ADAPTATION OF THE EU COMPETITION POLICY IN SLOVAKIA – SELECTED PROBLEMS

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As of 1 May 2004, competition rules apply directly on the new EU Member States. As regards the State aid, there are only some very limited transitional arrangements. The EU needs to ensure implementing of the State aid rules in economies which are in some aspects still different from those of the initial 15 Member States, and which have not always yet fully completed the process of transition from centrally planned to market-based economies. The Slovak experience of the State aid granting mainly to foreign investors illustrates some of the difficulties that may arise. Thus, we selected the case of the State aid to Korean automobile producer Kia Motors Corporation and Hyundai Mobis, on which basis we want to point out the recent problems.

1. State aid regulation in the new EU Member States

In order to prepare for a gradual introduction of the State aid control in line with the EU *acquis*, the EU has been working for many years closely with the authorities in the Acceding States. Since the late 1990s, the EU has actively encouraged the introduction of State aid legislation and the establishment of State aid monitoring authorities in the Candidate Countries, in line with the provisions of the Europe Agreements. The Commission has consistently taken the view that Candidate Countries had to demonstrate a credible State aid enforcement record in line with the acquis well before the date of accession. This has ensured that the Acceding States have phased out or aligned their most distortive forms of aid, i.e. aid for the bail-out of ailing businesses as well as incompatible fiscal aid measures, largely designed to attract internationally mobile investments.

Since the EU Accession the European legislation regarding State aid is superior to the national legislation. Hence, if any provision of national legislation were at variance with *acqius*, they would not be enforceable. The State aid is regulated in Art. 87 – 89 EC Treaty. Pursuant to these articles the new Member States are obliged to notify to the Commission their intent to grant State aid. Consequently, the Commission examines the compatibility of the State aid in question with criteria specified in Art. 87 EC Treaty as well as in legal acts adopted pursuant to Art. 88 and 89 EC Treaty. If a Member State grants State aid without prior notification or if the Commission finds that the State aid granted distorts or threatens to distort competition in the internal market it may order its recovery.

Furthermore, the Accession Treaty, signed in Athens in April 2003, provides for a mechanism that enables the Commission to screen State aid measures that entered into effect before the date of accession and that the authorities of the Acceding States intend to operate after that date. Hence, the Accession Treaty differentiates between the existing and the new aid. The purpose of the existing aid mechanism is to provide the Acceding States and economic operators with legal certainty as regards State aid measures that are applicable after the date of accession. It enables the Commission to object to any such measure if it considers that it is incompatible with the common market, as well as it enables the Acceding States to ensure continuity without any interruption to their State aid systems immediately after accession. A total of 222 State aid

measures were accepted for inclusion in the Accession Treaty.[1] Between January 2003 and February 2004, the Acceding States submitted a further 288 measures, 110 of which have been approved or cleared for approval by the Commission.

2. Main changes in the Slovak State Aid regulation

In the Accession Treaty, the existing aid is defined as an aid put into effect in Slovakia between 10 December 1994 and 1 May 2004 that is still applicable after the accession, provided that it is listed among existing aid measures which have been assessed by the national State Aid Authority and which have been found compatible with the acquis by that authority. Any other still applicable aid is considered to be a new aid. There is, however, no explanation of the term "still applicable aid". It is possible to interpret it as a State aid that affects the internal market. Hence, tax exemptions granted in Slovakia before accession may constitute the still-applicable aid, in so far as its effects would distort the competition in the EU.

New responsibilities in the field of the State aid regulation as well as discontinuation of the State Aid Authority and shift of competencies to the Ministry of Finance has been regulated by the State Aid Act amendment No. 203/2004 that entered into force on 1 May 2004. The amendment reflects the existence of EC regulations in the way that the provisions already included in the EC regulations are not repeated (e.g. *de minimis* rules). Furthermore, the amendment provides for the obligation to an undertaking to recover the State aid that has not been granted in compliance with the EC rules and to pay the interest on that amount.

Pursuant to the EC Regulation No 659/1999 laying down detail rules for application of Article 88 EC Treaty is Slovakia obliged to cooperate with the Commission on the State aid approval procedure, keep a record on the State aid granted under the *de minimis* rule and send the Commission annual reports on all existing aid schemes.

