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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Slovenia --

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This document reproduces a written contribution from Slovenia submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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-- SLOVENIA --

1. In 2015, the Slovenian Competition Protection Agency (SCPA) examined 31 notified concentrations, among which it has not blocked any transactions, but four mergers were cleared conditionally subject to additional remedies at the end of either Phase I or Phase II.

2. These conditional decisions were adopted in the following sectors: beer production (Heineken N.V./Pivovarna Laško, d.d.), urban and suburban passenger bus transport (Arriva Dolenjska and Primorska d.o.o./Alpetour d.d.), telecommunications (Telekom Slovenije d.d./Debitel d.d.) and electricity trading (GEN-I d.o.o./Elektro Energija d.o.o.).

1. Short descriptions of recent conditionally cleared mergers

1.1 The takeover of Arriva Dolenjska and Primorska of Alpetour

3. In April 2015 the SCPA received a notification of the concentration which considered the acquisition of sole control over a bus passenger transport undertaking Alpetour by the bus transport company Arriva Dolenjska and Primorska, which is a subsidiary of Deutsche Bahn in Slovenia. After the concentration on the market the SCPA found that there will actually remain only two major competitors and a few smaller ones, which do not pose the same competitive pressure on larger companies on the market or at least not to the same extent as they pose in before the concentration, when the Arriva and Alpetour were competitors to each other. The market structure that will result from the takeover will lead to an oligopolistic structure, which increases the likelihood of coordination of (un)competitive behaviour in the market, including the increased possibility of tacit coordination, which could lead to price increases in the market for long distance public bus passenger transport. The probability of this is increased because the companies that are merging are close competitors and the government as a buyer (government subsidies for regular service are the main source of income) has limited possibilities of switching supplier or contractor.

4. The notifying party relies on two fundamental objectives of the proposed remedies. The first objective of the proposed remedies is to provide conditions for smaller competitors to compete more efficiently in future tenders for the award of concessions (subsidies) in the long-distance (interregional) passenger road transport and to facilitate potential competitors, especially from abroad, to enter the market. The aim of the remedy is to ensure fair access against payment of fair and equal prices to critical infrastructure operated by any of the Deutsche Bahn companies in Slovenia because it allows competing bus operators without their own infrastructure predictability of costs that are associated with significant input services.

5. The second objective of the proposed remedies, however, is to eliminate any concern about a possible reduction in effective competition between the merged entity Arriva/Alpetour and the entity Avrigo/Izletnik Celje (the other company with a significant market position) in future tenders for concessions in long-distance passenger road transport. Therefore the parties will submit to the Agency copies of the notifying party's bid and of the other companies of the Arriva Group in Slovenia, the method of calculating the value of the offer or the submission of reasons for the decision on non-tenders at a future invitation to tender for the award of concessions in regular long-distance bus and coach transport passenger. In this way it should enable the Agency to effectively monitor the implementation of the corrective measures.

6. The Agency estimated that the first corrective measure by allowing access to the necessary infrastructure actually puts all bus operators including small and potential competitors who do not have their own infrastructure for the provision of adequate buses' services in the public interregional bus passenger transport in the same position which is important in the case they will win the contract at the public tender. The Agency estimates that this measure will make it easier and more efficiently to compete for smaller and potential new competitors at a future invitation to tender, as the access to bus stops is necessary to perform these services on the market for interregional (interurban) regular passenger services.

7. Furthermore, the decision of bus operators for the submission of bids in a public tender to a certain extent also depends on the methodology of creating a public tender for concessions in long-distance bus transport of passengers by the competent authority. Designing a future invitation to tender in a way that would allow the participation of smaller bus operators and potential new entrants once the corrective measures will be implemented would allow the establishment of market conditions, in which effective competition on the market for interurban bus passenger services would not be substantially reduced or prevented due to the concentration.

8. Despite the fact that companies with higher sales volumes more effectively compete in the market, the corrective actions enable competitors and potential new entrants to the market to benefit from the infrastructure that is needed to provide long-distance liner passengers currently operated by the business group Deutsche Bahn, or will it be managed at the moment when the corrective measures will be fully implemented. That will at least slightly increase competitive pressure from other undertakings in the market on the merged entity that will be created by the concentration subject.

