

MERGER REMEDIES
HUNGARY
13-OCT-2003

Introduction

1. The following contribution of the Gazdasági Versenyhivatal (GVH - The Hungarian Competition Authority) to the mini-roundtable on merger remedies follows the structure of the issues paper prepared by the OECD. However, the limited number of cases the GVH had to deal with does not allow us to comment on every single issue raised by the paper due to a lack of the underlying case material, instead we try to focus on the issues that the Hungarian regulation and case law allows to comment on, with a short introduction to the relevant Hungarian rules.

2. The Hungarian Competition Act establishes a pre-notification system on merger cases. The application for authorization shall be submitted to the GVH within thirty days of the date of the publication of the invitation to tender, the conclusion of the contract or the acquisition of the controlling rights, whichever of them is the earliest. The merger requires the authorisation of the GVH for validity. The parties may proceed with the factual implementation of the transaction before the conclusion of the proceedings by the authority at their own risk.

3. The decision shall be made within 45 days if the transaction does not qualify for a merger, the thresholds are not met, or if the application may clearly not be refused. In all other cases the deadline is 120 days, which can be expanded by an additional 60 days. The investigation itself is conducted by an official of the investigation section concerned, while the final decisions are made by the Competition Council, which is the decision making body of the GVH.

I. The principles

4. The GVH case law appears to be in line with the principles presented in the Issues Paper.

1. Remedies should not be applied unless there is a threat to competition

5. At the imposition of remedies the GVH seems to be moderate. In the last four years out of almost 300 mergers only 11 were cleared subject to conditions. We consider that this limited number of interventions were justified by the threat to competition in all these cases, and the use of remedies allowed mergers to be completed which would have been prohibited otherwise.

6. These threats to competition were:

- (partially) unnecessary ancillary restraints associated with some mergers
- discrimination as a result of vertical integration
- changes in the market structure causing competition to potentially deteriorate
- increase in oligopolistic interdependence, increased probability of collusion

7. As it is clear from the introduction, there is a strict timetable for merger control in Hungary, too, which normally carries a certain degree of risk of agreeing on a remedy erring on the overly strict side. However, the possibility to expand the deadline leaves some playing room for the Competition Council to cooperate with the merging parties if they needed some additional time to formulate their commitments.

2. Remedies as the least restrictive means to effectively eliminate the competition problem posed by a merger

8. The GVH is relying on remedies as a means to eliminate competition problems and is trying to find the least restrictive remedy at the same time.

9. A good example of this is the Friesland/Numico merger. Friesland (FEH) had a 33% share in Mizo competitor undergoing reorganisation. Numico held an option to an additional 16% share of the same undertaking. The unconditional clearance of the merger would have put the merged entity into a position that enabled it to determine the future of an important potential competitor. However a divestiture order would have caused significant losses for Friesland since the actual value of the shares were low at that phase of the reorganisation procedure. Taking all this into account the Competition Council found, that *“Competition concerns deriving from the merger would be clearly solved by the divestiture of FEH’s interest in Mizo. The imposition of such a condition however – taking into account that Mizo is under reorganization – would be disproportionate for FEH as the value of a minority interest in an undertaking of uncertain future would be low so FEH would in reality loose its investment. On the other hand the quit of FEH would reduce the chance for survival by Mizo.”*

3. Industrial planning, regulatory role

10. Like most competition authorities, the GVH has no mandate to engage in industrial planning, either, and the GVH is acting correspondingly, as it is illustrated by the following example. Upon a request from the Hungarian Energy Authority the Competition Council explicitly established that *“In the present proceedings it should be kept in mind that the competence of the Competition Authority relates to the solution of the competition concerns deriving from the merger. It may not undertake the general role of a market regulator even if it would lead to more desirable circumstances for competition.”* Nevertheless, in practice it might prove to be very difficult to establish a borderline between industrial planning and competition supervision.

11. However we do not agree to a full extent with the statement quoted in the issues paper that *“the goal is to effectively remedy the violation...maintaining competition at pre-merger levels”*. This statement is based on the “significant lessening of competition” test while Hungary just like most of the European jurisdictions follow a dominance test. According to this, there is a realistic option to apply a remedy that does not restore competition at the pre-merger level, but still eliminates competition concerns associated with dominance. On the other hand according to our opinion if there were only such remedies available that actually improve the conditions of competition on the market, the authority should not hesitate to apply them.

