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The International Comparative Legal Guide to:

Merger Control 2017

13th Edition

A practical cross-border insight into merger control issues

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 50 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Nigel Parr and Catherine Hammon of Ashurst LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The relevant merger authority in Slovakia is the Antimonopoly Office of the Slovak Republic (*Protimonopolný úrad Slovenskej republiky*) with its seat in Bratislava (the "Office"). The Office's website is www.antimon.gov.sk.

The Council of the Office, as a second instance, is an appeal body within the Office.

Every party to the merger proceedings, if dissatisfied with the result of the proceedings, is entitled to have its decision reviewed by the Regional Court in Bratislava (*Krajský súd v Bratislave*).

The Supreme Court (*Najvyšší súd Slovenskej republiky*) stands as the last instance. Upon a cassation, the party to the proceedings could have its decision reviewed by the Supreme Court.

1.2 What is the merger legislation?

Slovak merger control legislation is set out in the Act on the Protection of Competition (*Zákon o ochrane hospodárskej súťaže*, Act 136/2001, as amended; the "Act"), which came into force on 1 May 2001 and was amended several times – the latest amendment dates back to 1 July 2016. Since 1 May 2004, when Slovakia joined the European Union, the Council Regulation (EC) 139/2004 (the "ECMR") regime applies to all transactions notifiable in Slovakia that have a Community Dimension.

Details on Slovak merger filings are covered by Decree 170/2014, which concerns the essentials of filing a concentration.

Further aspects related to concentrations are described in the Office's guidelines ("Guidelines"). Even if this soft law is not as binding as legal acts, it is fully followed by the Office and parties to the concentration.

The Office has published the following guidelines/notices on:

(i) details of the simplified notification of the concentration;

(ii) restrictions of competition relating directly to a concentration and which are essential for its realisation;

(iii) granting an exemption from the prohibition of implementation of a concentration;

(iv) determination of turnover; and

(v) pre-notification merger procedure.

1.3 Is there any other relevant legislation for foreign mergers?

The Act also applies to foreign mergers; no specific legislation exists in this regard.

1.4 Is there any other relevant legislation for mergers in particular sectors?

The merger regime set out in the Act applies across all sectors. For transactions in the financial and banking sector, however, the clearance of the National Bank of Slovakia might be required.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

The Act defines the following types of transactions to constitute a "merger" (the Act refers to "mergers" as "concentrations"):

- merger of two or more previously independent undertakings, including situations where two undertakings come under joint economic management, but remain separate legal entities ("economic mergers");
- acquisition of direct or indirect control of another undertaking, enterprise or part thereof by one or more persons already controlling at least one undertaking, either by acquisition of shares or ownership interest or by an agreement or by any other means, which enable the acquiring undertaking(s) to control the acquired undertaking; or
- creation of a joint venture, which is jointly controlled by two or more undertakings and which brings permanent changes to the structure of an undertaking and performs all functions of an independent economic entity on a lasting basis.

The concept of "control" is defined as the possibility of exercising decisive influence over an undertaking, especially by means of: (i) ownership rights or other rights to the undertaking or part thereof; or (ii) rights, contracts or other facts allowing the exercise of a controlling influence on the composition, voting or decisions of an undertaking's bodies. There is no precise shareholding or other test for decisive influence. Every concentration is evaluated and decided on its own facts and actual situation.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

In cases where an acquisition of a minority shareholding could lead to the exercise of *de facto* or *de jure* decisive influence over an undertaking, such an acquisition may well amount to a notifiable merger. The Office would look at the specific situation and assess whether the minority shareholder is conferred with special voting or veto rights which amount to *de jure* decisive influence on key business behaviour (e.g. investments, budget or business plan) or appointment of the management. The acquisition of a minority shareholding may also lead to the exercise of *de facto* decisive influence in cases where the remaining shareholders are widely dispersed.

2.3 Are joint ventures subject to merger control?

Full-function joint ventures, performing on a lasting basis all functions of an autonomous economic entity which result in a permanent structural market change, are subject to merger control.

Joint ventures whose purpose is to coordinate controlling parties (non-full-function) are not considered as a merger, but they may still be subject to rules of the Act concerning practices restricting competition.

