GLOBAL LEGAL INSIGHTS

Merger Control

Second Edition

Contributing Editors: Nigel Parr & Ruth Sander
Published by Global Legal Group

CONTENTS

Hungary

Anikó Keller & Bence Molnár
Szecskay Attorneys at Law

Overview of merger control activity during the last 12 months

Between September 2011 and November 2012, the Hungarian Competition Office (the "**HCO**") issued 30 decisions in merger cases. This means almost a 20% decrease in the number of concentrations above the thresholds, compared to the preceding period. The number of notifications is not publicly available.

Three concentrations were cleared in the second stage, 25 cases were cleared in the first stage. There have been two cases where the participants failed to notify the HCO about the transaction and the HCO investigated the concentration *ex officio*. In one of these cases *(Vj-27/2011 ELMIB/ DunaCent)*, the HCO established that it did not have to be notified of the concentration under the Competition Act; in the other case *(Vj-04/2011 Ispotály Management/HungaroCare),* the HCO established that it should have been notified of the concentration and imposed a fine for the failure to do so.

Obligations have only been prescribed in one case *(Vj-066/2011 Magyar RTL/ IKO Televízió)*.

We are not aware of any concentrations notified to the HCO that were not cleared by the HCO. Nor are we aware of any referrals between the European Commission and the HCO.

New developments in jurisdictional assessment or procedure

We are not aware of any development in jurisdictional assessment.

In late 2011 and 2012, the HCO issued three instruments that are relevant for the procedure of the HCO in merger control cases. These are: (i) the new notification form; (ii) the information memorandum on pre-notification meetings; and (iii) the information memorandum on simplified decisions without any reasoning.

The new notification form is applicable to concentrations notified to the HCO not earlier than February 1, 2012. First of all, the new form requires different amounts of information in respect of the direct participants, in respect of the indirect participants with (supply, production, sale, *etc.*) links to Hungary and in respect of (groups of) indirect participants not related to Hungary at all. This is a more sophisticated (and reasonable) approach compared to the old form. Another great change is that the form requires the applicant to identify all the reasonably possible market definitions where (horizontal) overlaps or (vertical) relations may arise. If activities with significant overlaps or relations are identified (significance being measured on the market shares) then detailed information shall be provided on the relevant markets, and on the effects of the concentration on them. However, if the overlaps or relations are not significant at all, it is not necessary to provide extensive information on the markets (except on the market sizes and shares).

Pre-notification meetings with the HCO were normal and very practical before the issuance of the memorandum on this issue. However, the memorandum now clearly sets out the framework of these meetings and what should be expected. *e.g.:* no minutes are taken of the meetings; the applicant may send the draft notification form to the HCO before the meeting; market definitions may be discussed and clarified, *etc*. In comparison to the practice of the EU Commission, the

aim of such pre-notification discussions is not to "complete" the notification and delay the filing, because the 30-day deadline applies regardless of the outcome of the pre-notification discussion, and failure to meet the deadline is subject to fines.

The HCO has been entitled to issue *simplified decisions* since February 1, 2012, based on the reference of the Competition Act to a specific section of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services. According to this section, a decision without reasoning and information on legal remedies can (but does not have to) be issued if: (i) the authority satisfies the request of the applicant in its entirety; and (ii) there is no opposing party, or the rights and legal interests of opposing parties are not affected. (Under Hungarian law, competitors are not considered opposing parties in the proceeding on the approval of concentrations.) The mentioned information memorandum sets out the cases where it will not issue such a simplified decision, even if the above two conditions are met. Such cases are, for example: (i) if the cooperation of another authority is mandatory; (ii) if a full (rather than a simplified) proceeding is conducted, or the decision about whether the procedure is simplified is not made in accordance with the respective notice of the HCO; (iii) if an obligation or condition is prescribed; (iv) if there are ancillary restraints that are not necessary for the concentration and the HCO deems it necessary to highlight this; (v) if the notification was filed late; (vi) if fundamental questions of the case have to be clarified (*e.g.* whether it is a concentration, the identification of the participating groups of undertakings, jurisdiction of the HCO, calculation of turnover); and (vii) if the HCO wishes to publish the reasons of the decision due to increased public attention, acquisition of control by a state entity or a local government, or the fact that the decision contains conclusions important for the interpretation of the law. It is clear from the above that a simplified proceeding does not necessarily mean a simplified decision. The fact that the HCO may issue a simplified decision has two consequences: first, the fact that no reasoning is given may shorten the time within which a concentration is approved by a few working days. Second, the absence of published reasoning will cause the situation that market-definitions accepted by the HCO in such cases will not be available publicly, thus less guidance for future concentrations will be available from the previous practice of the HCO.

