

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

**ROUNDTABLE ON THE STANDARD FOR MERGER REVIEW, WITH A PARTICULAR EMPHASIS
ON COUNTRY EXPERIENCE WITH THE CHANGE OF MERGER REVIEW STANDARD FROM
THE DOMINANCE TEST TO THE SLC/SIEC TEST**

-- Hungary --

9 June 2009

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 9 June 2009.

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1. The substantive test for merger review

Please describe the substantive test which is applied to mergers in your jurisdiction and what factors are featured in determining whether competition is likely to be harmed by a merger. Please discuss what type of possible anti-competitive effects are covered by the substantive test applied in your country. If you feel that the merger test which is currently applicable in your jurisdiction is inadequate to address some potentially anti-competitive effects of mergers, please explain why that is.

1. The Hungarian competition law is just under modification. The law amendment brought by the Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) passed on 23th March 2009 and will come into force on 1st June 2009. One of the core modifications involves the merger control as the GVH switches to the SLC test from the previously applied dominance test.

2. According to the current legislation “[t]he Hungarian Competition Authority may not refuse to grant authorisation for a concentration where [...] the concentration does not create or strengthen a dominant position, which would impede the formation, development or continuation of effective competition on the relevant market”.¹ It implies a two-step test: the GVH has to consider first whether the merger creates or strengthens dominance, and then decide about its effects on competition. While evaluating these effects, all the advantages and disadvantages of the merger have to be assessed, taking into consideration the impact of the merger on stakeholders and the characteristics of the relevant market and the firms concerned.² This kind of approach means that the GVH can prohibit a merger or approve it with conditions only if dominance or strengthening of dominance is proved.

3. Concerning the anti-competitive effects covered by the test we apply: those abuses can be prevented which would be committed by a dominant firm or by firms which are collectively dominant. Although we think that most of the potential effects of mergers are covered by this test, the GVH had a case that showed that there can be situations in which the current legislation is not suitable to handle the competitive concerns. This is why the necessity of switching to the SLC test emerged. (Concerning the description of this case and the other reasons that led to the modification, see the next section.)

¹ Hungarian Competition Act (Act LVII of 1996), Article 30 (2). The wording of the Act is in line with the EC merger regulation applied till 2004 (Council Regulation No. 4064/89).

² According to the Hungarian Competition Act (Act LVII of 1996), Article 30 (1):

“When assessing an application for authorisation of a concentration, both concomitant advantages and disadvantages shall be considered. In the course of this consideration, the following aspects shall be examined, in particular:

a) the structure of the relevant markets, existing or potential competition on the relevant markets, procurement and marketing possibilities, the costs, risks and technical, economic and legal conditions of market entry and exit, the prospective effects of the concentration on competition on the relevant markets;

b) the market position and strategy, economic and financial capacity, business conduct, internal and external competitiveness of the undertakings concerned and likely changes in them;

c) the effect of the concentration on suppliers and on intermediate and final consumers.”

2. Legislative changes in the standard of review of mergers

Please explain if the substantive test for the review of mergers has been changed over time in your country. If yes, please describe the changes and provide some background as to the policy rationale that lead to these changes. If you have recently changed your substantive test, please describe whether the change appears to have achieved the desired effect. If your jurisdiction is currently considering changing the test for the review of mergers in the foreseeable future, please summarise the current policy debate and explain why such legislative changes are being considered.

4. As already mentioned above, the change of the substantive test applied in merger control is under way at present, since the amendment of the Hungarian Competition Act involves a switch from dominance test to the SLC test. The new law follows the line of the EC merger regulation³, thus the lessening of competition will be of interest, while the creation or strengthening of dominance becomes just one special case.⁴

5. The immediate cause for considering the initiation of law amendment was the case *HTCC/MateI*⁵. Although finally the GVH reached the conclusion that the merger did not raise any competitive concern, the situation was like that if it had been problematic, the authority would not have had the possibility to handle it due to lack of dominance. The market share of the merging parties was around 25% on the relevant market, namely the provision of business Internet and data communication services. This proportion is generally not sufficient to establish dominance, and in this case, the much higher market share of the market leader (Magyar Telekom), which was above 50%, clearly excluded this possibility. On the other hand, tenders were common on the market, which warned that turnover-based market shares might not have been good proxies for the competitive constraint the firms posed on each other. In addition, as the number of the significant market players was to reduce from four to three following the merger, it was reasonable to check whether it could have led to the lessening of competition and to coordinated effects. The bidding study, which was carried out by the GVH and covered more than 100 tenders submitted in the previous three years, showed that the two merging parties did not exert significant competitive pressure on each other, and a so-called maverick firm was also identified, so the transaction could be cleared without any worry.

6. Anyhow, if the bidding study had ended differently, the GVH would not have been able to intervene as the merging party did not obtain dominant position. In this way, the case presented a situation in which the GVH cannot prohibit a merger potentially harmful to consumers through dominance test, while it would be possible through SLC standards. Although the authority has the view that gap cases are not too common, the welfare loss they may involve is high enough to give the motivation to change the test applied.

