

The International Comparative Legal Guide to: **Merger Control 2008**

A practical insight to cross-border merger control issues



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1 Relevant Authorities and Legislation

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

The primary authority for merger control in the Slovak Republic is the Antimonopoly Office of the Slovak Republic (the "Office"), a central state administrative body located in Bratislava. The Office's activities in competition protection are defined by the Competition Act (see question 1.2 below) and its principal role is to intervene against the restriction of competition by, in particular, business enterprises. The Office's competence comprises (i) prohibited agreements (including concerted conduct); (ii) abuse of a dominant position; and (iii) merger control.

The Office is headed by a chairman, who is nominated by the government and then appointed by the president of the Slovak Republic. The council of the Office (the "Council") is an appellate body and its members are appointed by the government upon the chairman's nomination.

In 2006, the Office held 51 proceedings on concentrations. It approved 40 petitions and rejected two, the first of which was related to the privatisation of Bratislava Airport and the second was the concentration of Tesco plc and Carrefour Slovensko, a.s.

The Office's website is at www.antimon.gov.sk and is available in both Slovak and English.

1.2 What is the merger legislation?

The Constitution of the Slovak Republic contains general provisions on participation in economic competition.

Unlawful restriction of economic competition is subject to the Act on Protection of Economic Competition (Act no. 136/2001 Coll., as amended; the "Competition Act"). The Competition Act regulates mergers, cartels and other prohibited agreements, and abuse of a dominant position in the relevant market.

The Office has issued two legally binding regulations on merger control, the Decree on Notification, which outlines the particulars of notification of a concentration, and the Decree on Turnover, which outlines the details of the calculation of turnover. The Office also issues guidelines from time to time, which describe its practice and opinions. Four sets of guidelines have thus far been issued, three of which deal with the subject of mergers. The topics are (i) participants to a concentration, (ii) remedies, and (iii) ancillary restrictions. The guidelines are not legally binding, but they are useful to companies contemplating mergers.

Although no information on future legislation has been made public, the Office has confirmed that there will be changes in the

legislation within the next several years. However the only changes that the Office would specifically allude to are those associated with the Slovak Republic's adoption of the Euro.

1.3 Is there any other relevant legislation for foreign mergers?

The Competition Act does not distinguish between Slovak and foreign undertakings, so both are subject to the same merger control rules.

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

There is no other relevant legislation for merger control in particular sectors; the Competition Act governs merger control and the Office is the only authority that issues final decisions under the Competition Act. However, a change in control over an undertaking within certain sectors may be subject to the consent, either prior or subsequent, of that sector's supervisory authority.

Most notably, legislation stipulates that the National Bank of Slovakia (the "NBS") must approve mergers in specified sectors, as follows:

- (i) The Act on Securities and Investment Services regulates the notification obligation of stock brokerage firms to the NBS (Act No. 566/2001 Coll., as amended);
- (ii) The Banking Act regulates the notification obligation of banks to the NBS (Act No. 483/2001 Coll., as amended);
- (iii) The Act on the Insurance Industry regulates the notification obligation of insurance and reinsurance companies to the NBS (Act No. 95/2002 Coll., as amended);
- (iv) The Act on the Stock Exchange regulates the notification obligation of the Stock Exchange to the NBS (Act No. 429/2002 Coll., as amended); and
- (v) The Act on Collective Investment regulates the notification obligation of asset management companies to the NBS (Act No. 594/2003 Coll., as amended).

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

According to the Competition Act, a concentration is defined as:

- (i) a merger by acquisition or a merger by formation of a new successor company of two or more separate undertakings; or

- (ii) an acquisition of direct or indirect control by an undertaking or several undertakings over all or part of another undertaking or undertakings.

The definition includes mergers in which undertakings retain their legal independence, especially in the case of joint economic management.

Control within the meaning under (ii) above means the ability to exercise a decisive influence on the activities of an undertaking, especially by means of (a) ownership or other rights to all or part of the undertaking; or (b) rights, agreements or other facts allowing the exercise of a decisive influence on the composition, voting or decisions of the undertaking's corporate bodies.

Concentration under (ii) above also means the establishment of a joint venture jointly controlled by two or more undertakings if the joint venture performs all the functions of an independent economic entity on a lasting basis.

2.2 Are joint ventures subject to merger control?

Establishment of a joint venture is subject to merger control under the Competition Act if the joint venture will perform all the functions of an independent economic entity on a lasting basis. The Competition Act uses the definition of "full function joint venture" ("FFJV") that is contained in the EC Merger Regulation.

