

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

Working Party No. 3 on Co-operation and Enforcement

REMEDIES IN MERGER CASES

-- Hungary --

28 June 2011

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 the 28 June 2011.

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1. The present contribution of the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH) is based on the questions posed, but follows a slightly different structure. We first discuss the procedural issues of crafting a merger remedy (relating to questions 1, 5, 6, 7 and 8), and then the GVH's approach to the types of remedies used (in connection to questions 2, 3, 4 and 9), and finally, we present, as examples, a few recent merger cases where remedies were considered.

1. The GVH's procedure concerning merger remedies

2. Parties may put forward possible remedies at any time during the merger investigation procedure; there is no separate remedy phase in the merger investigation. In principle, there is also no difference between a one- and a two-phase merger with regard to the submission of remedies, but parties naturally face different incentives regarding the submission of remedies in different phases of a case.

3. It is possible to already submit potential remedies in the notification. These may stem, for example, from parties' previous experience from similar mergers or pre-notification discussion. The remedies, in this case, are submitted with the understanding that they only be implemented if the GVH identifies competition concerns to justify them.

4. If remedies are submitted when the merger is still under investigation by the case team, the Competition Council (the decision making body of the GVH) may take part in the process to the extent of handling any remedy discussions.

5. Most frequently, however, remedies are put forward after the GVH has identified specific competition concerns and made these known to the parties, that is, following the issue of a Statement of Objections. The remedies are proposed by the parties and further discussions are led, on the part of the GVH, primarily by the Competition Council.

6. If a remedy includes a divestiture, there is no rule that the divestiture must be finalized before the merger closes. The timing of the divestiture depends on the specific case, and is subject to discussion between the GVH and the parties. Of course, it is preferred that the divestiture takes place as soon as possible.

7. The remedy typically contains measures to be taken in case the divestiture does not take place in a timely fashion; the transaction could thus, for example, become null and void. Also, the relevant laws contain provisions for enforcing the Competition Council's decisions. The remedy also usually includes reporting requirements and inspection clauses. The Authority has so far not employed sales trustees or monitoring trustees. There is also no staff dedicated solely to the enforcement of remedies. The GVH has to monitor whether the remedy has been correctly implemented through launching a separate, post-merger investigation.

8. The GVH has issued a short set of guidelines relating specifically to remedies, containing the general requirement for monitoring.¹ The GVH also maintains a document containing general principles followed by the Competition Council in interpreting and applying the Competition Act.² Some of these principles relate to merger remedies, and the procedural practices and general approach followed by the GVH that we describe in this submission.

¹ The 2008/1. Notice of the Competition Council, can be downloaded in Hungarian from the GVH's website: <http://www.gvh.hu/domain2/files/modules/module25/521787C1F0F45831.pdf>

² This document can also be downloaded in Hungarian from the GVH's website: <http://www.gvh.hu/domain2/files/modules/module25/13908B1C365CEFE2C.pdf>

2. The GVH's approach in crafting remedies

9. The case and competition concern in question determines the type of remedy that should be used, and there are no hard rules in choosing between structural, behavioral or hybrid remedies. Structural remedies, especially divestitures, are usually preferred over behavioral remedies for several reasons. First, they are often easier to implement, and thus the costly continual monitoring of a market may be avoided. Second, they are often also the most effective, in that a divestiture may result in the creation or strengthening of a competitor in the market. In some cases, however, effective structural remedies are not available (we shall present such a case in the next chapter), and a behavioral remedy is sought instead. On the other hand, some competition concerns may be solved through a relatively simple behavioral remedy, which means smaller intervention into the functioning of the market. It is also preferable to intervene as little as possible, while alleviating any competition concerns.

10. In principal, the general approach to choosing remedies does not differ between horizontal and vertical cases. However, since the concerns that arise are different in horizontal and vertical mergers, the relative frequency of various types of remedies may differ. For example, divestitures may be more likely in horizontal mergers, and behavioral remedies pertaining to access to a facility more frequent in vertical mergers.

11. It is possible for a remedy to require the divestiture of intellectual property, although such a case has not yet occurred in the GVH's practice. There has been, however, a case where the right to use a specific brand name was divested, as part of a more complex, hybrid remedy.

12. The most typical behavioral remedies applied by the Authority relate to access to a facility. Such contracts often also contain methods for calculating price schedules and regulate many other aspects of access.

13. During remedy negotiations, the Authority typically conducts a market test of the proposed remedy, or possible remedies, in order to allow third parties to comment. The market test usually takes the form of a questionnaire, but public consultation have also been used in some cases.

3. Recent GVH experience with merger remedies

14. The UPC/Spektrum merger was a vertical merger concerning UPC, the leading cable television service provider (downstream market) acquiring Spektrum, a television content provider (upstream market).³ In this case, UPC already indicated in the notification that it pledged to provide non-discriminatory access to Spektrum's television channel to its downstream competitors. This behavioral remedy was accepted as alleviating any vertical competition concerns that may arise, and rules were set out to monitor its enforcement. The remedy, in this case, was proposed early on by the parties based on their previous experience with similar mergers.

15. The Prímagáz/Intergas merger gave rise to competitive concerns regarding access to a facility.⁴ While Prímagáz was active (among others) in the downstream markets for wholesale and retail LPG gas, Intergas provided a loading service at the border enabling the importing of gas into Hungary via railway from the Ukraine. The service provided by Intergas formed a bottleneck in the industry, and third parties voiced concerns regarding their future access to this service. A behavioral remedy was adopted, which set out conditions for providing access to third parties for the next 2 years.

³ Case 61/2008.

⁴ Case 146/2009.

16. The Holcim/VSH merger gave rise to both horizontal coordinative competition concerns in the market for cement production and trade in Hungary, and vertical competition concerns regarding the upstream cement market and the downstream ready-mix concrete market.⁵ Ideally, a divestiture of production facilities in the cement market would have been the optimal remedy that could have alleviated both concerns. However, for various reasons, there was no possibility to divest production facilities. As a second best solution, a hybrid remedy was accepted by the Competition Council. The parties divested their ownership in a major cement trading company in Hungary with suitable storage and transport facilities. Additionally, the parties committed a supply contract, to ensure that the trader has the option for access to cement from the parties' production facilities under reasonable conditions for 5 years, a sufficiently long transition period for it to secure its own sources. In this way, a new competitor had the possibility of entering the market, disrupting possible tacit collusion, and offering a supply alternative to the parties in the ready-mix concrete markets.

17. The Magyar Telekom/Vidanet merger provides an example for a case when no suitable divestiture could have been identified to alleviate competition concerns.⁶ The merger would have eliminated competition between the two incumbent internet service providers on two alternative platforms, ADSL and cable. There was no suitable structural remedy available, and the behavioral remedies offered by the parties (to provide access to basic infrastructure) were, in the opinion of the Competition Council, insufficient to enable viable entry that could compensate for the loss in competition.

⁵ Case 153/2009.

⁶ Case 158/2008.