In addition, we would like to highlight a case where, due to the parties' failure to notify the HCO, the latter investigated the concentration *ex officio*: this is case *Vj-04/2011 Ispotály Management/ HungaroCare*. The reason for the failure to notify was the incorrect interpretation of the Competition Act by the parties in connection with the necessity of clearance regarding the acquisition of indirect and joint control over the target company in addition to the acquisition of direct and sole control. This very same interpretation error happened several times in the practice of HCO (see Vj-24/2006, Vj-100/2009). Therefore, we think it is worth mentioning it briefly.

In this particular case, Ispotály Management Kft. (Ispotály) acquired direct and sole control over HungaroCare Intézeti Gyógyszertár Kft. (HungaroCare). Ispotály was jointly controlled by Hungaropharma Gyógyszerkereskedelmi Zrt. (Hungaropharma) and Kókai Tanácsadó Kft. (Kókai).

The parties identified Ispotály's as the buyer's and HungaroCare's as the target's groups of undertakings, where, due to a lack of sole control, the parent companies were not to be included in the buyer's group of undertakings in accordance with Section 15 of the Competition Act. Based on this, the parties found that the relevant turnover thresholds, above which notification to the HCO is mandatory, were not met. This was, however, only true in respect of the acquisition of direct and sole control by Ispotály. Notably, simultaneously with the acquisition of direct and sole control over HungaroCare by Ispotály, Hungaropharma and Kókai acquired indirect and joint control over HungaroCare. Since, according to item b) of Section 23(1) of the Competition Act, a concentration of undertakings is effected where a sole undertaking or more than one undertaking jointly acquires direct or indirect control of the whole or parts of one or more than one other undertaking which have been independent of them, the turnover thresholds relating to the group of undertakings of Hungaropharma and Kókai should have also been assessed. The HCO did this in its procedure initiated *ex officio* and found that, in relation to the acquisition of indirect and joint control by Hungaropharma and Kókai, the relevant turnover thresholds were met and, therefore, although the parties failed to notify the HCO, the transaction was subject to the latter's clearance.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry

Among the concentrations approved in full proceedings, *Magyar RTL Televízió Zrt. / IKO Televisions Kft. (Vj-066/2011)* is worth introducing. The acquiring party is Magyar RTL Televízió Zrt., a member of the RTL-group, and Hungary's largest commercial TV broadcasting company (a "media service provider" as defined under EU law), having a concession over one of the two national commercial (terrestrial) TV broadcasting rights. The acquired participant, IKO Televisions Kft., is the broadcaster of several smaller TV-channels, available via cable-reception.

Before January 1, 2011, the concessionaire of one of the national commercial broadcasting rights was not allowed to acquire a controlling interest in any other broadcasting entity. The concentration could come about due to the fact that this restriction was lifted, therefore it can be regarded as unique. Accordingly, the HCO examined the market's and the participants' status in detail.

The HCO identified two main markets related to the transaction: the sale and purchase of advertising time between advertisers and broadcasters (or their sales houses); and the sale of TV programmes by the broadcasters to the TV programme-distributors (*e.g.* cable companies making the broadcast available to the audience) for fees. The audience is the final element in both chains. The HCO also established that the markets of media services are so-called two-sided markets, due to the fact that the media product is sold both to the audience and the advertisers, and these two kinds of demands are highly dependent on each other.

In its decision, the HCO examined two markets: the distribution of TV broadcasts; and the TV advertisements market.

Regarding the relevant product markets within the distribution of TV broadcasts, the HCO established that most channels are substitutable with other channels within their genre, however certain channels are "must have" channels. Such "must have" channels are the two national commercial broadcasting channels, *i.e.* RTL Klub and TV2, and certain other channels may potentially also belong here. "Must have" channels are so important for the audience that they cannot be substituted, even if there is another within the same genre. Therefore, the HCO established that RTL Klub forms a separate product market for the purposes of TV-programme distribution services. The relevant geographic market is national in all cases.

Regarding the relevant product markets within the TV advertisements markets, the HCO established that the purpose and structure of advertising is different on the two national commercial channels (RTL Klub, TV2) from that on the smaller cable channels. Therefore, the two national commercial channels form a separate relevant product market. The relevant geographic markets are also national for the broadcasting services.

Due to the above, namely that the acquiring participant's channel forms a market that is separate from the acquired participant's channels, the HCO could not identify horizontal and vertical effects, only significant portfolio effects.

Regarding programme distribution, the HCO found that no harmful effects on competition are likely, due to the structure of the market, as there are relatively few barriers to entry to the cable-channel (broadcasting) market, and media regulation.

Regarding the advertising markets, the HCO established that the bundled sale of both the advertising time of RTL and the cable channels could cause the lessening of competition. Therefore, the HCO found it necessary to counterbalance such effects by obligations. The HCO did not find it necessary to prohibit bundled sales of advertising time, but it is prescribed in the decision that: (i) separate sale of the advertising time of RTL Klub and of the acquired channels shall be maintained; and (ii) the fees, discounts and conditions in respect of separate sales shall be reasonable and free of unjustified discrimination. The applicant also undertook to create, operate and make available to the HCO a documentation system that enables the HCO to monitor compliance. The obligations expire as of December 31, 2013.

