



Reply to the Attention of A. Neil Campbell
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VIA FAX to +36-1 472 8898 and EMAIL to Sarai.Jozsef@gvh.hu and to fuzioskonzultacio@gvh.hu

József Sárai
Head of International Section
Hungarian Competition Authority
H-1054 Budapest Alkotmány utca 5.
Budapest, Hungary

Dear Mr. Sárai:

Re: Competition Law Consultation — Nyilvános Konzultáció a GVH

Further to our recent exchange of email messages, we write on behalf of the Merger Streamlining Group (“MSG” or the “Group”), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.¹ The cornerstone of the Group’s activity has been to work with competition agencies and governments to help implement international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* (“Recommended Practices”) of the International Competition Network (“ICN”),² of which, as you know, the Hungarian Competition Authority (“GVH”) is a member.

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in over twenty other jurisdictions (e.g., the United Kingdom, Russia, Brazil, India, China, Japan, Korea, Spain, Italy and Portugal) to promote reforms consistent with the *Recommended Practices*.

¹ The current members of the Group include Accenture, BHP Billiton, Chevron, Cisco, Danaher, GE, Novartis, Oracle, Procter & Gamble, Siemens, and United Technologies.

² International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>> [*Recommended Practices*].

The Group writes in connection with the GVH's recent public consultation³ on changes to the Hungarian competition law, including its mandatory merger notification procedures. We understand that the catalyst for this public consultation was the amendment of various aspects of the Hungarian Competition Act (Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices) by legislation adopted by the Hungarian parliament on December 6, 2016 (the "2016 Amendments"). We appreciate the GVH's willingness to receive this submission after the intended December 23, 2016, deadline and hope that it will prove useful to you; this document draws upon the MSG members' very substantial experience with multinational merger transactions.

Our particular interest is the merger control-related portions of the 2016 Amendments. We applaud the GVH and the Hungarian Government's desire to modernize certain aspects of Hungarian merger control law through the 2016 Amendments, specifically by expanding the second branch of the merger notification thresholds to require that the net turnover in Hungary of each of at least two groups of undertakings involved in the transaction exceed HUF 1 billion (*i.e.*, approximately €3.2 million), rather than the former threshold of HUF 500 million (*i.e.*, approximately €1.6 million). The MSG views this as a valuable step towards bringing Hungary's merger control thresholds into greater conformity with the *Recommended Practices* by incorporating a greater level of local nexus.

However, as described more fully below, the Group strongly believes that the adoption of a new "soft" merger notification threshold is inconsistent with the *Recommended Practices* and will create significant burdens and uncertainty for the business community, while at the same time requiring the GVH to expend its valuable resources reviewing a large volume of transactions that are unlikely to raise any competition concerns in Hungary. For these reasons, at the end of this letter the Group has offered some suggestions for issues to be addressed in the future GVH policy/guideline document that we understand you will be issuing.

I. The New "Soft" Merger Notification Threshold

We understand that the 2016 Amendments have created a new, alternative "soft" merger notification threshold by which any transaction that falls below the existing merger notification thresholds must still be notified to the GVH where: (1) the parties' combined Hungarian turnover is above HUF 5 billion (*i.e.*, approximately €16 million); and (2) "*it is not obvious that the contemplated transaction would not significantly decrease competition in the relevant market*".

The Group believes that the second branch of the above new notification threshold — requiring parties to identify any transaction where it is "*not obvious*" that "*the contemplated transaction would not significantly decrease competition in the relevant market*" — involves a vague and subjective analysis that will create significant uncertainty for parties to

³ See the public announcement of the GVH, available online at <http://www.gvh.hu/gvh/elemzesek/vitaanyagok/nyilvanos_konzultacio_a_gvh_uj_fuzios_eljarasrendj/nyilvanos_konzultacio_a_gvh_uj_fuzios_eljarasrendj.html>.

transactions. Whether or not something is “*obvious*” is a highly subjective determination that may change according to the opinion of the viewer. Such a threshold would clearly appear to be inconsistent with the *Recommended Practices*, which provide that “[n]otification thresholds should be clear and understandable”,⁴ and further elaborate that:

*Clarity and simplicity should be essential features of notification thresholds so as to permit parties to readily determine whether a transaction is notifiable. Given the increasing incidence of multi-jurisdictional transactions and the growing number of jurisdictions in which notification thresholds must be evaluated, the business community, competition agencies and the efficient operation of capital markets are best served by clear, understandable, easily administrable, bright-line tests.*⁵