2.4 What are the jurisdictional thresholds for application of merger control?

A concentration is subject to approval by the Office if:

- the aggregate turnover in the Slovak Republic of all parties to the concentration exceeded EUR 46,000,000 in the last accounting period prior to the concentration and the turnover of each of at least two of the parties to the concentration in the last accounting period prior to the concentration in the Slovak Republic exceeded at least EUR 14,000,000; or
- the aggregate turnover in the Slovak Republic, in the last accounting period prior to the concentration of (a) at least one merging party, (b) the party being acquired, or (c) at least one of the parties creating a joint venture exceeded EUR 14,000,000 and the aggregate worldwide turnover in the last accounting period prior to the concentration of the other party to the concentration exceeded EUR 46,000,000.

The aggregated turnover of the party to the concentration comprises the turnovers of:

- the party to the concentration (buyer(s) and the target);
- an undertaking controlled directly or indirectly by the party to the concentration, i.e.: (i) holds more than half of the shares; (ii) may exercise more than half of the voting rights; (iii) has the right to appoint more than half of the members of the undertaking's bodies; or (iv) has the right to manage the undertaking concerned;
- an undertaking controlling the party to the concentration;
- an undertaking controlled by the same undertaking which control the party to the concentration; and
- an undertaking jointly controlled by two or more undertakings listed above.

For the purposes of calculation, the aggregated turnover of the undertaking does not include sales, income or receivables from the sale of goods between merging undertakings.

2.5 Does merger control apply in the absence of a substantive overlap?

Merger control also applies in the absence of an overlap.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

The Act applies to all transactions that may have an impact on the Slovak market. Since the turnover thresholds generated in Slovakia are relevant for the merger review, all transactions which meet the turnover thresholds, also involving foreign undertakings, are covered by the Slovak merger control legislation.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The ECMR has precedence over the national legislation and applies to transactions that have a Community Dimension, in light of the one-stop-shop principle.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

If the same transaction is implemented in several steps, or two or more transactions that are not subject to the merger control are implemented among the same parties within a period of two years, these various stages constitute a single transaction and are assessed as one concentration.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

A concentration that meets turnover thresholds must be notified to the Office. There is no deadline for filing the notification, but the transaction may not be implemented prior to clearance by the Office. The transaction must be notified prior to its implementation and after the following stages:

- an agreement on which the concentration is based has been concluded;
- acceptance of a bid in a public tender is announced;
- a state authority's decision being delivered to an undertaking (e.g. approval of financial authorities);
- an announcement of a takeover;
- the day on which the European Commission informed an undertaking that the concentration is subject to the Office's jurisdiction; or
- the day on which another fact giving rise to the concentration has occurred.

The concentration should also be notified to the Office prior to the agreement based upon which the concentration is concluded

(pre-merger notification), or if another fact giving rise to the concentration has occurred. In such a case, the notification must also contain written reasoning and written documents certifying essential facts for the concentration.

Pre-notification contacts with the Office are also possible, and are very often used by parties to the concentration. Details of pre-notification contacts are specified in the Office's Guidelines on pre-notification contacts within the merger control.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

All transactions are subject to notification to the Office if the transaction constitutes a concentration according to the Act, and if the turnover thresholds are met.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

If the parties failed to notify a notifiable transaction, the Office is authorised to impose on the undertakings that failed to notify the transaction (i) a fine of up to 10% of its turnover achieved during the last financial year, or (ii) a fine of up to EUR 330,000 to an undertaking whose turnover does not exceed EUR 330 or does not generate any turnover.

Furthermore, the Office may also impose the obligation to restore the level of competition that existed prior to the merger, especially a demerger obligation or transfer of rights.

The issue of validity of the non-notified transaction has not been settled. Although there is no case law in this respect, we believe that the validity of the transaction should not be questioned.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

There is no provision in the Act for an exemption of the prohibition to implement the transaction prior to clearance by the Office. The Act applies irrespectively to all transactions which have an impact on the Slovak market.

Pursuant to the Office's Guidelines on granting an exemption from the prohibition to implement the concentration, it is possible to carve out local completion of a merger to avoid delaying global completion in specific cases. Such exemption must be granted on the basis of administrative proceedings initiated on an application from an applicant. The applicant must prove (i) the urgency of acts based on the transaction, and (ii) that there is no negative impact on competition. All such arguments must be evidenced by the relevant documentation.

Even if an exemption is granted, the final merger approval must be granted additionally.