3. Persisting problems connected with the State aid granting

Slovak State aid legislation is harmonised with the EC rules and since Slovakia has joined the EU, all State aid has to be approved by the Commission according to existing procedural provisions. Provision of the State aid, which the Slovak Government has committed itself to in various contracts with mostly foreign investors is, however, in many aspects problematic. Investment contract signed between the Slovak Republic and Korean automobile producers KIA Motors Corporation and Hyundai Mobis (Kia/Hyundai) in March 2004 serves as the best example. In this contract, Slovakia committed itself to grant a State aid to the investor in accordance with the contract provisions. Some of the commitments have risen, however, legal questions.

Investment contracts between the Slovak Republic and the companies KIA Motors Corporation and Hyundai Mobis of 5 March 2004 impose the Ministry of Economy of the Slovak Republic and the city of Žilina, as the Slovak parties, to carry out preparation of the location for implementation of the projects until 31 August 2004, particularly through obtaining the property right in the lands encumbered by nothing and through carrying out arrangement of these lands as shown in technical specifications of the investment contracts. Acquisition of technically arranged lots with constructed infrastructure represents part of State aid provided to the investor.

[1] State Aid Scoreboard - Spring 2004 update.

The process of purchasing the lands has encountered resistance by their owners, particularly due to the average purchase price ascertained. The Government of the Slovak Republic subsequently decided to begin preparations for expropriation of lands with regard to commitments contained in the investment contract. Failing to keep the commitment is namely associated with a risk of demanding compensations for damages by the investor from the Slovak Republic due to failing to keep contractual conditions as well as with a risk of possible withdrawing from the contract.

Legal regulation of the institute of expropriation is based on the Article 20 Paragraph 4 of the Act No. 460/1992 Constitution of the Slovak Republic, according to which: „Expropriation of property right is only possible in inevitable scope and within public interest, particularly for appropriate compensation."

Expropriation is a permanent intervention into the right to possess property. It is bound to public interest. „Public interest is a kind of interest that is generally beneficial; opposite to a purely private interest. It applies in creating, interpreting and in executing the law, especially as one of two reasons of legal restriction of fundamental rights and freedoms. As the matter is in one of legal notions with vague meaning, it should be specified or defined in laws more closely or in more detail."[2]

Regarding the question of public interest, the Constitutional Court of the Slovak Republic in its finding No. 33/95 has stated as follows: „The notion of public interest can be stipulated in terms of law just in relation to particular right or freedom. If the aim assumed by restricting the right to possess property cannot be attained by means impacting the property right protected by the Constitution in a milder way and if public interest is superior and objectivised towards the interests of possessor, the condition of public interest may be considered to have been met."

In addition to public interest, the Constitution of the Slovak Republic states its using in an inevitable scope as a substantial condition of expropriation for reasonable compensation and based on law. Anyway, expropriation should occur neither in case of meeting all conditions.

Legal regulation of the institute of expropriation is based especially on Sections 108 to 116 of the Construction Law No. 50/1976 of the Collection of Laws backed up by the Constitution of the Slovak Republic, making more precise the conditions on which it would be possible to expropriate the property right, while stipulating the notion of public interest in Section 108 Paragraph 2, setting an obligation to expropriate just in inevitable scope in Section 110 Paragraph 3 and stating a mechanism of compensations for expropriation in Sections 111, 111a and 111b. Equally, the Construction Law sets in its Section 110 Paragraph 2 another condition that should be kept in the process of expropriation, particularly compliance of expropriation with the aims and intentions of regional planning. In addition to construction of motorways, gas facilities or water-management works, as well „implementation of structures that are a significant investment in compliance with special regulations" rank among the reasons for which lands, structures and rights to them may be expropriated.

This special regulation is the Act No. 175/1999 on Significant Investments. In order construction could meet the definition of investment, there is required concurrent meeting of

[2] Hendrych, Dictionary of Law, p. 251.

three conditions set forth in Section 1 Paragraph 2 of the Act. Nevertheless, these conditions are so vague that the Government is allowed to identify substantially anything as a significant investment. One of the conditions is existence of public interest decided on by the Government. The Investment contract with Kia/Hyundai sets forth that „implementation of the project is in the best interests of Slovakia and Žilina and that it shall be an important factor contributing to economic development of Slovakia in general and to economic development of the region of central Slovakia and Žilina in particular.“[3]

That is why the Government of the Slovak Republic decided by its resolution No. 742 of 14 July 2004 the project of Kia/Hyundai to be in public interest, being backed up by the Act No. 175/1999 on Significant Investments. The resolution sets forth: „Implementation of construction of the factory for assembly of motor-cars in Žilina for the company KIA Motors Corporation and construction of the factory for production of automobile parts and modules in Žilina for the company Hyundai Mobis are in public interest.“