Moreover, as you will appreciate, whether or not a transaction will “*significantly decrease competition*” in a relevant market requires a detailed analysis of many complex factors, including the definition of relevant markets, consideration of existing and potential future competition, barriers to entry, potential countervailing buyer power, efficiencies, and a host of other elements. Recognizing this, the *Recommended Practices* also stipulate that notification thresholds “*should be based exclusively on objectively quantifiable criteria [...] Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects.*”⁶ It would be timely, costly, and extremely difficult for transaction parties to determine in every transaction, *ex ante*, whether the transaction will “*significantly decrease competition*” in order to perform their pre-merger notification analysis. As a result, the *Recommended Practices* indicate that the use of “[m]arket share-based tests and other criteria that are more judgmental”⁷ is something that a competition agency may employ during the substantive review of a transaction, but that “*such tests are not appropriate for use in making the initial determination as to whether a transaction is notifiable.*”⁸

Given these inconsistencies with the *Recommended Practices*, and the uncertainty that such a subjective standard creates for the business community, the Group respectfully recommends that the GVH include in its forthcoming policy/guideline document some “*clear, understandable, easily administrable, bright-line tests*” which both the business community and the GVH can use to identify, *ex ante*, certain categories of transactions that would be excluded from the “*not obvious [to] significantly decrease competition*” standard and thereby not require notification in Hungary. The Group suggests that two such categories could include:

⁴ International Competition Network, *Recommended Practices for Merger Notification Procedures*, at *Recommended Practice II.A*.

⁵ *Ibid*, at Comment 1 to *Recommended Practice II.A* (emphasis added).

⁶ *Ibid*, at Comment 1 to *Recommended Practice II.B* (emphasis added).

⁷ *Ibid*, at Comment 2 to *Recommended Practice II.B*.

⁸ *Ibid*, at Comment 2 to *Recommended Practice II.B* (emphasis added).

- **Minimal Local Turnover.** Transactions in which the assets to be acquired in Hungary do not generate significant local turnover are unlikely to generate anti-competitive effects in Hungary. As the *Recommended Practices* note, transactions that do not have a “*material*” local nexus (in the form of local assets or turnover) to the reviewing jurisdiction are “*unlikely to result in appreciable competitive effects within its territory*”.⁹ Consequently, the Group recommends that the GVH clarify in its forthcoming policy/guideline document that transactions in which the business/assets being acquired in Hungary generate less than HUF 500 million (*i.e.*, approximately €1.6 million) are excluded from the “*not obvious [to] significantly decrease competition*” standard, as they will not have any material local nexus to Hungary and are therefore unlikely to have any “*appreciable competitive effects*” (much less “*significantly decrease competition*”). We infer that a HUF 500 million standard should be acceptable to the GVH and the Hungarian Government, as transactions below this standard were previously not notifiable in any case.

- **Minimal Horizontal And/Or Vertical Overlaps.** Transactions which involve no or only minimal horizontal or vertical overlaps should similarly be excluded from the “*not obvious [to] significantly decrease competition*” standard. The Group understands, from the materials that the GVH translated into English and kindly provided to us, that the GVH will be issuing a policy document clarifying that it will not initiate merger review proceedings: (1) where the transaction parties’ operations overlap and the transaction would result in a combined market share below 20%; (2) where the transaction parties’ operations are in vertically-connected markets, and the transaction will result in a combined market share below 30% in a market; and (3) where combined market shares exceed either of the thresholds in instances (1) or (2) above, but the incremental increase in market share is “*not more than 5%*”. As you know, such market share thresholds closely follow the thresholds used by the European Commission in its merger control simplified procedure,¹⁰ and the Group believes that the GVH’s proposed approach would provide welcomed and valuable guidance for merger parties in Hungary. We would, however, respectfully suggest that the GVH clarify that these thresholds are meant to apply to shares on a relevant market in Hungary, and clarify that the reference in the materials you provided that the GVH “*does not initiate a proceeding*” in any of the above three instances is intended to mean that parties need not notify such transaction under the “soft” threshold.

⁹ *Ibid*, at Comment 1 to *Recommended Practice I.B.*

¹⁰ Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2013/C 366/04).

Obviously, this latter category involves the use of market shares in merger notification thresholds which, as noted above, is generally inconsistent with the ICN *Recommended Practices*.¹¹ However, as we understand that the 2016 Amendments have already been adopted by Parliament, and there is no current prospect for reconsidering the adoption of the alternative “soft” threshold, the Group believes that in these unique circumstances the use of such market share-based references is essential to clarifying the application of Hungary’s merger notification thresholds for the business community.

* * *

Thank you very much for considering the Group’s views. We believe that the suggestions set out above would provide important clarity to the business community, while at the same time bringing Hungary’s merger control laws into great conformity with the ICN’s *Recommended Practices*, and also allowing the GVH to focus its resources on those transactions most likely to have significant domestic effects. We would welcome the opportunity to respond to any questions or discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,



A. Neil Campbell



Casey W. Halladay

Copy to: Miklos Juhász, President, GVH (Juhasz.Miklos@gvh.hu)
Members of the Merger Streamlining Group
J. Chad, McMillan LLP

¹¹ *Supra* note 7.