9. The remedies were set for forthcoming five years.

1.2 The merger Heineken/Pivovarna Laško

10. In the merger case Heineken and Pivovarna Laško both undertakings are active in the production and distribution of beer in the Republic of Slovenia (the market of wholesale beer). Given the small market share held by the Dutch company in Slovenia, Pivovarna Laško's market share on the beer market is around 80%. In assessing the concentration, the SCPA found that the access of competitors to consumers in the restaurant channel is more limited than that in the commercial channel for a number of reasons. The buyer power of HoReCa buyers is not as great as that of retailers. Furthermore, consumers in the restaurant channel drink beer mainly from glass bottles, which cause higher transport costs for foreign producers than for domestic. HoReCa consumers order mainly draft beer, for which installation and service costs are greater, moreover due to limited space in pubs it is not expected that they will have a larger set of different draft beers. In the restaurant channel in general there are also not present private beer labels which in the commercial channel represent serious competitive pressure on domestic producers of beer and reduce the loyalty to incumbent (domestic) beer brands. In addition, distributors of foreign brands of beer stressed the access to refrigerators as an obstacle to market entry and growth of market share. More than one or two fridges in a single catering establishment due to space limitation are not possible and they are not economically justified for providers.

11. During the procedure the party proposed to the SCPA corrective measures to eliminate its competition concerns. In this case the SCPA the remedies concerned the limited use of cooling cabinets provided by the parties to the concentration in catering establishments.

12. Restaurants and bars will now have the possibility to keep the competing products in refrigerators which are provided by the company Pivovarna Laško. The competitive products will have a dedicated space in the fridge, and also they cannot be stored at the highest shelf. In any case the competing products must have at least 20% of the space in a refrigerator. Arrangements depend on certain conditions (e.g. the number of refrigerator cabinets in a catering facility, the obligation to pay the rent for refrigerators, etc.).

13. The duration of remedies is three years.

1.3 Telekom Slovenije/Debitel

14. The SCPA assessed the acquisition of sole control by the incumbent operator Telekom Slovenije of the fourth biggest light MVNO Debitel. Slovenian retail market for mobile telecommunications services is a mature market with a high degree of penetration and high barriers to entry with the majority state owned incumbent Telekom Slovenije still commanding half of the mobile market. During the phase I the SCPA received a remedies proposal by Telekom Slovenije in which Telekom Slovenia committed itself that for the next five years it will offer access to its network to at least one new operator under the pre-set conditions (existing) or even more favourable terms than those for a new operator.

15. The most effective way to maintain effective competition, apart from prohibition, is creating the conditions for the emergence of a new competitive entity or strengthening of existing competitors so the SCPA conclude that the party's submitted corrective action is appropriate in terms of ease of market entry for new providers.

1.4 GEN-I/Elektro Energija

16. In 2015 the SCPA also assessed a planned merger of two of Slovenia's biggest electricity traders Gen-I and Elektro Energija.

17. The degree of concentration in the market even before the notified concentration was high in all markets for the sale of electricity, both in the retail markets for commercial and household customers as well as on the wholesale electricity market. The SCPA launched a phase II investigation. The SCPA has expressed its concerns about the high combined market shares of GEN-I and Elektro Energija after the concentration which is expected to lead to a significant increase in the degree of market power of the merged entity in the retail electricity market. Furthermore, Petrol, which is the largest Slovenian oil and gas retailer and a competitor of GEN-I and Elektro Energija in electricity trading, has a joint control in GEN-I.

18. Therefore the notifying party proposed two remedies for the duration of next five years, which should eliminate competition concerns identified by SCPA. With the first remedy GEN-I committed to adopt and implement all necessary measures to prevent the movement of any market sensitive information from the GEN-I and Elektro Energija on one side and the company Petrol on the other side. For this purpose a firewall will be established and within it the parties will adopt special written rules to execute the remedy.

19. The second commitment relates to the prevention of the possibility of an increase in market prices in the household segment and small business customers with the definition of price caps for next three years and the establishment of a system of control over potential lowering of electricity prices by anti-competitive intent.

2. Prohibition against conditional clearance – SCPA practice and view

20. The SCPA would prohibit a merger when there is a probability that harm to competition is expected to occur more likely than not to. The SCPA prefers to accept remedies rather than to prohibit a merger, especially in those cases in which mergers generate also high pro-competitive effects. Remedies eliminate competition concerns identified and at the same time preserve efficiencies and synergies.

21. The SCPA requires that the proposed remedies eliminate entirely all competition concerns and identified which would cause harm for consumers. Slovenian Competition Act states that “remedies needs to remove serious doubts as to the compatibility of a concentration with competition rules and that the agency shall adopt such remedies as it considers appropriate to remove serious doubts as to the compatibility of the concentration with competition rules, taking into consideration their nature, scope and likelihood of effective and timely implementation”.

22. However, the SCPA’s practice when it decides between accepting remedies or rather prohibit a merger is not at the time being expressed in a written document such as guidelines or best practices. However, it tries to clearly share its views on the matter by extensive explanations in its decisions and by publishing of its decisions on the website.

