Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

26-May-2016

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2016)17
Unclassified

Working Party No. 3 on Co-operation and Enforcement

JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

-- Note by Hungary --

14-15 June 2016

This document reproduces a written contribution from Hungary submitted for Item 5 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm

JT03396737

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1. Historical background

1. In Hungary merger control was introduced into the competition law by the first modern and really market economy-oriented Hungarian Competition Act (HCA), which was enacted in November 1990 and entered into force on 1 January 1991.

2. According to the 1990 HCA, the ex ante control of the Gazdasági Versenyhivatal (GVH – Hungarian Competition Authority) was required in the case of concentrations, if

- the joint share in the relevant market of the participants to a transaction with respect to any goods sold by them exceeded thirty per cent in the previous calendar year; or

- the aggregate turnover of the participants exceeded HUF 10 billion (approximately ECU 122 million or USD 163 million in 1991) in the previous calendar year.

3. In June 1996 in light of the experience gained between 1991-1995, and also in fulfilment of the law approximation obligation imposed on Hungary in the 'Europe Agreement'[1], the merger notification regime was substantially amended. Recognising the uncertainties attached to the market share threshold, it was completely deleted. Moreover, the turnover threshold was also harmonised to the European solution. Namely, according to the new threshold system effective from 1 January 1997, the authorisation of the GVH had to be requested, if the aggregate net turnover of the undertakings concerned exceeded HUF 10 billion (cca ECU 52.4 million) in the preceding business year, provided that the net turnover of the acquired undertaking or of each of at least two undertakings party to the transaction was more than HUF 500 million (cca ECU 2.5 million).

4. In Hungary the inflation rate in the period from the early 1990s until the mid 2000s was rather high, between 1991 and 2005 it amounted to 595%. Consequently, the HUF 10 billion notification threshold had also eroded to a great extent. To put this into perspective, in 2005 the real value of this amount would have been approximately HUF 1.5 billion, or, if we would have wanted to keep the actual value of the original HUF 10 billion threshold also in 2005, this amount would have had to have been raised to HUF 69.5 billion. Since between 1991 and 2005 the HUF 10 billion threshold in nominal terms remained stable, the number of the notified M&A cases gradually increased. In the period between 1991-1995 on average 8.8 cases were notified annually, the same figure between 1996-2000 was 44 and between 2001-2005 it was 70.2.

5. After thorough analyses and considering also this increase in the number of M&A notifications to the GVH, the next major step in the fine-tuning of the merger notification threshold regime of the HCA was made in November 2005. One step of the amendments was that the HUF 10 billion threshold element was raised to HUF 15 billion. According to another amendment, the threshold was to no longer be based on the aggregate net turnover of the undertakings concerned, but was to be calculated on the basis of the aggregate net turnover of the *groups of undertakings* concerned.

[1] The Europe Agreement is the "Association Agreement" concluded between the European Communities and Hungary (signed in December 1991).

6. Since November 2005 the threshold element of the Hungarian merger control regime has remained unchanged.

7. As regards to the interpretation of the local nexus criteria, in the case of Hungarian undertakings the HUF 15 billion net turnovers has to be calculated on the basis of their world-wide turnover. Concerning undertakings domiciled abroad, when calculating their net turnover from the point of view of whether the transaction is notifiable to the GVH, only the net turnover realised on the Hungarian market has to be taken into account. (I.e., in the case of undertakings resident abroad, their local presence (in Hungary) is not required, their sales in the territory of Hungary are what count.) Logically, the requirement that there are "at least two undertakings that are parties to the transaction" whose total group turnover in the preceding business year exceeded more than HUF 500 million each, has to be calculated using the turnover realised on Hungarian markets, in the case of both Hungarian and foreign undertakings.

8. The number of notifications has substantially decreased over the years. E.g., for the period of 2006-2010 the annual average of the notifications was 41.8, while the same figure for the period of 2011-2015 was 36.4. This tendency may be due to three factors. First, since Hungary became an EU Member State in May 2004, those M&As meeting the notification thresholds of the EU Merger Regulation do not need to be notified to the GVH. Secondly, from 2008 the financial-economic crisis also had a decreasing influence on the number of notified concentrations. Thirdly, the modest increase of the jurisdictional threshold of the HCA for M&A notifications may have also played a role. However, it would be impossible to demonstrate how these three potential impacts have contributed to the decreasing tendency of the merger notifications in Hungary over the years.