4. Flexibility and creativity in devising remedies

12. Upon imposing a remedy the GVH tends to apply the most widely accepted types: divestiture, disallowance of unnecessary ancillary restraints and providing non-discriminatory access are examples of this.

13. Some flexibility can be experienced in the Raffinerie Tirlementoise/Financiere-Franklin Roosevelt case, as when the parties failed to comply with the remedy, a new remedy was applied. Also to this point is to be mentioned the application of “subsequent remedies”, imposing conditions in the case of

failing to fulfil the original condition. This method shows some common characteristics with the contingent remedies, so it will be presented there in some details.

14. There is an assumption based on case law experience that the GVH prefers remedies to post-merger intervention. There was an initiative in Deutsche Telekom/Westel-Matáv from the parties to dismiss the remedy and to rely on post-merger remedies instead, but it was turned down by the Competition Council.

II. Range of remedies

1. Combination of behavioural and structural remedies

15. Upon classification issues, a third type of remedies can be distinguished alongside with structural and behavioural ones, namely information remedies. In this case the competition authority obliges the parties to provide information to enable the authority to monitor and assess the outcome of the merger.

16. There have been both structural and behavioural remedies applied by the GVH. It is interesting to note, that behavioural remedies were the first to be introduced and the structural remedies followed somewhat later, but this shows no preference of the authority. The opinion of the members of the Competition Council reflects the view, that divestiture is the preferred remedy in horizontal cases, while it is less preferred in vertical cases, where typically some kind of behavioural (or sometimes “quasi-structural”) remedy is used.

17. It is typical to apply either a structural or a behavioural remedy, but in the case of Deutsche Telekom/Media One International and Westel a combination of both has been used, as after DT has acquired a majority share in the largest Hungarian mobile company (Westel), the Competition Council ordered the granting of a non-discriminatory access by the operator of the Hungarian fixed-line network, DT-daughter Matáv to all Hungarian mobile phone companies together with forbidding the amalgamation of Westel and Matáv, i.e. the largest mobile and fixed-line telecommunication companies.

18. In addition to this there were some obligations attached to the structural remedy but these mainly served the administration and the monitoring of the divestiture. In Raffinerie Tirllementoise/Financiere-Franklin Roosevelt for instance it was subscribed to forward the minutes and decisions by the board of directors of the divested plant to the GVH during the first three years. The remedy served the proper fulfilment of the divestiture and the prevention of collusion between the former owner and the divested asset.

2. Interim measures

19. The Issues Paper raised the idea of the application of interim measures to ensure that the chosen corrective has its desired effect.

20. The wording of the Competition Act does not allow the application of interim measures in merger cases at all. The legal consequences of nullity of contracts if conditions are not fulfilled seem sufficient to withhold the parties from any kind of actions that would require the application of interim measures otherwise.

3. Contingent remedies

21. The Competition Act does not explicitly exclude the possibility of a contingent remedy, but the Competition Council has not applied it yet.

22. Somewhat similar to this are conditions that are formulated for the case of not fulfilling the original conditions (“subsequent conditions”). An example of this kind is the Group 4/Matávör case where Matáv, the leading telecommunications company was obliged to provide non-discriminatory access to an over-band data-transfer service in the monitoring (security) market. For the case of insufficient demand due to the lack of purchasing power in this sector, Matáv was prohibited to provide this service to any company on this market.

III. Design issues – effectiveness

23. The Competition Council has not yet faced serious dilemmas at the determination of remedies. The following examples try to illustrate the clear-cut approach the Competition Council has taken in divestiture cases.

24. In UTA Pharma/Pharma Concept the competitive concern was a horizontal effect resulting from the merger. Through the transaction the acquiring undertaking would have become a monopolist on the market of pharmacies in a quite small part of the geographic market affected by the deal. In this market, in the town of Szécsény only two pharmacies existed both of them were owned by the merging parties, respectively. In its decision the Competition Council required the selling of one of the two pharmacies.

25. In Bayer/Aventis the remedy prescribed was a divestiture previously ordered by the European Commission concerning the whole region. The Competition Council itself did not have to frame a remedy.