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

Under the Competition Act, a concentration is subject to merger control if:

- (1) the combined worldwide global turnover of the parties to the concentration was at least SKK 1.2 billion (approximately EUR 34,857,375 / USD 45,903,144); and
 - at least two of the parties to the concentration each attained a total turnover in the Slovak Republic of at least SKK 360 million (approximately EUR 10,457,213 / USD 13,770,943); or
- (2) at least one of the parties to the concentration attained a total turnover in the Slovak Republic of at least SKK 500 million (approximately EUR 14,523,906 / USD 19,126,310); and
 - at least one other party to the concentration attained a total worldwide turnover of at least SKK 1.2 billion (approximately EUR 34,857,375 / USD 45,903,144).

(The figures used above are always for the closed accounting period immediately preceding establishment of the concentration.)

"Turnover" means the total of revenues, yields and incomes from the sale of goods, to which any subsidies granted to the undertaking are added. "Total turnover" in principle means the turnover of the holding or group of the party to a concentration. The Competition Act also includes rules for revenues, yields or incomes originating from the sale of goods between members of the same group and between the parties to a concentration or joint venture. Turnover is defined differently within certain industries, primarily banking and finance, in the Decree on Turnover.

According to the Decree on Turnover, turnovers of foreign undertakings must be calculated in Slovak crowns based on the last exchange rates published by the National Bank of Slovakia in the relevant financial year. For the purposes of the above calculations, the exchange rates on 31 December 2006 were: EUR 1 = SKK 34.426; USD 1 = SKK 26.142.

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

Undertakings need notify concentrations based only on the turnover criteria specified above. The positions of the parties on the relevant market and any change in their positions following the concentration are irrelevant.

2.5 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 Competition Act also applies to activities and actions that have taken place abroad (foreign to foreign transactions) if they lead or may lead to a restriction of competition in the Slovak market. The only applicable criteria for notification of a concentration are the worldwide and Slovak turnover thresholds described in question 2.3 above. Whether or not the undertakings have any local presence in the Slovak Republic is irrelevant.

While the risk of foreign to foreign transactions attracting fines for failure to notify may currently be low, the transactions must be notified under the law. The parties to a concentration should be aware that the Office has access to information from foreign and international competition authorities.

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

The Office may suspend proceedings pursuant to the Competition Act in the case of a concentration until it is determined on the basis of the EC Merger Regulation (Council Regulation (EC) No. 139/2004) who will deal with the matter.

2.7 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?

Two or more concentrations within two years that are not subject to control by the Office pursuant to the threshold rule above are deemed to be one and the same concentration that arose on the date of the last concentration. Slovak law applies no other principles to a series of transactions.

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?

Notification is compulsory under Slovak law.

A concentration subject to control by the Office must be notified to the Office within 30 working days following the date on which an agreement is concluded or another fact occurred based on which the concentration has arisen (see question 3.5 below).

In addition to the notification obligation, the Competition Act allows undertakings to ask the Office for an opinion on an intended concentration in advance of that concentration.

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

All concentrations meeting the threshold criteria are obliged to notify the Office of the concentration; there are no exceptions to compulsory notification.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

If a concentration meets the notification criteria and an undertaking fails to file, the Office may impose a fine on that undertaking of up to 10% of its turnover for the immediately preceding closed accounting period or, for an undertaking with a turnover of SKK 0 to SKK 10,000 (approximately EUR 290 / USD 383) or an undertaking whose turnover cannot be calculated, a fine of up to SKK 10 million (approximately EUR 290,478 / USD 382,526). The Office may impose fines repeatedly and at any time within 4 years from the commencement of proceedings, however, within 8 years from the date of the violation. If an undertaking fails to pay a fine within the specified time limit, it will be required to pay a penalty of 0.1% of the outstanding amount of the imposed fine for each day it is overdue.

When imposing a fine, the Office considers the gravity and duration of the violation, whether of the Competition Act, or of a condition, obligation or commitment imposed by the Office. In assessing the gravity of the violation, the Office will consider its character, actual impact on the market and, where appropriate, the size of the relevant market. In addition to these criteria, the Office will also consider other facts with respect to imposing a fine, especially a repeated violation by the same undertaking, an undertaking's refusal to cooperate with the Office, or an undertaking being in the position of a leader or instigator of a violation, gaining financial benefit as a result of a violation, or failure to fulfil in practice an agreement restricting competition.

