint ventures type of mergers. Such change aimed further on elimination of the obligatory merger control in cases of purely extraterritorial join ventures (joint ventures still fall within more general notification criteria).

3. According to the new Act, any merger shall be subject to control by the Authority if:

1. the combined aggregate turnover of the undertakings concerned is at least EUR 46,000,000 for the accounting period preceding the concentration in the Slovak Republic and at least two of the undertakings concerned generated a turnover of at least EUR 14,000,000 each in the Slovak Republic for the accounting period preceding the concentration,[2] or
2. the aggregate turnover generated for the accounting period preceding the concentration in the Slovak Republic, in case of concentration under
    a. Section 7(1)(a),[3] by at least one of the undertakings concerned is at least EUR 14,000,000 and, at the same time, the worldwide aggregate turnover for the accounting period preceding the concentration generated by another undertaking concerned is at least EUR 46,000,000, or
    b. Section 7(1)(b),[4] by at least one of the undertakings concerned, over which or part of which the control shall be acquired, is at least EUR 14,000,000 and, at the same time, the worldwide aggregate turnover for the accounting period

[1] The Act was adopted in correlation with the changes brought by the transposition of 1/2009 EU Directive and besides obligatory issues related to this Directive introduced certain other issues connected with merger control.

[2] Regardless on the type of concentration.

[3] Merger or amalgamation of two or more previously independent undertakings.

[4] An acquisition of an exclusive or joint control (including joint ventures).

preceding the concentration generated by another undertaking concerned is at least EUR 46,000,000.

4. The undertakings fulfilling these criteria are obliged to notify the merger to the AMO before their first implementation step and the standstill obligation applies generally (with the possibility to impose an individual exemption and with legal exemptions for certain acts related to takeover bids and transaction with securities).

5. Thus, the merger control in Slovakia lies still on system of the obligatory ex ante notification of mergers based on purely turnover notification criteria.

6. Consequently, the AMO does not have any power to investigate and assess any consummated mergers that would fall below such notification criteria.

7. Neither has the AMO any jurisdiction within the merger control regime to investigate once approved merger (without remedies) that possibly later resulted in significant lessening of competition in the market. Such approach would face a legal obstacle as the legal principle of prohibition to act and decide on the same matter twice applies.

8. It is important to mention in this context, that the AMO shall revoke its decision only in certain situation. It shall revoke the decision on merger approved with remedy if the undertaking fails to comply with the imposed remedy. The AMO also may revoke its merger approval decision on its own initiative and issues a new decision in case of certain breach of rules on the undertaking's side if

- undertaking fails to fulfil the obligation related to the remedy imposed thereon in the decision, or
- the decision is based on incomplete or untrue information provided by the undertaking concerned.

9. In other cases, if any suspicion of lessening of competition arises after merger approval, only possible tools under Slovak legislation are standard antitrust interventions, that means an ex post investigation of possible abuse of dominant position, cartels or other prohibited agreements.

1.2. Failure to notify and gun jumping

10. The state of play for the Authority is different in cases of consummated mergers where undertakings did not comply with the obligatory notification rule – if they failed to notify certain merger (fulfilling notification criteria) and in gun jumping cases. In such cases, the AMO also does not have the power to commence the merger assessment ex officio, it still has to wait for the notification of merger.

11. However, the AMO disposes with several tools to force the undertakings to notify. Firstly, if the undertaking fails to notify a merger that is subject to mandatory notification, the AMO shall impose a fine of up to 10% of undertaking's turnover for the preceding accounting period. At the same time, the AMO shall impose a fine on an undertaking that has violated the prohibition to implement the rights and obligations ensuing from a merger. These (also repeatedly) imposed fines should motivate the undertakings to notify the merger and to stop with further early implementation steps. Since the new Act was introduced, effective from 01.06.2021, the AMO has also the option to impose periodic penalty payments in cases of gun jumping and/or failure to notify the merger in order to force the undertakings to notify (or to comply with the rule on prohibition of early implementation of merger). The Act also contains further tool that serves as a prevention of negative impact of a merger on certain market. According to the specific provision in

the Act the AMO may impose on the undertaking the obligation to restore the level of competition that existed prior to the establishment of the merger, especially an obligation to divide a company or transfer rights. The AMO may impose on the undertaking another duty aimed at ensuring the compliance with this primary obligation. Finally, the AMO may impose interim measures on the undertaking appropriate in order to restore or maintain the conditions of effective competition, also in cases if there is a reasonable presumption of an exercise of the rights and obligations arising from the concentration before the decision thereon becomes final.