The report submitted to the resolution sets forth that the decision by the Government of the Slovak Republic has concurrently significance also in relation to expropriation procedure pursuant to the Act No. 50/1976 on Regional Planning and Building Code, as expropriating may be done only in public interest, if accomplishing some of the reasons pursuant to Section 108 Paragraph 2 of this Act. Whereas one of these reasons is also the fact that the matter is in implementing constructions that are significant investment according to special regulations (Section 108 Paragraph 2 letter o), by which a significant investment is meant pursuant to Section 1 of the Act No. 175/1999 on Significant Investments.

An investment project of a private company cannot be perceived without anything else as public interest for which even expropriation could come into consideration. The European Court for Human Rights has uttered in similar spirit, according to which expropriation without any other reason than for the aim of assigning private benefit to a private party cannot be in public interest.[4]

Crucial question in preparing the lands for the car factory Kia/Hyundai is ability to defend public interest. There should be equilibrium between the means used and aims pursued, otherwise the intervention would become contradictory to the Constitution. The law imposes the Construction Office to investigate the question of public interest in any particular case.[5] Governmental Resolution on investment being in public interest does not deprive the Construction Office of the obligation (neither of the right), to investigate in relation to particular lots, whether there is public interest and whether it is prevailing over the interests of the possessor.

The only thing by which the Government may justify public interest in relation to the Kia/Hyundai project is an increase in employment rate. Anyway, the investment contract between the Slovak party and Kia/Hyundai does not contain any guarantee in this respect. The Contract‘s Article related to creation of labour opportunities investor assumes to employ new employees in association with implementing of this project. „The real number of new

[3] Section D of the contract.
[4] Drgonec, Fundamental…, p 241.
[5] Section 108 of the Act No. 50/1976 on Regional Planning and Building Code.

employees shall depend on real needs of production by Kia, while Kia shall have no obligation to employ any minimum number of new recruits for the project," as it is written in the point 4.2. of the Investment contract.

4. Act on Significant investments

Act No. 175/1999 on Significant Investments amended by Act. No 133/2004 provides for simplification of the property rights settlement related to preparation of significant investments. According to the Act on Significant Investments if the Government decides that a particular project is a "significant investment", it may expropriate the land on which the project is to be built (Section 3 Paragraph 2) according to the provisions of the Act No. 50/1976 on Regional Planning and Building Code. Section 111 of the Act regulates price setting for expropriated land. As indicated in the case above, controversies regarding appropriate price setting may occur. Thus, regulation of price setting may lead to lower prices for landowners than they would be normally. This means that any investor in a project classified as "significant investment" may save costs depending on the size of expropriated land, not to speak about the benefit of simplified land-acquisition procedure. By this way he is getting an advantage. A state measure that provides advantage to a certain undertaking may be considered for a State aid within the meaning of the Art 87(1) EC Treaty. To qualify for the State Aid pursuant to the Art 87(1) EC Treaty the question of the transfer of State resources has to be cleared. There are several cases in which the ECJ has detected State aid without either a grant of money from the State or the foregoing of revenue. In the Case Openbaar Ministerie v Van Tiggele the following reasoning has been used: "It is clear that for a measure which has the effect of favouring certain undertaking to constitute an aid, it must entail a financial burden for the State. (...) It is thus necessary that the State should grant certain undertakings an advantage entailing a burden on the public finances in the form either of expenditure or of reduced income."[6] If the state steps between the landowner and investor by ordering the land expropriation at price lower than the required contractual price between the landowner and the investor would be, this would not by itself constitute the transfer of State resources. If, however, the State finances the preparation of the building site, this constitutes an aid.[7] This applies also to the Kia/Hyundai case. In the contract with Kia/Hyundai Slovakia committed itself to finance the acquisition of land and preparation of the building site from the State budget and consequently sell it to the Kia/Hyundai for maximum of EUR 16,6 million.[8] If the total amount of costs for land acquisition and preparation would exceed EUR 16,6 million the State would bear the difference between the costs occurred and the selling price. This difference would create burden on public finances and thus constitute a State aid. In this light, the Act No. 175/1999 on Significant investments contains provisions that have to be put into connection with the State aid Act No. 231/1999, above all with the eligibility criteria for a State aid granting. However, the only criteria that must be met for a project to earn the status of "significant investment" are: (1) investment of at least SKK 1 billion (appr. EUR 23.7 million), (2) national economic significance of the production or employment generated by the project, and (3) decision of the cabinet that the project is in public interest. The status can be awarded also to investments of smaller amount provided that they are necessary for securing the significant investment functioning (such as subcontractors of big production units). Apart from the size of investment, which can be questioned as a measure of significance, none of the above criteria is clearly defined. Moreover, there are no restrictions in place for projects falling into the so-called