In its decision No. 2006/FK/3/1/103, the Office imposed a fine of SKK 60,000 for a breach of the duty to notify a concentration within 30 working days after the agreement had been concluded.

It would seem that Section 127 of the Criminal Code, Breach of the Binding Rules of Commercial Transactions, may be interpreted so as to cover breach of the competition rules.

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

The Competition Act does not regulate this possibility. According to the Competition Act an undertaking may not exercise its rights and obligations resulting from a concentration before the decision on the concentration becomes legally valid. But as the Competition Act applies only to those foreign activities and actions which lead or may lead to restriction of competition in the Slovak market, the possibility of carving out the local completion of a merger from the global completion is not excluded if it does not affect the Slovak market. Since this possibility is not directly regulated and thus the risks associated with completing the global merger without having local clearance cannot be excluded, it is advisable to apply for an exemption from the restriction referred to above, which may be granted by the Office for serious reasons.

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

A concentration subject to control by the Office must be notified to

the Office within 30 working days following the date on which: (i) an agreement is concluded; (ii) acceptance of a bid in a public tender is announced; (iii) a state authority's decision is delivered to an undertaking; (iv) the European Commission informs an undertaking that the Office will deal with the matter; or (v) another fact occurs based on which the concentration arises.

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 issues a decision on a notification of a concentration within 60 working days following delivery of the notification. Before the 60 days are up, the chairman of the Office may extend the time limit as appropriate, and repeatedly in complicated cases, by up to 90 working days in total. The time limit begins on the day after delivery of a complete notification. If the Office finds that the notification is incomplete, a new time limit will begin when the notification is completed. The Office is required to inform the party to the proceedings of the time limit in writing.

The Competition Act specifies several situations when the time for issuance of a decision will, in principle, stop running:

- (i) until missing data is submitted in the case of an incomplete notification;
- (ii) if the Office has raised competition concerns and has asked the undertakings to the concentration to submit a proposal of remedies (a 30-day cessation); and
- (iii) while it is being determined which authority is responsible for assessment of the concentration according to the EC Merger Regulation.

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?

The general rule in the Competition Act is that an undertaking may not exercise its rights and obligations resulting from a concentration until the decision on the concentration is in legal force. The Office has the power to grant an exemption to this ban at the request of an undertaking for serious reasons. The Office must issue a decision on the requested exemption within 30 working days from delivery of the request. When deciding on the exemption, the Office will take into account the effects of suspension of the concentration on the parties to the concentration and third parties. An exemption may be granted subject to conditions in order to ensure effective competition. If the undertakings exercise rights and obligations arising from the concentration in advance of the Office's decision, they can be fined as in question 3.3 above.

If the Office has conditionally approved a concentration, the undertakings can exercise rights and obligations resulting from the concentration. If they do not then fulfil the Office's condition for approval, the Office will prohibit the concentration. The Office will also be entitled to impose an obligation on the undertakings to restore the level of competition that had existed prior to establishment of the concentration, especially an obligation to divide a company or transfer rights.

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

There is no prescribed format for the notification, but the required content is specified in the Competition Act and the Decree on

Notification as follows:

- (i) basic information on the parties to the concentration;
- (ii) description of the concentration;
- (iii) information on assets and bank accounts;
- (iv) information on any personal relationships between the parties;
- (v) information on the affected markets;
- (vi) information on entering the relevant market;
- (vii) information on cooperation agreements;
- (viii) information on trade associations;
- (ix) general market information;
- (x) information on the cooperative effects of a joint venture;
- (xi) reasons for and effects of the concentration and their impact on competition;
- (xii) underlying documentation:
 - a) power of attorney (if applicable);
 - b) transaction agreement;
 - c) articles of association of the concerned undertakings;
 - d) extracts from commercial registers where the undertakings concerned are registered;
 - e) trade licences;
 - f) annual reports for the previous financial year; and
 - g) if available, analyses, studies, reports or other documents prepared for the purpose of appraisal or analysis of the concentration; and
- (xiii) confirmation of payment of the administrative fee.

The documents under (a), (b), (c) and (d) must be originals or verified copies. Documents from certain countries must also be affixed with an apostille. All documents must be submitted in the Slovak language.

3.9 Is there a short form or accelerated procedure for any types of mergers?

At the justified request of an undertaking announcing a concentration, the Office may reduce the amount of information required (see question 3.8 above). However, if the Office ascertains during the proceedings that it does not have enough information to make a decision, it may ask the undertaking to complete the information. At present, this is the only accelerated procedure for concentrations according to the Competition Act.