12. According to this legal background, in practice the Authority may investigate already implemented but still notifiable mergers in case of failure to notify and/or gun jumping cases in which undertakings consequently either voluntarily or with the helping of abovementioned sanctioning instruments subsequently submitted their notification.

13. As to the time limit, there is no strictly fixed legal time limit to investigate such a merger. If an undertaking submits the notification voluntarily after any period from completion of a merger, the Authority has the duty to commence the proceeding of merger assessment (the disposal with the notification submission is on the undertaking's side). In the absence of such voluntarily submission, the period to impose the sanctions to force the undertaking to notify is limited to ten years from the date of infringement. However as the early implementation of a merger is a lasting offence, the ten years period starts to run only on the date of stopping the early implementation steps – which in practice is often full implementation and in such case the ten years period practically does not start to commence. That means that legally there is no strong provision to stop the Authority to investigate the merger after some longer period either in case of its voluntary notification or in case of compulsion the undertakings to notify. A matter of course the fact of considerably longer period running from implementation of merger can be taken as one of the factors decisive if to start an investigation in that matter.

1.3. Prioritisation

14. The AMO has the general possibility to prioritise the cases (antitrust as well as merger infringements) in which it intervenes stated in the new Act, the more detailed prioritisation policy is subject to regular amendments and is published on the website of the Authority. The criteria to prioritise among cases are of double nature. One type of criteria sets short time priorities (on 2 – 3 years period) based on certain types of infringements and on certain segments of the economy that are important in Slovak ambient in some time. Those short time priorities are subject to regular revisions and changes. Nowadays cartels, bid rigging in public procurement and gun jumping in case of problematic mergers are priorities and from sectoral point of view e-commerce and digital platforms, IT technologies, healthcare and automotive are priority objectives. The prioritisation policy from more general point of view then describes the AMO's the criteria taken into account when evaluating if a specific case would be further investigated. The basic principles for an evaluation are following:

- gravity of the infringement (gravity by the nature, real impact on the market, size of geographic market, length of the infringement, the impact on vulnerable consumers, type of the product – common or luxury, market share of offenders, recidivism etc.)
- significance of the segment of economy (more priority on recently liberalised markets, markets with repeated infringements, markets with higher level of concentration, higher total damage caused by the infringement, existence of private damages action in this sector),

- likelihood of success (availability of evidence, time lapsing from infringement, decisive practice of the court as to the evidential standard and other) and
- intervention by the AMO (effectivity of this type of intervention by the AMO vs other solution, evaluation of the causes of the infringement, frequency of the infringements in certain sector).

15. Within this frame the AMO also selects cases of possible consummated mergers (non - notified and/or gun jumping) in which it starts the administrative proceeding in order to force undertaking to notify the merger and to enable the merger assessment in specific cases. In practice, the AMO concentrates according to criteria of prioritisation on prima facie problematic mergers and on mergers in sectors of priorities of the AMO.

16. Once the undertaking notifies the merger (either voluntarily or upon sanction), the AMO then does not have any possibility to use prioritisation criteria and has to assess each merger notified to it.

1.4. Differences in assessment/procedure

17. The AMO does not approach differently to the assessment or procedure in investigation of consummated mergers and there are no legal differences set up in the competition law. This statement leaves aside the different way on how the undertakings are forced to notify and leaves aside practical differences that stem from the fact that post – merger situation is often not only about pro futuro assessment but even real impact of merger may be noticeable at time of the merger assessment. Using generally the standard approach and procedure also means that the AMO in each situation of consummated merger may seek for remedies (to the differences with regard to the practical approach to the evidence and to the remedies please see further practical example).

1.5. Enforcement gap and proposals to amend the legislation

18. There are different opinions among relevant stakeholders and/or state institutions when it comes to the question of the existence of the enforcement gap related to non-existence of the opportunity to assess mergers in selected cases on an ex officio basis.

19. On the one hand, supporters of an ex officio based supplementary system to the current notification criteria claim that there are lot of examples of mergers of potentially anticompetitive effects that would require in-depth analyses and could escape mandatory notification system. These are above all mergers of undertakings operating only in local markets in Slovakia (creation of local dominant position can be at stake) and generally certain low-turnover sub-segments of economy. Mergers in such cases often do not fall within turnover criteria set out in law, but still would require in depth analysis of potential anticompetitive effects on competition. Practical examples from the past are mergers between hospitals, carcass disposal plants, waste disposal plants, heating plants but also for example certain sub-segments in media - radios, magazines and also various specific platforms such as real estate platform, second hand car platform etc. The other types of cases in which the merger control system nowadays is insufficient are takeovers of start-ups. The Authority does not have the power to control such concentrations under current legislation without any ex officio control regime. The general cut down of the level of turnover criteria would not be the appropriate solution due to the threat of the overburdening of undertakings from other prevailing segments of economy by imposing the duty to notify to substantially higher number of mergers.