9. In the last few years the GVH has placed great emphasis on i) increasing the efficiency of the M&A proceedings, ii) easing the merger control-related administrative burdens of businesses and iii) decreasing the time frame of the merger investigations, mostly for the so-called "simple cases". In 2012 several steps were taken. In March of that year a specialised Merger Section was set up at the GVH to deal exclusively with concentration cases. In parallel, a new notification form was elaborated. By introducing the pre-notification consultation system, it was made clear that if parties approach the GVH prior to submitting the notification form this can result in a faster review of the proposed merger. Since 1 February 2012 the GVH has been able to make so-called "simplified decisions" in merger cases if the Authority does not want to block the transaction or set conditions or commitments to its approval and there is (are) no client(s) in the case who would be counter-interested. In these cases, it is not necessary to provide an in-depth justification for the approval, thus reducing the workload of the GVH. In the last few years this simplified decision has been used in approximately one-third of the M&A cases. However, the above-mentioned fine-tuning measures have not affected the notification threshold system.

2. The situation in 2016

10. As a result of all the measures outlined above, between 2010 and 2015 the actual time for the investigations and decision-making in first phase M&A cases decreased from 50 to 22 days.

11. As from 1 January 2016, Act CXL of 2004 on the General Rules of Administrative Procedures and Services introduced new procedural deadlines for the so-called *"summary proceedings"*[2]. These new deadlines have affected the merger proceedings of the GVH, by obliging the Authority to make a decision in such cases within 8 days.

[2] Proceedings opened upon request are considered summary proceedings if: *a)* the relevant facts of the case are ascertained relying on the request and its enclosures, and on the data and information at the authority's disposal (including those which the petitioner cannot be ordered to provide), *b)* there is no adverse party, and *c)* the administrative time limit for the proceeding is less than two months, or sixty days. This new provision of the Act on the General Rules of Administrative Procedures and Services

3. Future plans

12. Due to the substantial decrease in the deadlines set for *"summary proceedings"* by the Act on the General Rules for Administrative Procedures and Services, since January 2016 the GVH has been faced with a huge amount of work related to its M&A cases, for which a solution has to be found.

13. The major elements of a potential solution for a new merger regime[3] might be as follows:

- The notification system would be replaced by a "simple notification", if the turnover thresholds are met by the planned transaction. This simple notification would not automatically trigger the GVH's proceeding, but within 8 days from the date of this simple notification the GVH would decide about the initiation of an *ex officio first phase merger proceeding*. If the transaction does not raise any competition concern, the GVH – within 8 days from the date of the simple notification – informs the notifying party about the non-initiation of a proceeding.

- Although the HUF 15 billion threshold is among one of the lowest ones in Europe in its absolute value, comparing its proportion to the GDP, it is among the highest ones. The relative value of the HUF 500 million threshold of the "at least two undertakings that are parties to the transaction" (in the % of the GDP) compared to other European countries is, however, indeed among the lowest ones. So, it is contemplated that it would be worth doubling this threshold (by increasing it to HUF 1 billion (cca Euro 3.2 million, USD 3,5 million).

- The doubling of the HUF 500 million threshold would remove from the horizon of the GVH certain M&As which would normally fall under its merger control supervision. In order to remedy this situation, it is proposed that the GVH would also have the right to launch proceedings in relation to these transactions. A possible solution would be to allow parties to those transactions which do not meet the turnover thresholds under the HCA, to voluntarily notify these deals to the GVH.

- It is also under consideration to change the rule and the practice concerning the calculation of the HUF 15 billion in the case of national undertakings by limiting the calculation to the net turnover realised on the domestic (Hungarian) markets. Obviously, as a result this would decrease the number of transactions to be notified ex-ante to the GVH.

addressed all kinds of administrative proceedings which meet these criteria in general (i.e. it was not a rule related specifically to competition proceedings, nevertheless, it also concerned the first phase concentration control proceedings of the GVH).

[3] At the moment these ideas merely reflect the thinking of the GVH's policy planners and no steps have yet been taken to initiate legislative action (which may only be taken by the Hungarian Ministry of Justice in the case of competition law amendments).