3.10 Who is responsible for making the notification and are there any filing fees?

In the case of a merger by acquisition or by formation of a new successor company by two or more independent undertakings, or if a state authority has issued a decision on a merger under the Commercial Code, the undertakings jointly submit the notification. In the case of a public tender, the notification is submitted by the selected bidder. In other cases, notification is submitted by the undertaking or undertakings that are acquiring control over all or part of another undertaking or undertakings. The filing fee for notification is SKK 100,000 (approximately EUR 2,905 / USD 3,825), payable in advance.

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 substantive test under the Slovak Competition Act follows the European Community's traditional dominance test. The Office issues a clearance decision if the concentration does not create or strengthen a dominant position resulting in major barriers to effective competition in the relevant market. The Office applies this test in the appraisal of all types of concentrations: horizontal mergers; vertical mergers; and conglomerate concentrations. The test is also used for FFJVs in addition to an assessment under the antitrust rules to ensure that the co-ordination of competition activities does not aim at or result in the limiting of competition. The practice of the Office is still developing and no guidelines on the substantive test have been published.

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

Under the Competition Act, third parties cannot be parties to proceedings before the Office on merger approval.

Third parties contribute to the Office's investigations mainly through replying to requests for information. If third parties request in writing to contribute to proceedings and demonstrate an interest in the matter, the Office will inform them in writing of the subject of the proceedings and set a date by which they may submit their views in writing. Also, if third parties request in writing that they wish to participate in an oral hearing and demonstrate an interest in the matter, the Office may allow them to take part in the oral hearing and make their views heard. There is a list of third parties that are considered to have a "sufficient interest" in the Office's procedure, which includes customers, suppliers, purchasers, and competitors.

The Office considers communication with the public an important part of its work. On its website, the Office provides information about initiated proceedings and publishes its legally valid decisions with explanations.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

When examining notifications, the Office is entitled to request information and documents necessary for its activities from undertakings, their senior employees, corporate bodies and their members, and supervisory bodies and their members. Documents requested are most often accounting and trade documents or legal documents, regardless of the medium on which they are recorded. The Office will make copies of and notes from these documents or request certified translations into Slovak. The Office is also entitled to request oral or written explanations.

In order to secure documents and information, Office employees have the right to seal information or documents or buildings and premises in which an inspection is being carried out for a specified time period and to the extent necessary. Office employees are also entitled to take away information and documents for the necessary time to make copies. The Office is entitled to inspect an undertaking's buildings and premises and, with the consent of the court, also private premises.

If an undertaking fails to submit requested documents or information to the Office within the specified time limit, or if it

submits false or incomplete documents or information, the Office can fine the undertaking up to SKK 5 million. In a recent decision (No. 2007/SP/3/1/017) the Office imposed a fine of SKK 20,000 (approximately EUR 590) for misleading information submitted in merger proceedings. The information was discovered to be misleading in other merger proceedings where the company was asked, as a third party, to inform the Office of the situation in the relevant (beef) market. Using the given information, the Office found differences between that information and the information submitted earlier in the company's own merger proceedings.

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

In accordance with the Competition Act, the Office protects confidential information and business secrets contained in the submissions provided by the parties involved in proceedings throughout the investigation. The Office is, however, required to publish its legally valid decisions in full, certain details only of notifications of concentrations and, if the nature of the matter does not exclude it, notices on the commencement of proceedings.

Regarding notifications of concentrations, the Office publishes only the names of the parties to the concentration, the character of the concentration and the industry in which the concentration is being established.

It is not considered a violation of confidentiality if information is provided to a court for the purpose of civil proceedings, to an authority involved in criminal proceedings, or to the police or the prosecutor's Office.

It must be stressed that according to the Act on free access to information (Act No. 211/2000 Coll.), any person may request access to a file and the information contained within unless the information or document in question was identified by the undertakings concerned as confidential and the information constitutes business secrets within the legal definition in the Commercial Code. Therefore it is necessary that undertakings indicate to the Office, in writing and with reasons, which of the information or documents provided are subject to business secrecy or which of the information or documents they consider confidential.

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

5.1 How does the regulatory process end?

After the Office has completed their examination of a notification, it makes a decision to: (a) approve the concentration; (b) prohibit the concentration if it creates or strengthens a dominant position resulting in significant barriers to effective competition in the relevant market; or (c) issue a conditional approval.

The Office must issue a decision within 60 working days following the date of delivery of the notification. Prior to the expiration of that time limit, the Office chairman may extend the time limit as appropriate in complicated cases by a total of 90 working days at a maximum.

