

## CONSIDERATIONS IN DIFFERENTIATING BETWEEN CONCENTRATIONS SUBJECT TO AUTHORISATION IN SIMPLIFIED OR FULL PROCEDURE

### NOTICE No 1/2003 OF THE PRESIDENT OF THE HUNGARIAN COMPETITION AUTHORITY AND THE CHAIR OF THE COMPETITION COUNCIL OF THE HUNGARIAN COMPETITION AUTHORITY<sup>1</sup>

#### I. Introduction

1. Pursuant to Article 36(6) of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices as amended (hereinafter: "PURA"), the President of the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH), together with the Chair of the Competition Council, may issue notices explaining the foundations of the law-enforcement practice of the GVH. Such notices have no binding force; their function is to state how the law enforcer will apply the legal provisions, summarising past experience and outlining the practice to be followed in the future.
2. This Notice explains the factors and considerations used by the GVH when deciding whether to assess an application for the authorisation of a concentration under the procedure described in Article 63(3) point ac) of the PURA (hereinafter: "the simplified procedure") or under Article 63(3) point b) (hereinafter: "the full procedure").
3. The Notice sets out the considerations of differentiation exclusively in respect of concentrations subject to authorisation, and it does not discuss in detail decisions which are also reached in a simplified procedure pursuant to the PURA where:
  - the transaction underlying the application (examination) does not constitute a concentration (Article 63(3) point aa) of the PURA); or
  - based on the net turnover figures of the parties to the concentration, the concentration is not subject to the authorisation of the GVH (Article 63(3) point ab) of the PURA).
4. When designing and publishing the considerations of differentiating between transactions to be assessed under the simplified or the full procedure, the GVH took into consideration the position of the Supreme Court stating that – *"in the course of the review of discretionary decisions, the court may examine whether the administrative authority has taken into consideration all aspects which may be taken into consideration at the weighing and whether it has explained their acceptance or rejection. If no infringement [committed in the procedure of the law-enforcement body] can be established, the court may not exercise powers to reconsider the matter."*<sup>2</sup>

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<sup>1</sup> As amended by Notice No 1/2005, on the amendment of Notice No 1/2003 on considerations in differentiating between concentrations subject to authorisation in simplified or full procedure, of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the GVH; version applied in merger control proceedings started after 1 November 2005

<sup>2</sup> Judgement of 24 February 2003, Kf.V.39.361/2001/4, *Büki Üdtő Kft v. GVH*.

5. By publishing this Notice, the GVH aims to promote legal certainty, and the transparency and predictability of its actions, thereby contributing to the uniform and non-discriminatory application of the law. In light of the Notice, undertakings can assess – in the course of the preparation for their transactions leading to a concentration – in which cases they can expect the faster and cheaper procedure of the GVH and what type of information they need to furnish to promote the faster and less expensive procedure by the GVH.
6. The contents of the Notice reflect the past enforcement practice of the GVH. Therefore, unless there are special circumstances, undertakings can expect that if they substantiate they satisfy the criteria set out in the Notice in their application for the authorisation of the concentration, their application will be assessed under the simplified procedure (which is more favourable to them in every respect). However, the contents of the Notice do not exclude the possibility of further cases, not so far identified in practice, which can also be assessed in a simplified procedure.
7. If the GVH deems it necessary, in light of the experience it will gain through its further enforcement practice, this Notice may be reviewed in the future or its contents may be set out in [further] detail or clarified.

## **II. Legal background**

8. Pursuant to Article 30(2) PURA, the GVH may not refuse to grant authorisation unless the concentration creates or strengthens a dominant position which would hinder the formation, continuation or development of effective competition on the relevant market (Article 14 PURA) or on a substantial part thereof.
9. Pursuant to Article 63(3) point ac) and b) of the PURA, when assessing concentrations subject to authorisation, the decision on the merits of the case must be adopted
  - within 45 days (or 65 days, if the time limit for settlement is extended under Article 63(6) PURA) if granting authorisation may clearly not be refused pursuant to Article 30(2) PURA (simplified procedure), in which case the procedural fee under Article 62(1) PURA is two million HUF,
  - within 120 days (or 180 days, if the time limit for settlement is extended under Article 63(6) PURA) in any other case (full procedure), in which case the procedural fee under Article 62(1) PURA is ten million HUF.
- 9/A. Pursuant to Article 64 PURA the competition council bringing proceedings in the case must make, within forty five days of the date of receipt or completion of an application for the authorisation of a concentration, one of the following resolutions:
  - a) resolution in a decision on the substance of the case; this resolution may also be other than one about the authorisation of the concentration in a simplified procedure as the PURA does not preclude the possibility of full procedures being finished within forty five days (in which case the decision on the substance of the case contains also a decision pursuant to point c) below);
  - b) extension, by an injunction of the competition council bringing proceedings in the case or even of the investigator, of the time limit for settlement. In this case

(with no resolution pursuant to point c) below made) the decision on the substance of the case cannot be other than one authorising the concentration in question in a simplified procedure;

- c) declaration of the procedure to be a full one.