Key economic appraisal techniques applied, assessment of vertical and conglomerate mergers

We are not aware of any sudden shift or change in the economic appraisal techniques applied. In our view, the HCO mainly follows the practice of the European Commission in merger control matters.

In September 2010, the HCO issued a non-binding memorandum on the relevant aspects in evaluating non-coordinative horizontal effects of a concentration. This memorandum does not have the authority of an HCO notice (the issuance of which is authorised by the Competition Act). The memorandum provides three levels of assessment, as described below.

First phase of the evaluation: Market shares

In most cases, the **market shares** provide information on whether a more detailed analysis is needed. However, the analysis of market shares may not be sufficient if the market changes swiftly or a transaction (*e.g.* a tender) is capable of significantly altering the market.

Second phase of the evaluation: Horizontal effects

If, based on the analysis of market shares, it cannot be stated clearly that there will be no significant (detrimental) effects to competition, the HCO examines the **horizontal effects** of the concentration. For this analysis, the HCO differentiates between three main types of the market: (i) markets of relatively homogenous products; (ii) markets of differentiated products with prices set without respect to customers; and (iii) markets with individualised prices. (Of course, the HCO does not seek to force any market into one of the categories.)

(i) In case of *homogenous products,* the HCO mentions the following methods for the analysis of the effects: *(a)* examination of structural indexes, *i.e.* market share, based on either income, or volumes sold, or production capacities; *(b)* price-concentration analysis; and *(c)* examination of the effects of the presence of a competitor to another competitor's pricing.

(ii) In case of markets where *products are differentiated* but prices of a single participant are standardised (*e.g.* chocolate bars, newspapers, internet access packages), the HCO takes into account that the same relevant market is segmented by the fact that certain products are better substitutes to each other than other products. Therefore, there is a greater price (cross-) elasticity (and more intense competition) between products that are closer substitutes to each other, and nude market shares do not give a fair view of competition. Due to this, a concentration between participants with more substitutable products may have a more detrimental horizontal effect on competition than a concentration of more distant participants. The HCO notes that due to potential entries to the market and the hypothetical situations that shall be taken into account, customer queries and surveys are often the means of discovering market behaviour. The HCO takes into account the difficulty of comparing prices of relatively different products. This difficulty may often be solved by identifying the elements of the prices, or creating an artificial average price. Price-concentration analysis and the examination of the effects of the presence of a competitor on another competitor's pricing are also used on differentiated markets. The HCO also pays attention to the fact that the participants may compete in factors other than prices, such as marketing or innovation.

(iii) *Markets with individual prices* have two main (proto) types, according to the HCO: *(a*) markets where products are similar, but single customers may receive individual discounts; and *(b)* markets where rare auctions or biddings with great value generate demand for the product/service. The HCO points out that, in the first case, analysing methods used for homogenous markets and differentiated markets may be well adopted. In the second case however, different methods are necessary for markets with big unique transactions. Prices applied towards individual customers or (if necessary) in individual transactions shall be collected from customers. According to the HCO, market shares on this market are less representative and longer trends shall be analysed, due to the fact that the winner of bidding may "take it all" for a certain period. Therefore, it may be important to precisely explore the rules of the individual biddings and the relations between the participants. For example, the number of tenders where certain market participants *actually compete* may describe whether they are actual competitors or not. According to the HCO, close competitors often have *close positions* at the outcome of the biddings, thus outcome analysis may also give a description of the market. The HCO also takes into account whether prices offered by an undertaking change whether a competitor undertaking is also participating in the bidding/auction.

Third phase of the evaluation: Pro-competitive effects and defences

Finally, if anticompetitive effects of the concentration have been identified, the HCO deliberates the

potential pro-competitive effects. These are categorised in the memorandum as follows:

(i) *New entrants*. New entrants can counterbalance anticompetitive effects if the entrance is: *(a)* likely to happen; *(b)* happens soon enough after the concentration; and *(c)* has an impact sufficient enough to counterbalance anticompetitive effects. When investigating the possibility of new entrances, events in the past (entrances and exits) and the possibilities to enter (minimal costs, return rate, minimum market share necessary to compete effectively, chance to reach such market share) must be taken into consideration. If such information is available, the HCO investigates whether there is any undertaking that is likely to enter the market.

(ii) *Buyer power*. The HCO takes the position that it is not enough if there is a certain buyer power on the market. Customers having buyer power must cover a sufficiently large part of the market. The HCO notes that on markets without a possibility to discriminate prices, there is a greater probability that buyer power will be effective. It is important that buyers have a strong bargaining position, and the loss of a buyer is a significant loss for the sellers. There is less chance that buyer power is effective if the costs of changing business partners (suppliers) are high.