3.5 At what stage in the transaction timetable can the notification be filed?

A transaction may be notified, as mentioned in question 3.1, as soon as the undertakings can demonstrate that the legally binding documents have been signed or even prior to the agreement being concluded.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The Office has 25 business days, upon submission of the notification, to assess the transaction. However, in complex matters that could give rise to competition concerns, this period may be extended up to an additional 90 business days. The period does not start to run until the notification filing is complete, i.e. it satisfies the scope and detail of information required by the Office.

A stop-the-clock mechanism also applies. This means that the administrative proceedings' deadline stops running when the Office sends out a request for information to the parties to the proceedings. The clock starts to run again once the Office is provided with the requested information.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

As a general rule, the transaction must not be implemented prior to clearance by the Office. Infringement of this ban may lead to fines of up to 10% of the turnover (for more details, see question 3.3). However, the Office may, at the request of the notifying party, grant an exemption on implementing the transaction prior to clearance if there are serious reasons for this exemption. The Office must make a decision on the exemption without undue delay, but no later than 20 business days from the request. An exemption may be granted subject to conditions and obligations in order to ensure effective competition.

Moreover, the prohibition does not prejudice the implementation of a public bid, provided that the transaction is immediately notified to the Office and the acquirer does not exercise its voting right arising in connection with the implementation.

3.8 Where notification is required, is there a prescribed format?

The Office's Decree 170/2014 (Annex 1) summarises a list of general information which needs to be submitted to the Office, such as:

- a summary description of the concentration;
- basic information about the parties to the concentration;
- a detailed description of the concentration;
- information on capital, financial and personnel structure;
- general market information;
- a definition of affected markets and potentially affected markets;
- information on affected markets and potentially affected markets;
- general conditions on affected markets and potentially affected markets;
- information on co-operative effects of a joint venture;
- reasons for, and effects of, the concentration and their impact on competition;
- information on notification to other departments of the competition; and
- the underlying documentation.

The notifying party shall submit the above-mentioned information in a clear and structured way in the form prescribed in Annex 1 of the Decree. The notification must be made in the Slovak language.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

The Office's Decree 170/2014 provides a model simplified questionnaire. Only a narrower range of documents and information can be submitted by the notifying party/ies to the concentration in the case of (i) gaining sole control over the entrepreneur who is already under joint control of the notifying party, (ii) no horizontal or vertical overlap between the parties' activities in the Slovak Republic, (iii) combined market share of the parties concerned on the relevant market is less than 15% in the case of horizontal concentrations, or if the market share of either party or the combined market share of the parties concerned on the relevant market is less than 30% on vertical concentration.

The notifying party shall submit all requested information in a clear and structured way on the form, annexed to the Office Decree as Annex 2. The notification must be made in the Slovak language.

There is an informal way to speed up the clearance timetable, e.g. by providing the Office with reasonable arguments of the urgency of a specific case, etc.

3.10 Who is responsible for making the notification?

The notification has to be submitted:

- in the case of a merger jointly by the merging parties;
- in the case of a public bid by the selected bidder;
- in the case of a decision issued by a state authority on a merger jointly by the merging parties;
- in the case of a takeover bid by the bidder; and
- in other cases by undertakings acquiring control over another undertaking, enterprise or part thereof.

3.11 Are there any fees in relation to merger control?

The filing fee is fixed at EUR 5,000. It must be paid with the submission of the notification the latest, because the confirmation about the payment of the fee is a mandatory annex to the notification.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

The ban to exercise the rights resulting from a concentration before the clearance decision shall not apply if the transaction is realised through an acquisition bid or more transactions with securities on the securities market, provided that (i) such a concentration is immediately notified to the Office, and (ii) the acquirer does not exercise its voting rights connected with these securities or it does so only in order to maintain the entire value of these investments.

3.13 Will the notification be published?

The Office publishes only an announcement regarding the notification of concentrations without delay in the Commercial Bulletin and on its website. The announcement contains an invitation to third parties to submit their potential objections and comments.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The merger control regulation as of 2012, in line with the EU Merger Regulation 139/2004, abandoned the dominance test as the substantive test for a merger clearance and adopted the substantive impediment of effective competition test.

4.2 To what extent are efficiency considerations taken into account?

If the Office has established that a concentration may lead to a substantial lessening of competition, the parties to the concentration bear the burden of demonstrating the existence of circumstances that may justify a clearance, such as substantiated concentration-related efficiencies. However, we are not aware of cases where the Office considered efficiencies of the concentration.