### III. Concentrations subject to authorisation under the simplified procedure

#### III. 1. General considerations

10. The PURA does not specify the circumstances under which a concentration qualifies as one for which "*granting authorisation ... may clearly not be refused pursuant to Article 30(2)*". It follows from the reference to Article 30(2) PURA that the concentrations to be authorised in this manner are those, which **clearly** do not create or strengthen a dominant position. The establishment of the range of concentrations that must clearly be authorised is within the discretionary powers of the GVH.
11. According to the experience gained in applying the PURA, and in line with the international practice of competition law enforcement, concentrations may have the following effects (emerging separately or jointly) on a dominant position and on economic competition in general.
- i. **Horizontal effects** arise if there is a relevant market (in terms of both product and geographical market) on the same side of which, be it the supply- or the demand-side of the market, both groups of undertakings involved in the concentration are present or have a real possibility of entering the market. In this event, the concentration brings about a reduction in the number of competitors and an increase in the market share of the group of undertakings that will be enlarged as a result of the concentration. Consequently, sole or, with the involvement of other undertakings, joint dominance may be created or an existing dominant position may be strengthened.<sup>3</sup> A dominant position based on high market shares allows a group of undertakings to engage in both exploitative (e.g. by setting excessive sales prices) or restrictive (e.g. by hindering market entry) market practices. Joint dominance, in turn, increases the likelihood that restrictive agreements will be concluded or conscious parallel behaviour will be conducted on the relevant market.
  - ii. **Vertical effects** arise if there is a relevant market where one and the other of the groups of undertakings are (may be) present in a capacity as supplier and buyer respectively, that is, one of the two groups operates in a stage which is downstream to that of the other. In this case, the existing market relationship between them will become an intra-group relationship. This may create an incentive for the group, which has a dominant position in one of the relevant markets, to abuse that position on the other market, that is, it becomes capable of engaging in restrictive market practices (such as unjustified refusal to deal or price discrimination).<sup>4</sup>
  - iii. **Portfolio effects** stem from the expansion of the range of products manufactured (distributed) by the group of undertakings created by the concentration. This may have especially harmful effects on competition if the manufacturers (distributors)

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<sup>3</sup> See Vj-127/2001 *Raffinerie Tirlementoise S.A./Financière-Franklin Roosevelt S.A.S.*

<sup>4</sup> Vj-182/2001 *Hungaropharma.*

of complementary products (bought by the same buyers) become members of the same group. In this case if one group of the undertakings has a high market share on the market of a product/certain products, the group of undertakings expanded as a result of the concentration may be able to conduct restrictive market practices (e.g. tying) on the market of other product(s).<sup>5</sup>

- iv. **Conglomerate effects** arise where, even though no dominant position is created or strengthened on any of the relevant markets when examined in isolation, there is an overall improvement in the property status, financial strength and profitability of the group, i.e. in factors which are decisive in respect of dominance (Article 22(2) point b) of the PURA), and may give rise to the application of restrictive strategies (e.g. predatory pricing).
12. Pursuant to Article 22 PURA, dominant position is a complex concept, its establishment requiring a comprehensive analysis of the market position and operating conditions of the undertaking in question. The exclusion of the possibility of the creation or strengthening of dominance is considerably simpler. Below a certain size of the combined market shares of the participants concerned by the concentration as defined in Article 26 PURA, clearly no dominance is expected to emerge, with the exception of highly special cases. Unlike other factors of dominance, the share on the relevant market pursuant to Article 14 PURA can be clearly quantified in the overwhelming majority of cases. Consequently, it is appropriate to use market shares resulting from the implementation of a concentration as an indicator for the obviousness of such a concentration being authorisable.
  13. In line with European competition law enforcement, the Hungarian competition supervision practice considers market shares not reaching 25% to 30% as such below which the **sole** dominance of a group of undertakings is unlikely. However, in particular in the case of horizontal concentrations, a lower market share should be set as a "threshold" below which the existence of a dominant position may clearly be excluded as concentrations may create or strengthen an oligopolistic market structure which may lead to the creation or strengthening of the joint dominance of the group created by the concentration together with other undertakings.

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<sup>5</sup> Vj-166/2001 *Matáv Rt./Group 4 Securitas Biztonsági Szolgálat*

### **III.2. Categories of concentrations suitable for treatment under the simplified procedure**

14. Based on the considerations explained in detail above, the GVH applies the simplified procedure to the following categories of concentrations which are subject to authorisation:

