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Serial Acquisitions and Industry Roll-ups – Note by the Slovak Republic

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www.oecd.org/competition/serial-acquisitions-and-industry-roll-ups.htm.

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1. Introduction

1. Besides other competences, The Antimonopoly Office of the Slovak Republic (hereinafter as “AMO”) has the power of ex ante assessment of mergers that meet determined notification criteria. This means that only mergers meeting specific turnover based notification criteria set in the Act on Protection of Competition no. 187/2021 Coll. are subject of ex ante merger assessment in Slovakia.

2. Only if serial acquisitions¹ meet these notification criteria, they are also subject of standard merger assessment. In case that only one (or few) individual acquisition from serial acquisitions meets the notification thresholds and the others not, the AMO assesses only the one meeting turnover thresholds.

3. Such serial acquisitions can have at the same time the characteristics of staggered acquisitions in which case the notification rule is broader. The law sets the duty to notify any such transactions that occurs between the same undertakings² within two years period regardless whether the individual transaction(s) does not meet notification thresholds.

4. Otherwise, the AMO does not have any direct competence based on the Act to interfere in case of serial acquisitions in the form of the ex ante/ex post merger assessment. The Act does not state any specific tool similar to some other competition authorities to assess a merger on an ex officio basis in case of the presumption of competition harm. The effort to introduce such ex officio tool to assess mergers that do not meet notification criteria has not yet been successful (see section 4).

5. The substantive assessment of serial acquisitions effects on markets (if there is notification duty) faces certain challenges. Especially on how to assess usually small increment made by the specific merger, then whether the AMO has sufficient information on all activities of parties and if and how to take into account all increments from the other previous acquisitions that often had not met notification criteria (see sections 3 and 4).

2. The Presence of Serial Acquisitions in Slovakia

6. The strategy of serial acquisitions arises relatively often in Slovakia. The first presumption why is it so lies in the size of economy. As a small economy, lot of segments with only regional or local presence of stores or operations stands for such small mergers. Likewise, in some sectors the turnovers are far lower than in most of industries what causes almost all such sectors falling out of merger notification thresholds.

7. The investor type in case of serial acquisitions is ambivalent. Traditionally there has been a type of bigger entity seeking to build a sufficient presence at markets via buying

¹ We use the term „serial acquisitions“ to define any series of acquisitions of targets acting in the same/related sector. For the purpose of this contribution we use also the different term „staggered acquisitions“ for subsequent transactions between the same undertakings within certain time period (regardless of the sector in which undertakings concerned are active).

² The concept of undertaking is broad and includes any natural persons and companies belonging to the same economic group based on control relationships.

smaller entities. Generally, this is usually industry investor type acting in the same or similar industry abroad/in other regions within Slovakia.

8. From practice, we can observe also different type of investors that are typically private equity companies or similar economic line-ups seeking for good investment opportunity. If certain segment is more open and appropriate for investments, such undertakings try to gradually broaden the portfolio in the same segment. This phenomenon is more visible in the last years, probably also related to relatively newer forms of grouping into investment entities. This also relates to growing options to such acquisitions in certain sectors due to the difficulties to run smaller companies after Covid-19 pandemic and current economic crisis that forces companies in certain sectors to consolidation. Also the first wave of retirement leave of founders of smaller companies that arose in Slovakia in years after communism era can be observed.

9. In some segments or sectors with certain market characteristics, such serial acquisitions arose more often. Firstly, segments distinctive for local/regional entities or assets that can be divided easily and acquired just part of the assets active in certain localities. The typical cases are from healthcare segment – hospitals, outpatient clinics, other “local” services in healthcare – laboratories, medical transport services, then for example petrol stations, retail stores in different segments (cars, food, electro products), companies providing tourist business services such as theme parks, restaurants, hotels etc.

10. On the other hand other common type of sectors in which such serial acquisitions happen to be more often, are low – turnover sectors in which the geographic market is principally nation-wide, in Slovakia for example radio broadcasting, differently aimed web portals, personal placement services.

3. Effects of Serial Acquisitions – Competition Risks

11. From the point of view of effects of such serial acquisitions on the market there are standard theories of harm applicable also in these cases, only the scenario on how the undertakings concerned change the market structure or the relations on the markets is different. Such “step by step” strategy achieved via serial acquisitions can be dangerous as it is not regulated at all and the negative effects can be the same as in case of “standard” merger that is notified and its negative effects are remedied if necessary.

12. The acquirer (be it industrial investor or private equity company) in such scenario obtains market power gradually to the level of dominant company, or may gradually eliminate close competitors at already concentrated markets, or obtain market power at vertically or other related markets and thus the risk of foreclosing inputs or customers to its rivals arises.