26. In Raffinerie Tirllementoise/Financiere-Franklin Roosevelt the divestiture affected a sugar plant jointly owned by two undertakings one of which was affected by the merger. The remedy consisted in the transferring of controlling rights of third company to a competitor in order to maintain structural competition on the sugar market.

27. Divestiture became a preferred remedy of horizontal concerns deriving from mergers. No vertical, conglomerate or portfolio issues were addressed by such conditions. However the relatively small number of mergers cleared subject to conditions does not make possible the drawing of general conclusions on the application of behavioural and structural remedies.

28. In theory the divestment of assets not affected by the merger is possible but no concerns were identified yet justifying the imposition of such remedies.

IV. Implementation Administrability and Enforceability Issues

1. Ensuring the fulfilment of the conditions imposed on the parties

29. Once a remedy is applied there are possibilities to ensure its proper application. In Bayer/Aventis the authority asked for regular reports on the process of the divestiture. It is also possible to order a post-investigation to supervise the fulfilment of the undertakings and conditions offered by or imposed on the parties. In the jurisdiction of the GVH no precedence could be found for the appointment of a trustee. The Competition Act does not exclude the possibility of the appointment of it though it does not mention it either.

2. Up-front buyers

30. There have been three divestiture cases in Hungary, and an up-front buyer was identified only in one of these. However, in Raffinerie Tirllementoise/Financiere-Franklin Roosevelt the proposed condition, the transfer of controlling rights of Eastern Sugar, a sugar producing plant to another company did not

proved to be a feasible solution. The Competition Council had to re-formulate the condition without an up-front buyer this time.

V. Table of cases

Number of the case	Parties (sector)	Competition threat/Remedy
VJ-104/1999	ALSTOM S. A. - ABB Handels und Verwaltungs AG (energetic equipment)	anti-competitive ancillary restraints/ <i>prohibition</i> of unnecessary ancillary restraints
Vj-152/1999	Matáv Kábel TV - Marczibányi Téri Művelődési Központ (Cable TV)	anti-competitive ancillary restraints/ <i>prohibition</i> of unnecessary ancillary restraints
Vj-176/1999	Deutsche Telekom AG - MediaOne International B.V. Westel Rádiótelefon Kft (mobile telecommunications)	discrimination, refusal to deal after vertical integration/ <i>non-discriminatory access</i> hold separate order
Vj-178/1999	Matáv Kábel TV –Marcali kábeltevézés hálózata (Cable TV)	anti-competitive ancillary restraints/ <i>prohibition</i> of unnecessary ancillary restraints
VJ-74/2000	Matáv Kábel TV – Tele 6 Elektronika Kft (Cable TV)	anti-competitive ancillary restraints/ <i>prohibition</i> of unnecessary ancillary restraints
Vj-62/2001	Friesland Coberco Dairy Foods Holding N.V. - Koninklijke Numico N.V. (dairy products)	determination of the future of a competitor under reorganization <i>prohibition of further acquisitions</i> in a further competitor in its reorganization process
Vj-116/2001	a Group 4 – Matávőr /Monitoring (property protection)	discrimination, refusal to deal after vertical integration/ <i>non-discriminatory access</i> hold separate order
VJ-127/2001	Raffinerie Tirlementoise S.A. - Financiere-Franklin Roosevelt S.A.S. (sugar production)	increased oligopolistic interdependence increased probability of collusion <i>divestiture</i> : transfer of controlling rights of a separate plant and company. Minutes of the meetings by the board of directors to be forwarded to the GVH.

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Vj-181/2001	<p>Bayer AG- Aventis Crop Science Holding SA</p> <p>(chemicals)</p>	<p>discrimination, refusal to deal after vertical integration/ <i>divestiture</i></p> <p>Hold separate order till divestiture is complete</p> <p>Information in every two months to GVH</p>
Vj-182/2001	<p>Richter, EGIS, Béres, Magyar Gyógyszer Tanácsadó, Szervezés és Szolgáltató, - Hunropharma (pharmaceuticals)</p>	<p>discrimination, refusal to deal after vertical integration/ <i>non-discriminatory access</i></p>
Vj-39/2003	<p>UTA Pharma Beteligungs GmbH Pharma Concept Része-sedési és Szolgáltató Kft</p> <p>(pharmaceuticals)</p>	<p>Monopoly in a local market/ <i>divestiture</i>: selling of a pharmacy</p>