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

If the concentration raises concerns of non-compliance with the Competition Act, the Office is entitled to ask a party to the proceedings in writing to propose a condition and obligation(s) related to this condition.

The proposal must be presented to the Office in writing and the party to the proceedings is required to submit this proposal within 30 working days of delivery of the request. The Office will not take into account any proposal submitted after the expiration of the time limit. The time period for issuance of the decision ceases to run during this 30-day time limit. The Office is not bound by the proposed condition and after evaluation of the proposal the Office may or may not issue a conditional approval.

With respect to the variety of cases, it is not possible to provide an exhaustive list of remedies. However there is a list of remedies, which the party to the proceedings may propose, in the *Guidelines on the Imposition of Conditions and Obligations in Concentrations*.

5.3 At what stage in the process can the negotiation of remedies be commenced?

As stated above in question 5.2, the negotiation of remedies can be commenced if the Office determines that the concentration raises concerns of non-compliance with the Competition Act and negotiation of remedies thus always starts upon the initiative of the Office.

5.4 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?

The Office has issued the *Guidelines on the Imposition of Conditions and Obligations in Concentrations*, which outlines the Office's approach to structural remedies including divestment. The *Guidelines* explain what conditions have to be met for the Office to accept suggested remedies, but there are no standard terms and conditions.

5.5 Can the parties complete the merger before the remedies have been complied?

According to the Competition Act, in the case of a conditional approval the Office may prohibit the parties to the proceedings from exercising the rights and obligations resulting from the concentration until the imposed condition has been fulfilled. The prohibition is at the discretion of the Office, and is not mandatory.

If the Office has conditionally approved a concentration, the undertakings can exercise rights and obligations resulting from the concentration. If they do not then fulfil the Office's condition for approval, the Office will prohibit the concentration. The Office will also be entitled to impose an obligation on the undertakings to restore the level of competition that had existed prior to establishment of the concentration, especially an obligation to divide a company or transfer rights.

5.6 How are any negotiated remedies enforced?

Under the Competition Act negotiated remedies are enforced with fines. An undertaking that fails to fulfil a condition, an undertaking that violates an obligation or commitment imposed by a decision of the Office, an undertaking that fails to fulfil a decision of the Office, or an undertaking that has violated a prohibition to exercise rights and obligations ensuing from a concentration may be fined by the Office up to 10% of its turnover.

5.7 Will a clearance decision cover ancillary restrictions?

An Office decision approving a concentration will cover only those ancillary restrictions that are directly related to the concentration

and necessary for its implementation. The Office has published guidelines on this issue.

5.8 Can a decision on merger clearance be appealed?

A decision issued by the Office within first instance proceedings may be appealed within 15 days following the date of delivery of the decision. The Council has exclusive jurisdiction to decide appeals. Pursuant to the Administrative Procedure Code, the parties to the proceedings may also use extraordinary remedies, but only in a limited number of cases.

As well as being entitled to reverse its decision granting a conditional approval, the Office may also modify a conditional approval at the request of a party to the proceedings in stipulated cases.

The Competition Act also provides the Office with the power to modify or reverse a decision on concentration on its own initiative if it is determined that an undertaking provided information that was incomplete or false or if the concentration has arisen in a way other than that notified.

Further, according to the Civil Procedure Code, a party to the proceedings may submit a petition for full judicial review of the Office's final decision to the Regional Court in Bratislava. In a limited number of cases, it is also possible to appeal the decisions of the Regional Court in Bratislava, in which case the Supreme Court of the Slovak Republic reviews only the legality of the decisions.

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

The Office's decision may be enforced within five years after the expiration of the time limit set for fulfilment of the imposed obligation.

6 Miscellaneous

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

The Office liaises with other national competition authorities as well as with the European Commission through its memberships in the European Competition Network, the International Competition Network, the European Competition Authorities, and the Association of Competition Economics.

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

September 12, 2007.

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**BALCAR POLANSKÝ EVERSLEDHS**

Balcar Polanský Eversheds started as Balcar Polanský in 1990 in Prague as one of the first law firms in post-communist Czechoslovakia. In 2005, the firm expanded to Slovakia. The Prague and Bratislava offices co-operate closely and support each other on Czecho-Slovak transactions and other cross-border work. The Slovak branch benefits from the firm's 17 years of experience and from the strong team of Slovak lawyers based in Prague. The Balcar Polanský offices became part of the Eversheds International network in 2007, and the firm was rebranded as Balcar Polanský Eversheds.

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