20. However, opponents of the establishment of an ex officio based system claim that current rules are sufficient, as an ex post antitrust based safety brake may be used in case of any suspicion of possible breach of competition rules. They argue that such ex post possibility to intervene is sufficient and less burdensome on undertakings as any generally set up additional notification criterion or possibility to intervene ex officio within merger control rules.

21. This battle of opinions was demonstrated clearly in the course of the efforts by the Authority to introduce a new mechanism to solve the enforcement gap within adoption of the new Act. The AMO prepared two different proposals.

22. The first proposal of the AMO enacted the possibility of the AMO to request notification in certain cases under its preliminary evaluation of the possibility of significant lessening of competition. The competence to request a notification of certain merger had limitation to period less than one year after implementation of merger (6 or 9 months). Due to the heavy opposition, the AMO SR revised this proposal. Most of criticism concerned the lack of legal certainty and unpredictability of such system.

23. In the new proposal, the AMO tried to balance the need to cover un-notifiable prima facie problematic mergers without increasing overall burden on undertakings and at the same time to ensure legal certainty to the highest possible level.

24. The proposal aimed on mergers of solely horizontal and vertical character. The basic two criteria should have been combination of certain domestic turnover threshold (considerably lower than abovementioned obligatory notification criteria) eur 4 mil. in case of each of at least two of the undertakings concerned and significant presence in the (domestic) market (expressed as certain market position).

25. The proceedings had to be set up in a different manner than in case of standard merger assessment. Undertakings that fulfilled abovementioned criteria should have asked ask the Authority for opinion if their merger should be subject of the merger assessment or not. The AMO had to issue the opinion within 25 working days from the submission of the request. The negative opinion (that the merger does not need an analysis) should have closed the whole procedure. The positive opinion should have initiated the merger assessment administrative proceedings. Only the undertaking with the positive opinion should then pay the administrative fee. The time for evaluation and issuing of opinion by the AMO had to be calculated as part of phase one of standard merger assessment procedure.

26. However, within the interministry legislative proceedings even such more precise set up of rules faced strong opposition from different stakeholders especially from associations of undertakings. They claimed that the proposal still lacked legal certainty mainly due to the necessity to at least to assess the market presence. As the second objection they argued that the administrative burden put on undertakings was still high with the necessity to wait 25 working days on the opinion of the Authority and with the preparation of whole request for opinion. As the legal enactment of the prioritisation policy was set up in the new Act, they also claimed that priorities of the Authority could be flexibly adapted to the ex post revision of problematic situation in certain markets/segments using standard antitrust tools. Finally, due to massive objections the Act has been approved without this additional notification mechanism.

2. Decisions on consummated mergers and Remedies

27. The AMO has assessed several consummated mergers, as explained above only in gun jumping and failure to notify cases. In some of those cases, notifications were submitted at the later stage of their implementation but voluntarily (without using forcing tools) and some of them have been notified only after using sanctioning mechanism.

28. Up to now all such merger were approved in the end without using remedy, except of one case where the behavioural remedy was imposed (the other two possible problematic cases are currently investigated in which a structural remedy may be the most appropriate solution).

29. In the course of an ex post assessment of such mergers the AMO SR has faced several challenges and difficulties, though the AMO sees also some advantages in that assessment.

30. The main advantage may stem from the fact, that often such merger is fully implemented – the AMO has assessed several mergers that were implemented for some years so the AMO could see their real effect on market in time of assessment. The practice shows that also the market investigation including market survey may be more precise in such situation, as stakeholders (competitors, suppliers, customers etc.) are more familiar with effects of the merger on their activity and on markets as such. The Authority then is able to evaluate all aspects of mergers with more certainty.