13. The special type of risk connected with such serial acquisitions held at local markets is not only the dominant position at the specific local market, but also the 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. The AMO has assessed several mergers in which defined this issue as competition risk, while the position of the acquirer on the specific market/competition advantage was obtained through serial acquisitions and the AMO assessed only some individual acquisitions (that met notification criteria).

14. First example is from the healthcare industry, more specifically relates to the providing of so called transport medical services, where the acquirer obtained its market

position at buying markets also through series of acquisitions of small regional competitors (see the case description below in section 4).

15. The next example refers to the market of providing of public bus services (either municipal or regional services). The criteria of public procurements for providing public bus services at local/regional level often request past experience in the area, corresponding number of appropriate vehicles, corresponding repair and other services background. The AMO has assessed several mergers of industry acquirers acquiring small local/regional bus companies, while other such acquisitions had not to be notified due to the lower turnover of the targets. The acquirer thus gradually increased its power in terms of competition advantage for upcoming procurements to provide municipal/regional public bus services in other regions.

16. With private equity investors, the concern could be also the consequence of the ownership structures typical for this type of business where the private equity entities often have widespread portfolio of activities and it is not always clear what belongs in the entity when it comes to the control relationships. We noticed that private equity companies usually group their investments to certain segments into funds (each of them having focus on different segment) managed differently by separate entities. It applies also to natural persons or companies as founders or ultimate beneficial owners of such private equity entities or funds, where often is not easy to find out who is behind such funds and to what extent he controls the activities of the funds/private equity companies. At the same time different segments managed by different funds within such entity (or activities of the natural persons/companies behind such funds) could be somehow related to each other and coordinate their activities on markets. Then there could be a risk of not catching the whole range of activities in the assessment of particular merger (if it is notifiable). The AMO SR approaches to private equity entities as undertakings in the broadest sense asking for complex information. If there is a doubt on what belongs to the group based on control relations, the AMO SR tends to evaluate the effects of merger as if these un-certain companies were part of undertaking. The other tool used by AMO is the Declaration on oath in case of unclear structure of entities. The undertakings concerned must be aware of all activities of the group in the widest sense to the extent that it may confirm that the other activities out of those described in notification are not in any sense related to the business acquired via particular concentration.

4. The Competences and Current Approach to Serial Acquisitions

17. In summary serial acquisitions are currently subject to ex ante merger control by the AMO in two scenarios:

- Each individual acquisition meets the notification criteria (or at least some of acquisitions forming part of overall strategy)
- Individual acquisitions are executed within two years period between the same undertakings.

18. The question, what can the AMO SR do in case of serial acquisitions scenario, contains several partial issues.

19. On the one side, much depends on the abovementioned competences of the AMO. If any of individual transaction does not meet notification thresholds, the AMO does not have legal competence to assess the effects of such serial acquisitions ex ante at all (the same applies to the ex post evaluation of merger).

20. According to AMO the general cut down of the level of turnover criteria would not be the appropriate solution to approach to serial acquisitions due to the threat of the overburdening of undertakings from other segments of economy by imposing the duty to notify to substantially higher number of mergers. Instead of this, the AMO has seek several times for adoption of correction mechanism to the standard merger notification criteria, lastly when adopting the new Act 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.³ Finally, due to massive objections the Act has been approved without this correction notification mechanism.

21. In such scenario, the current legal background allows to intervene in case of non-notifiable mergers only in case of the suspicion of the post-merger breaking of antitrust rules (abuse of dominant position most often). Then the assessment is a standard one as in other antitrust cases. The AMO has noticed several examples of such gradual growing of market power by serial acquisitions with a necessity to intervene and apply antitrust tools. There is currently one pending antitrust case involving company operating web portal of specific focus that had obtained its market position thanks to past acquisitions of smaller companies operating in the same segment (such acquisition were non-notifiable due to the low turnover of targets).

22. The situation is different in case of obligatory notification of one (or few) individual acquisition that forms part of the overall strategy of serial acquisitions. By the law the AMO does not have the direct possibility to evaluate the merger non-specific issues, that means that the AMO has to look at each single transaction as standalone and link the possible competition risks only to the specific single transaction. Thus, the AMO only compares the specific pre-merger situation and certain pre-merger structure in markets and position of the undertakings concerned with the increment brought by the specific merger. In that sense, it is challenging to evaluate, that the particular (often negligible) increment to the position of the undertakings concerned brought by the particular merger is that one decisive to conclude that there is anticompetitive harm.

23. However, to certain extent it is possible to take into account the overall strategy of the acquirers. If the AMO SR found the series of previous acquisitions in the same sector in past made by the same acquirer, this should be taken into account 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 particular merger and may then contribute to the overall conclusion of competition risks or might be evaluated when considering appropriate remedy.