7. Another decisive argument for changing the substantive test in the analysis of mergers was that the EC had already switched to the SLC test in 2004. As a member of the European Union, Hungary tries to adopt all the significant changes of the European legislation to its own law. Moreover, the effect-based assessment is more and more comes to the forefront in different fields of antitrust, thus the need to

³ Council Regulation (EC) No. 139/2004

⁴ “The Hungarian Competition Authority may not refuse to grant authorisation for a concentration where [...] the concentration would not significantly reduce competition on the relevant market [...], in particular as a result of the creation or strengthening of a dominant position.”

⁵ Vj-019/2007

harmonise the approaches applied in these fields also supports the introduction of the SLC test which is also effect-based oriented.

8. Some other arguments in favour of the SLC test were also taken into account, for example that the ability to raise prices (which is used to show the competitive effects) is more exact and objective than the concept of “independence to a large extent” (which is the core of the definition of dominance). Finally, the GVH does not agree with the view that the introduction of the SLC test would cause trouble or difficulties to firms in Hungary in the understanding and the application of the new standards (as the merger review process becomes the same at European and national levels, and previous European merger cases and other effect-based analyses can serve as a point of reference).

3. Enforcement issues

Please explain if the change in the merger test has had an impact on how your agency assesses the effects of a merger. For example, discuss if the choice of competition tests makes a difference in the roles played by market definition, market shares, barriers to entry and to expansion, efficiencies and concentration indexes in the assessment of a merger. More generally, explain if difference in competition tests applied may lead to different emphases on economic analysis as opposed to legal characterisation. If your jurisdiction has not changed its merger test, please discuss if, based on your experience, a different substantive test would require changes in the analytical and investigative techniques that your agency currently uses for assessing mergers. Please discuss if the choice of competition test influence the choice of remedy for or against a structural solution.

9. In our view there is no substantial difference in the roles what fundamental competition policy concepts (such as market definition, entry barriers or efficiencies) play in the assessment of a merger, at least in theory. In each case, both tests deal with the same issues that influence the opinion of the competition authority about competitive effects. However, if dominance is sufficiently improbable, the analysis can be considered complete earlier than it would be under SLC.

10. Although the latter argument implies that applying dominance test often makes the analysis simpler, the GVH has not taken advantage of this in the last few years. Since the need to change the test emerged, the chief economist section of the GVH, beyond the traditional economic assessment, has also analysed the competitive effects of mergers almost in every potentially significant case, even if dominance could easily be rejected (for instance in *Shell/Tesco*⁶, where the second biggest market player had taken control over a smaller firm, but it still could not reach the level of market power the market leader possessed). This does not mean that the GVH has already switched to applying the SLC test in merger cases, it should be viewed as a preparation instead.

11. On the basis of this kind of parallelism in the economic analysis, due to which the GVH has some experience in comparing the results of the two possible approaches, we can conclude that, so far, none of the merger notifications would have ended differently if the authority had already applied the SLC test. An interesting “would be exception” was the case *Strabag/Cemex*⁷ where the increase of market power was suspected in several local markets, but dominant position was not proven. In this sense, it could have been a gap case. Nevertheless, due to data deficiencies, the competitive effects analysis (e.g. the future/expected price changes) would have been also seriously problematic, therefore the final decision would not have altered even if the GVH had applied SLC test. (The Competition Council obliged the merging entity to sell one of its factories in only one market where dominance was clearly established.)

⁶ Vj-017/2009

⁷ Vj-146/2008

4. Broader policy considerations deriving from different merger standards

Please discuss if the type of substantive test applied may affect the risk of over enforcement in Please discuss if you think that the substantive standards applied to mergers have a broader policy impact on the interpretation and enforcement of unilateral conduct rules or on the prohibition of anti-competitive agreements. Please discuss to what extent legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) can be affected depending on which competition test is applied to mergers.

12. The GVH has not experienced any policy impact of merger standards on other antitrust issues yet. The effect-based approach is increasingly peculiar to the enforcement of unilateral conduct rules and to the prohibition of anti-competitive agreements, but we do not think that it is due to the change of the test applied in merger assessment. Instead, the two changes might be rooted in the same phenomenon, namely that economic thinking, the role of economic analysis and actual effects have become more and more important in the GVH just like in other competition agencies.

5. International cooperation

In a world where merger enforcement is increasingly multi-jurisdictional, differences in standard of reviews of mergers, please discuss if competition authorities should consider converging on one of the generic merger tests (i.e. SLC, dominance or public benefit). Please discuss any instance where differences in substantive tests for mergers have had any relevance in the context of international cooperation in a merger case.

13. In general, it can be said that applying the same merger standard in different jurisdictions is beneficial for international companies as the procedures are less divergent, thus the possible outcomes are more predictable. In this sense, converging on one of the generic merger tests is beneficial. On the other hand, the GVH has not had a case in which it would have been of relevance or decisive in the cooperation that the other competition authority involved applied the other type of test (SLC).

14. Those mergers which have a European Community dimension according to their significance, but affect competition in a distinct market within a Member State, can be referred to National competition authorities.⁸ The GVH takes into consideration the difference in the applied merger standards when decides about requesting a case. For instance, in *E.On/MOL*⁹ the creation of dominance was questionable, but some potential competitive concerns were identified and the lessening of competition was likely. Thus the GVH took into account, among other factors, that the European Commission might had better tools to handle those concerns, and did not request the case.

⁸ Council Regulation (EC) No. 139/2004, Article 4 (4)

⁹ M.3696