31. On the other hand, there are many challenges connected with such an assessment. The first matter to discuss is the moment in time that is relevant for the assessment of merger. This was particularly important in below mentioned case with remedies, as in the meantime the undertakings acquired other assets in horizontally and vertically related markets (that following acquisitions were not notifiable under current notification criteria). The result was that the pre-merger situation would had been different if the Authority had the possibility to assess the merger ex ante (in moment of its creation) and was different in the moment of its real assessment ex post. The AMO decided to evaluate such cases (gun jumping and failure to notify cases) by taking into account the whole portfolio of activities of undertakings in time of the assessment. It means that the AMO takes all portfolio of activities of the undertakings as it stays in moment of merger assessment (even assets acquired after the date of the merger) and it reviews the impacts of merger in such ambient. The AMO also takes into account the fact, that it was the decision of the undertakings that failed to notify the merger or implemented it before approval from the AMO. According to the Authority's opinion it does not matter on time ranking of individual acquisitions, the more important is to avoid negative market impacts.

32. Another issue is the challenge related to the time passed from the creation of the merger situation and merger assessment itself. In practice, the Authority has faced the issue of certain internal and external changes of the transaction structure and of the final appearance of the merger. The issue was then whether to assess the original shape of the merger or its revised form, including partly other undertakings. In the example below, the procedure of the merger assessment had several stages.

33. Firstly, as it was failure to notify case and gun jumping case the AMO has used sanctioning mechanism to force the undertakings to notify. Upon decision on imposing fines, the undertakings have notified the merger in its original appearance (in that case as joint control of two undertakings above one acquired entity).

34. At that time the merger had been implemented for several years and in the meantime one of the acquiring undertakings – the private equity company had changed its general organizational set up. It had carved out its financial business (that originally

acquired the entity in the original transaction) and private equity business and reorganized this private equity business (still more less within undertakings connected to the same group or natural persons connected with it). The another issue was the fact that in the meantime, also other vertically related business to the original acquired entity had been acquired (by both original acquiring entities) and this related business had been also subject to movements within abovementioned organisational set up. As a result, the original appearance of merger was not the same. The AMO decided to stop the procedure on original merger. Upon new submission made by partly revised undertakings the AMO then assessed revised form of merger that consisted of original merger with revised acquiring parties and the further acquired business.

35. In this particular case, the AMO has also imposed remedies of purely behavioural nature. Although the possibility of imposing remedy of structural nature is not excluded, it would seem particularly difficult in cases of full implementation of merger. However, in cases of horizontal overlaps with heavy market impact the Authority would not see any other conclusion than horizontal remedy or prohibition. In the example below, the case was on vertical merger where behavioural remedies were sufficient (confirmed also by market survey). Within discussion on remedies, the AMO tackled with some challenges. Almost all of them related to the fact that the merger had been already implemented and in order to implement the remedy the undertakings had to propose a specific set of obligations on how to secure the separation of their certain internal systems.

36. The Authority have not realized any ex post study on the effectiveness of remedies imposed yet, as the time lapse from the below mentioned decision is relatively short (ten moths). However, in this particular case the AMO put the emphasis on monitoring trustee that was chosen for the whole period of the operation of remedies. The monitoring trustee has played an important role in the period of implementation remedies package actively proposing appropriate ways on how to secure certain obligation (such as internal separation of some activities, IT systems and approach to sensitive information) and has wide competences related to the opportunity of control internal processes of the undertakings, business policy in certain markets. At the same time, the market in question is noted for its quite transparent character with market players that would probably quickly seek for remedy if there is any distortion of competition.

37. The EXAMPLE below presents all abovementioned stages of the whole assessment (sanctioning procedure, first notification concluded by stopping the procedure and second notification ending with decision with remedies).

2.1. Sanctioning decision

38. In the decision from November 2018, the AMO stated that the two acquiring entities (one financial holding company and one natural person) infringed the Act on the Protection of Competition by failure to notify the merger consisted in the acquisition of their joint control over the undertaking Panta Rhei (active in retail sale of books through the biggest network of retail bookshops in Slovakia). They infringed the Act also by exercising rights and obligations arising from the merger before it was finally decided on it by the AMO, with the full implementation of the merger being occurred.

39. Before the merger, the company Panta Rhei had been under the exclusive control of natural person (the one that acquired then joint control) that then sold certain (controlling) share to another undertaking. The Authority had suspicions in relation to the real acquirer of the share in Panta Rhei. In the framework of the investigation outside the administrative proceedings, the AMO used several options to acquire information and documentation, among other things, it carried out an

inspection in the business premises of the possibly artificial acquirer of shared and of the undertaking Panta Rhei.

40. Its findings in relation to the infringements of the Act were communicated in the call for expression before the issuance of the decision addressed towards the parties to the proceedings. It is relevant to add that AMO may, in the interests of economy of the proceedings or of swift and effective remedy on the market, on its own initiative or at the request of a party to proceedings, conduct a settlement hearing. In this case, the the AMO began negotiations on settlement. Both parties, having regard to the AMO's findings, made the settlement, resulting in the reduction of the fine by 50 %.