24. The critical point is that the sources of such information are limited. The AMO has some direct source of information via requirements in the notification forms itself where the acquirer has to inform on all mergers made in last three years. The other reliable source on such acquisitions may be internal documents of the undertakings concerned but there is strong reluctance of the parties to provide such documents to AMO (they often appeal on non-existence of such documents or the AMO does not know if they have provided only partial documents to formally meet the requirement of the notification form). Unless, if

³ This proposal was revised and while the principle after revision remained the same, it contained certain criteria when the AMO was given the possibility to ask for notification, namely basic and very low but still turnover thresholds in combination with certain market position of undertakings concerned and horizontal/vertical character of the merger). See also the AMO's contribution to OECD Roundtable on disentangling consummated mergers (2022).

previous acquisitions are not public, the AMO has not reliable source on the existence of such serial acquisitions strategy.

4.1. Example 1⁴

25. To some extent the argument of overall strategy to increase market power proven by past serial acquisitions was used in a case of merger in healthcare sector. The acquirer was private equity company already active in healthcare sector in Slovakia 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, in some cases the individual transaction has met notification thresholds for obligatory notification, in the other cases not. In this particular 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 particular region. This merger was notifiable. 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 (in the past when the same acquirer was buying another hospital). The AMO investigated that this was due to several acquisitions of medical service providers made consecutively and that such acquisitions had not met notification thresholds. The market for providing medical transport services was characteristic with the presence of mostly local/regional players with low turnovers, so the AMO had the chance to assess the merger at this market only if it was a part of broader package, for example acquired together with hospital providing such services.

26. In this particular case, the AMO has been investigating the effects of the vertical connection (or 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.). 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 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 particular merger or even earlier by previous serial acquisitions. The conclusion of the AMO was that this particular acquisition further increased this position of the acquirer. However, the remedy was imposed only with regard to 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.

⁴ Decision of the AMO no. 162/2017/OK-2017/FH/3/1/008 from March 1, 2021

4.2. Example⁵ 2

27. The AMO has recently assessed the merger again in the healthcare sector, this time regarding pharmacies. The acquirer is the company with largest chain of pharmacies across Slovakia, although from the nationwide prospective not a dominant company, due to the still relatively low overall market share and the presence of several competitors operating also chains of pharmacies and individual pharmacies. The overall strategy to build strong presence at the market was clear from the history of acquisitions, some of them notified to AMO, some of them not due to low turnover of targets. In this particular merger, 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. 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). The acquirer therefore removed competition risks related to local overlaps of pharmacies 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 behavioral one and consisted in obligation that acquirer would not acquire back these pharmacies in identified problematic areas for certain period of time.

5. Enforcement Gap and Consideration De Lege Ferenda

28. As was seen from the previous section the AMO does not have any tools for direct ex ante assessment of serial acquisitions that do not trigger notification thresholds and has limited options to assess the effects of those meeting notification thresholds partly under existing merger control regime.

29. Under Slovak competition toolbox this can be partially saved by the indirect tools as was seen from the examples above (for partly notified serial acquisitions only), though the assessment that small increment brought by specific transaction was that decisive one ought to be declared only in explicit cases.

30. The other option is using antitrust tools when investigating anticompetitive behaviour by dominant companies ex post. However, the antitrust investigation is time and capacity consuming, characterized by usually long duration. Smaller competition authorities as Slovak one need to prioritise cases and select only those of most serious nature. Therefore it seems that antitrust tools can not completely supply the ex ante prevention of merger control.

31. Therefore, the AMO does see that there is certain enforcement gap while some of those serial acquisitions having anticompetitive effects.

32. That is why the consideration de lege ferenda directs toward special tool of an ex officio based investigation of mergers. This would allow the AMO to focus its attention on any smaller merger when also strategy of serial acquisitions and gradual increasing of market power is visible. The enforcement of such special tool will be a challenge stemming from the heavy opposition the AMO has faced in previous attempts. Another challenge would be to draw the special toll in appropriate way to address serial acquisitions properly. From this prospective, it seems that the more general the tool is, the better focus on most

⁵ Decision of the AMO no. 2023/KOH/SKP/3/21 from July 20, 2023

problematic issues allows. This is of course in contradiction with opponents of such ex officio based competence, arguing with lack of legal certainty.

33. Presumed that such additional competence to investigate of non-notified mergers is enacted further consideration on the scope of the substantive assessment is necessary. Namely 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).

34. The future challenge for the AMO is also the evaluation of the impact of Towercast judgement⁶ to ex post assessment of the merger itself as possible abuse of dominant position, in this case specifically with the aim if it suits to the national merger regime and to an assessment of serial acquisitions.

⁶ C-449/21