4.3 Are non-competition issues taken into account in assessing the merger?

The Office recognises that non-competition clauses are often integral to concentrations. With respect to concentration, the Office assesses the non-compete obligation in line with the Commission practice.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Third parties do not have legal standing in the proceeding; nevertheless, they have the right to make comments and remarks on the proposed concentration. The Office's announcement regarding the notification of concentrations contains an invitation to third parties to submit their potential objections. In addition, the Office may invite third parties to express their opinion on the likely impact of the transaction. If the third parties request to be heard and show reasonable interest, the Office may allow them to participate in the oral hearing.

4.5 What information gathering powers does the merger authority enjoy in relation to the scrutiny of a merger?

The Office is entitled to request all information necessary for assessing the concentration as well as for reviewing and copying relevant documents from the parties to the concentration, third parties or other public authorities. Moreover, the Office is empowered to enter the premises where business records may be kept, including private homes.

If the parties submit incomplete or misleading information, the Office may impose a fine of up to EUR 330,000 or up to 1% of their turnover from the last financial year.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The Office is obliged to respect the confidentiality of business secrets of the parties to the concentration in all submitted documents. The parties should submit a non-confidential version of the notification together with the confidential version of the notification. Information indicated by the parties and covered as business secrets must be omitted from the publicly available documents and must not be accessible to any third parties. The final decision is published as a non-confidential version.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Following the assessment of the concentration, the Office with its decision (i) approves the concentration, (ii) approves the concentration with conditions, or (iii) prohibits the concentration.

The Office has to decide on the concentration within a period of 25 business days from the date on which the notification filing has been completed. This 25-business-day period, in complex cases, may be additionally extended by 90 business days at the most.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

If the transaction gives rise to competition concerns, the Office may invite the parties to the concentration to offer structural or behavioural commitments that would remedy the identified competition problem. The parties have 30 business days from the Office's request to propose remedies which will lessen or eliminate the potential obstacles to effective competition. The remedies proposed by the parties are not binding for the Office.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

Thus far, the Office has not imposed remedies on foreign-to-foreign concentrations.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The negotiation of remedies commences upon the initiative of the Office. The parties must then propose the remedies to the transaction within 30 business days.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

In its Guidelines on imposing conditions and obligations on concentrations, the Office outlines the conditions necessary for accepting the proposed remedies and its approach to structural remedies, including divestments.

5.6 Can the parties complete the merger before the remedies have been complied with?

This depends on the wording of the remedy imposed. If a remedy consists in the promise of future behaviour, the concentration may be implemented before the remedy has been complied with. However, in the case of remedies which must be complied with prior to the implementation of the concentration, the prior implementation would amount to a breach of the suspension clause.

5.7 How are any negotiated remedies enforced?

If the parties to the concentration do not comply with the remedies, the Office may order the parties to sell shares or ownership interests acquired or to terminate the contract on the basis of which the concentration was implemented.

In addition, the Office may impose a fine for breach of non-compliance with remedies of up to 10% of the turnover.

5.8 Will a clearance decision cover ancillary restrictions?

The clearance decision will cover ancillary restrictions directly related to, and necessary for, the implementation of the concentration.

5.9 Can a decision on merger clearance be appealed?

The Office's decision may be appealed within 15 days from its delivery to the Council of the Office presided by the Office's chairman.

5.10 What is the time limit for any appeal?

The Office's decision can be appealed within 15 days to the Council of the Office. The Council's decision can be reviewed by the Regional Court in Bratislava. The action to the Regional Court has to be lodged within two months.

5.11 Is there a time limit for enforcement of merger control legislation?

A fine for breach of merger control legislation may be imposed within eight years of the breach of the obligation prescribed by the merger control legislation (objective limitation period), but within four years from the opening of a proceedings for breach of the merger control legislation (subjective limitation period).

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The Office co-operates with the European Commission and with the competition authorities of other EU Member States within the European Competition Network ("ECN"). The Office liaises particularly closely with the Czech Office for the Protection of Competition, with which it signed a memorandum of co-operation in 2014. In addition, the Office is a member of the International Competition Network ("ICN") and liaises with the Organisation for Co-operation and Development ("OECD").

6.2 Are there any proposals for reform of the merger control regime in your jurisdiction?

At present, there are no new proposals for reform of the merger control regime.

6.3 Please identify the date as at which your answers are up to date.

These answers are up to date as of 30 August 2016.

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