41. Upon this decision, the AMO expected a redress to be made in the form of the additional notification of the merger in question.

2.2. First notification

42. Early in 2020, the AMO stopped the assessment of the merger grounded in the acquisition of the joint control over Panta Rhei in the abovementioned case. During the administrative proceedings, the undertakings concerned submitted information, which showed that their joint control over Panta Rhei, had ceased in the meantime. More precisely the organizational set up within one of the acquirer was different and some movements of assets have been made. The fact in question was not made clear to the AMO at the time when the merger was originally notified. In this connection, the creation of a new merger situation related also to the undertaking Panta Rhei was subsequently notified to the AMO. Based on these above facts, the AMO stopped the assessment of the original merger.

2.3. Second decision

43. In June 2021, the AMO with conditions approved a merger grounded in the acquisition of

- joint control of two undertakings over the undertaking Panta Rhei and
- joint control of three undertakings over the undertaking IKAR.

44. The transactions in question were evaluated as mutually contingent. By the means of jointly controlling undertakings they involved connection between the companies Panta Rhei and IKAR. In the case in question, the AMO assessed particularly the vertical effects of the merger resulting from the position of IKAR as the publisher and the wholesale supplier of books to specialist shops (bookstores) and the position of Panta Rhei as the retailer of books

45. As to the position of IKAR, it was found that it was the biggest player in the wholesale of books (own and third party) in SR with market share over 30 % and significantly higher market share than the second biggest player. It held also the position of number two on the market for wholesale distribution of third party books in SR with market share over 30% (market shares of the 3 biggest players were similar). It had also largest storage facilities, the effective distribution system, wide portfolio of titles, books of several publishers distributed on exclusive basis. The AMO evaluated, that IKAR was the most complex player at the wholesale level because of its vertical integration into publishing.

46. Panta Rhei was on the other hand the biggest player on several alternatives of relevant market for retail sale of non-discounted books - market share well above 30% (depending on the alternative - market share as high as 40-50% and 50-60%). In many locations (cities) over Slovakia Panta Rhei had the highest number of bookstores, in some locations with only one or no competitors and with bookstores in attractive locations (shopping centres) or downtowns.

47. The result of the assessment was the expression of competition concerns, namely:

- reducing the possibility for publishers without their own distribution to choose a wholesale distributor through which they will supply printed books to Panta Rhei, resp. to narrowing this possibility to IKAR - this could limit the access of competing wholesale distributors to book production by publishers which do not have their own distribution, thereby to reducing the ability of these wholesale distributors to exert competitive pressure on IKAR and ultimately reducing the intensity of competition in wholesale book distribution in the SR; this concern did not apply to book publishers which have their own distribution;
- the possible advantage of Panta Rhei as the retailer of books compared to its competitors by the side of IKAR as the wholesale supplier of printed books, which would lead to significant barriers to competition in relevant market in the area of retail sale of ordinary books in the SR.

48. In response to competition concerns expressed, the parties to the proceeding submitted to the AMO the proposal of behavioral conditions and obligations to ensure the compliance of the merger with the conditions of competition.

49. Within the remedy relating to eliminate the risk of customer foreclosure the parties committed to not carry out any discriminatory activities as a result of which publishers that don’t self-distribute their books would be favoured if they supplied their print books to Panta Rhei through IKAR, or disadvantaged, if they didn't. Specific examples of the actions Panta Rhei obliged not engage in are:

- to require publishers who don't self-distribute their books to distribute their books exclusively through IKAR,
- when the transactions are equivalent to deal with IKAR under more favourable business terms (e.g. rebates) than with IKAR´s competitors,
- when it comes to business terms to discriminate publishers who don’t self-distribute their books based on whether they supply their books to Panta Rhei through IKAR, for example by refusing to display their books in Panta Rhei unless they supply them through IKAR, offering them better terms of display if they supply their books through IKAR and vice versa.

50. Within the remedy relating to eliminate the risk of input foreclosure IKAR as a wholesaler (its own and third party books) was obliged to supply print books to retailers under non-discriminatory terms, more specifically with regard to:

- the time of making it possible for retailers to order new-releases and the time they can start selling new-releases
- the range of titles offered, the possibility to order titles etc.

51. Within the remedy relating to eliminate any transfer of confidential business information about competitors undertakings concerned are under obligations not disclose to each other any confidential business information relating to their respective competitors and to that end information barriers between IKAR and Panta Rhei should be put in place.