- i. The concentration has no horizontal, vertical or portfolio effects, that is:
  - a) there is no relevant market on which at least two groups of undertakings participating in the concentration are active; and
  - b) there is no relevant market on which any two groups of the undertakings participating in the concentration are (may be) in a supplier/buyer relationship; and
  - c) the groups of undertakings participating in the concentration are in no way (production, distribution, etc.) involved in any activity on markets of complementary products.<sup>6</sup>
- ii. The concentration has horizontal and/or vertical and/or portfolio effects, but:
  - a) there is no relevant market on which the combined market share of the groups of undertakings participating in the concentration which are in a horizontal relationship with each other, exceeds 20%;<sup>7</sup> and
  - b) there is no relevant market on which the market share of either the supplier- or the buyer-group in any two groups of the undertakings participating in the concentration which are in a vertical relationship, exceeds 25%;<sup>8</sup>
  - c) there is no market concerned affected by portfolio effects on which the market share of any of the groups of undertakings participating in the concentration exceeds 25%.<sup>9</sup>
- iii. Even though the combined market share of the groups of undertakings implementing the concentration exceeds the threshold specified in point 14.ii.a) above on a relevant market, but the increase in the degree of concentration resulting from the transaction on this relevant market is insignificant. Pursuant to this point, the concentration may be authorised under the simplified procedure if:
  - a) without having regard to the group of undertakings concerned, the market share of which is higher than that of any other group concerned on this relevant market, the combined market share of the other groups concerned does not exceed 5% on this relevant market; and
  - b) on this relevant market there is a competitor with a market share which is similar to that of the largest group of undertakings participating in the concentration; and

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<sup>6</sup> See Vj-002/2001 *VNU/AC Nielsen*.

<sup>7</sup> See Vj-151/2002 *Volán Tefu Rt./HC Invest Szállítmányozási Rt.*

<sup>8</sup> See Vj-183/2001 *Siemens/TraffiCOM*.

<sup>9</sup> See Vj-135/2002 *Bige Holding Invest Beruházási és Befektetési Kft/Nitrogénművek Vegyipari Rt.*

- c) the concentration may not substantially reduce potential competition, as it can be reasonably believed that the shares of undertakings with currently low market shares would not increase to an appreciable extent in the future.
15. Even if the conditions laid down in point 14.i. are satisfied, the concentration may be assessed under the full procedure if, as a result of conglomerate effects, the group of undertakings with a previously weaker property status, financial strength and profitability
- a) would substantially reinforce its financial strength and property status; and
  - b) would increase its market share to over 30% on any of the relevant markets; and
  - c) taking into consideration the features of the market, a reasonable threat exists that restrictive strategies (e.g. predatory pricing) might be applied relying on the improved positions.
16. Concentrations which may be treated, based on the requirements in points 14 and 15 above, under the simplified procedure may be treated so even if they entail restrictions of competition necessary for the implementation of the concentration as defined in Article 30(5) PURA.<sup>10</sup> The necessity of restrictions is also the subject of a separate analysis in the course of the simplified procedure because the restrictions may extend to groups of undertakings which are not parties to the concentration pursuant to Article 26 PURA and because the role of the market shares may be different in assessing restrictive agreements than in the course of the authorisation of concentrations.

### **III. 3. Information requirements**

17. Not exceeding the market share thresholds on the relevant market as explained above is a necessary but not sufficient condition for the application of the simplified procedure. The simplified procedure may not be applied where it is difficult to define the relevant markets or to determine the parties' market shares. It is, therefore, a further necessary condition that the market shares should be based on unambiguous, objective and verifiable information and data available within the time limit set for the settlement both in respect of
- the definition of the particular relevant (product and geographical) markets and their respective total turnover (size) and
  - the identification of the undertakings concerned by the concentration.
18. The definition of the relevant markets and of the market shares of the undertakings concerned is
- a) unambiguous if it is based on the communication of clear and transparent data concerning the particular products within the relevant market as well as the relations (in terms of substitutability, complementarity and vertical relations) between them, the geographical scope of the market and the size

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<sup>10</sup> See Vj-57/2002 *Mazda Motor Corporation/Mazda Austria GmbH*.

of the relevant market, in such a manner that the data should allow for the determination of the market shares even at the narrowest market definition which may be taken into consideration;

- b) **objective** if the definition and size of the relevant market is not based (solely) on the views and estimates of the undertakings concerned but it is supported by sources or surveys recognised in the trade (including the previous proceedings and practice of the Hungarian Competition Authority);
- c) **verifiable** if the data and information supplied by the undertakings concerned can be confirmed from other sources (communications of competitors or business partners, trade press, etc.).

**19.** It is also important, however, that the definition of the relevant markets is not the end but the means to appraise the effects on competition. If the market share of none of the parties to the concentration reaches the level specified in point 14.ii. above on any of the assumed markets which must be clearly narrower than the actual relevant markets, it is not necessary to define precisely the possibly broader relevant markets because the market shares computed on them would necessarily be lower than the highest of the market shares measured on the narrower markets.<sup>11</sup> It is in the same way not necessary to define precisely the relevant market in a case where the possibility of the creation or strengthening of a dominant position can be excluded without determining the shares held on the relevant market.<sup>12</sup>

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<sup>11</sup> See Vj-40/2001 *Stinnes/HCI*.

<sup>12</sup> See Vj-146/2002 *Mecsek/Sláger*.

#### **IV. Full procedures**

20. Article 63(3) point ac) of the PURA links the simplified procedure to Article 30(2) PURA. Consequently, concentrations in respect of which the approval

a) will be granted subject to conditions or obligations (Article 30(3) PURA), or

b) will be refused,

are necessarily to be treated in the full procedure.

Budapest, 15 December 2003

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