[6] Case 82/77, Openbaar Ministerie v Van Tiggele, (1978) ECR 25, paragraph 8 and 25.
[7] Twenty-Fifth Report on Competition Policy , 1995, pt. 158.
[8] Annex III, Art. 1.1.3. of the contract.

"sensitive sectors"[9] according to the EU classification. The table below shows that most benefiting projects fall into this category (particularly projects in the motor industry).

Table 1 **The status of "significant investment" has been awarded to the following projects**

Company	Name of project
VOLKSWAGEN Slovakia, a.s. Bratislava	Expansion of car manufacture and sub-group productions, including related and ancillary structures
AUTO Martin, a.s. Martin	Construction of an industrial par for car manufacture in the Záhorie region
Plastic Omnium Auto Exteriors, s.r.o. Bratislava	Manufacture of outer parts for automobiles and their assembly, branch of Lozorno
Plastic Omnium Fuel Systems, s.r.o. Bratislava	Manufacture and assembly of fuel systems for cars, branch of Lozorno (including road link to highway)
VUMA, a.s. Nove Mesto nad Vahom	New production hall of BRANSON
Whirlpool Slovakia, a.s.	Expansion of production facilities and spare parts manufacture in the city of Poprad
SLOVALCO, a.s. Ziar nad Hronom	Expansion of aluminium production and processing

Source: Position on the Chapter "Competition Policy". Center for Environmental Public Advocacy, Friends of the Earth – Slovakia, CEE Bankwatch Network – Slovakia, February 2002.

Although Slovakia has a law on free access to information[10] and these "significant investments" have been formally pronounced as being in public interest, public officials are reluctant to publicise the documents based on which decisions ware taken to classify projects as "significant investments" pursuant to Act No. 175/1999 on Significant Investments amended by Act. No 133/2004.

The Government awards certain investors the status of being significant and thus makes them eligible for various benefits that are not available to other economic operators. Obviously, if a "significant investment" is in the public interest and the law provides for a possibility to expropriate land in public interest, any decision in this regard must be transparent and publicly controllable. Nevertheless, the Government claims that such information is confidential and constitutes commercial secret. For example, in the case of the Whirlpool "significant investment", the Government has not disclosed underlying documents from the government session.[11] A lawsuit demanding the release of documents on the "significant investment" of Whirlpool is pending at the Supreme Court.

The transparency of decisions on any type of State aid should be paramount to private interests, particularly if such a private interest is claimed to involve an investment in public interest. Thus, the Slovak Government should make publicly available all the documents it has used in the past to take decisions on "significant investments" within the meaning of Act No. 175/1999 on Significant Investments.

[9] Under the State Aid Act, the 'sensitive' sectors include steel industry, motor industry, shipbuilding industry and synthetic fibres industry. These sectors are under close scrutiny of the Commission and the state aid is largely restricted.

[10] Act No. 211/2000 on Free Access to Information.

[11] Government session held on 17 December 2003, document Nr. 11768/2003, www.rokovania.sk.

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[7] SAKOVA, B. Transnational Corporations in the World Economy, Sprint, Bratislava 2004.
[8] State Aid Scoreboard – Spring 2004 update, http://www.europa.eu.int

Summary

Od 1. mája 2004 platia pravidlá hospodárskej súťaže EÚ aj v nových členských krajinách. Pokiaľ ide o pravidlá poskytovania štátnej pomoci, prechodné obdobia boli dohodnuté iba v obmedzenej miere. V týchto krajinách je potrebné zabezpečiť implementáciu príslušných pravidiel vzhľadom na to, že proces transformácie z centrálne plánovaných na trhové ekonomiky ešte nebol úplne dokončený. Skúsenosti Slovenska s poskytovaním štátnej pomoci zahraničným investorom naznačujú možné problémy. Konkrétne sme sa zamerali na štátnu pomoc poskytnutú kórejským firmám Kia Motors Corporation a Hyundai Mobis.