23. Furthermore, undertakings are well informed that when considering remedial action SCPA follows the European Commission guidelines and best practices as also EC’s case law. However, the past practice shows that nevertheless the appropriate remedy is determined at the end on a case by case basis, taking into account particular circumstances, available information and time constraints in each case. So despite having a written document reflecting a competition authority’s views and comments on effectiveness of remedies or not can be useful for granting a degree of legal certainty to undertakings, this can at the same time turn out as an obstacle for a competition authority in the sense that in some cases there would be needed a different approach that that stated in the guidance.

24. The SCPA is not planning to issue a merger remedies’ guidelines in the near future.

3. Deciding on effectiveness of remedies

25. The main challenge of SCPA in the design of appropriate remedies is the assessment whether the proposed remedies would eliminate the competition concerns identified and whether the SCPA will be capable of monitoring their effects on the competition in the market. The problem stems from the fact that when assessing the effectiveness of proposed remedies the SCPA must basically rely on the information provided by the parties. The notifying parties must provide their remedies, detailed information on the content of the remedies offered and show their suitability to remove any significant impediment of effective competition.

26. Before taking a final decision on whether accept or rather prohibit a merger the SCPA in its attempt to obtain more information checks the remedies proposal with the market test and afterwards it considers comments received by interested public seriously. It has happened on many occasions that the SCPA decided to accept or not to accept remedies based on the comments received in market test. Obviously, the SCPA also takes into account its past remedies’ implementation and monitoring experience. In general, the SCPA till now imposed only behaviour remedies (i.e. access to network at fair and non-discriminatory prices, commitments on future behaviour of the merged entity, etc.).

27. However, the commitments to grant access to key infrastructure on non-discriminatory terms were most often used in the past but at the same time they caused us many problems with the monitoring. Such remedies have rarely led to actual and timely entry of new competitors. In our experience also firewalls are doubtful because their implementation in practice is very difficult to monitor. The proportion of the remedy needed depends on the magnitude of the competition concerns identified as a consequence of the proposed transaction. The SCPA considers whether consumers will not be harmed more after the implementation of the proposed remedy and whether there will be enough competitors on the market capable of competing sufficiently with the merged entity which will constrain the merged entity to a sufficient degree.

28. The proposed remedies have to be able to prevent the likely negative impact on prices, quality of service or innovation as a result of the merger. In addition, the SCPA requires that the proposed commitments can be put in place in a short time and that their effect will last for a sustained period of time. If these would not be the case, the SCPA would rather decide to block the proposed transaction.

29. To date, the court has not revised the SCPA's practice in relation to remedies in merger cases. Indeed our system provides that only the party that gained control in the transaction can appeal a SCPA decision (i.e. only the notifying party can have legitimate interest). Third parties have not a legitimate interest, and consequently they cannot make an appeal.

4. Third parties opinion and market testing

30. Despite the possibility of market testing is not explicitly stated in Slovenian competition law after receiving remedy proposals by the parties and after deciding that the remedies received may be suitable to solve the identified competition concerns, the SCPA will normally make a market test. However, if the SCPA finds that the proposal is insufficient to eliminate competition concerns it can reject remedies even without the need of being priory market tested. The SCPA in general considers market testing of great importance. It helps us design remedies on the basis of evidence collected from parties with the professional skills and knowledge of the industry under investigation. However, the SCPA is also well aware of a potential bias of competitors when assessing the received replies.

31. The comments received help us in choosing between options that are viable and most workable on the market, that is the reason why we encourage (not only with publishing on our web site but we also send the competitors and known interested parties a written request to comment) interested parties to reply to our market tests. Many times market tests allow us to recognize problems that could have been otherwise found out only in a later stage, in the implementation phase, which would inhibit the effectiveness of remedies already accepted.

5. Conclusion

32. Despite the SCPA in its practice favours more the acceptance of remedies than blocking a merger, it is well aware that there are a few situations in which this can be effective, especially if we are talking about behavioural remedies. In this regards the SCPA recognized that while behaviour remedies can effectively remove competition concerns in vertical or conglomerate mergers, they can at the same time turn to be very insufficient in anticompetitive effects caused by horizontal mergers. Based on the extent to which they have fulfilled their competition objective (i.e. maintaining effective competition on the market) such remedies often fail to preserve competition as foreseen in the conditional clearance decision (e.g. although access is granted due to access prices or conditions the entry on the market indeed didn't occur).

33. This recognition can lead to changing the practice of the SCPA towards more merger prohibitions and less conditional clearances in the future.