(iii) *Increase in efficiency*. The HCO takes into account that a concentration may have effects decreasing costs or otherwise increasing efficiency. However, following the horizontal guidelines of the European Commission (2004/C 31/03 – OJ C 31, 2004.2.5.), four conditions must be met to accept such argumentation: *(a)* only such improvements may be taken into account that would not occur without the concentration; *(b)* improvements shall be represented in decreasing prices; *(c)* improvements must be verified by calculations, not just arguments; and *(d)* improvements that are more likely to happen in the close future are more convincing. Furthermore, increases in efficiency shall match the anticompetitive effects and effectively counterbalance them.

(iv) *Failing firm defence*. It may be argued that the intensity of competition would also decrease without the concentration, due to the fact that the acquired undertaking would also disappear from the market due to its poor financial situation. The HCO notes that this argumentation may only be accepted with certain restrictions, namely: (a) it cannot be expected that the failing firm would be replaced by a new entrant; and (b) it is likely that the assets and production of the failing firm would actually disappear from the market. It is the obligation of the concentrating parties to prove such conditions.

In the memorandum summarised above, the HCO describes its methods for analysing non-coordinative horizontal effects. However, the analysis of coordinative effects also forms part of the HCO's practice, as shown above in the summary of the *Holcim/Východoslovenské stavebné hmoty* case.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Pursuant to Notice 3/2009 of the Head of the Hungarian Competition Office and the President of the Competition Council on simplified and full proceedings, if commitments or obligations are attached to the clearance, the concentration will be investigated in a full proceeding and will therefore consist of two stages. However, the HCO may exceptionally accept commitments in the simplified proceeding as well, provided that:

(i) the competition problem can be easily identified;

(ii) the remedy for the competition problems can be simply assessed;

(iii) the notification filed by the applicant already contains the commitment for the competition problem foreseen and not disputed by the applicant; and

(iv) with the commitments, the concentration meets the requirements set out in the same Notice for simplified proceedings.

The Head of the HCO and the President of the Competition Council issued a Notice on prescribing conditions and obligations in merger clearances (Notice 1/2008). As explained in the Notice, a condition may be a *condition precedent* (the clearance is not effective until the condition is fulfilled) or a *condition subsequent* (the clearance is annulled if the condition is not fulfilled). *Obligations* do not affect the effectiveness of the clearance, but the HCO may revoke the clearance on non-compliance. The HCO points out that these are only the forms, so the same behaviour may be prescribed in any of

the above three constructions, depending on the circumstances of the case.

The HCO has set the following principles for prescribing remedies:

- The condition or obligation shall be applied to solve only the competition problems that are caused by the concentration.
- The condition or obligation may only be prescribed if the applicant has offered the remedy as a commitment or accepted it before adopting the final resolution. If neither is the case, the HCO does not prescribe the condition/obligation not agreed to by the participant, but rather denies the concentration.
- The condition/obligation shall be clear, unambiguous, precise and enforceable, and compliance shall be verifiable.
- The HCO continuously negotiates with the applicant and (if necessary) foreign competition authorities.

Pursuant to Notice 1/2008, the HCO prefers *structural remedies over behavioural remedies*. As a third category of remedies, the HCO often prescribes *obligations to provide information,* most likely about the fulfilment of other conditions and compliance with other obligations. The Notice also explains the practice of the HCO in connection with divestitures.

We are not aware of any circumstances where the HCO's actual practice deviates from the above policy statements.

Reform proposals

We are not aware of any reform proposals.

Anikó Keller
Tel: +36 1 472 3000 / Email: aniko.keller@szecskay.com

Anikó Keller is a Hungarian attorney admitted to the Budapest Bar Association. She joined Szecskay Attorneys at Law in 2003.
She currently specialises in competition law, state aid, advertising law, consumer protection, data protection, employment law and commercial law.
She received her JD, *summa cum laude,* from Eötvös Loránd Faculty of State and Legal Sciences in 2000 and a postgraduate diploma in a King's College London postgraduate course on European Union Competition Law in 2012.
Anikó Keller is member of the German-Hungarian Jurist-Union and the Hungarian Self-Regulatory Advertising Board and author of a number of articles on competition law. Chambers Europe 2011 recognised her as an "Associate to watch". She is fluent in English and German.

Bence Molnár
Tel: +36 1 472 3000 / Email: bence.molnar@szecskay.com

Bence Molnár is a Hungarian attorney candidate admitted to the Budapest Bar Association. He joined Szecskay Attorneys at Law in 2008.
He currently specialises in competition law, banking regulatory law and corporate law.
He received his JD, *cum laude*, from Eötvös Loránd Faculty of State and Legal Sciences in 2009. During his university years he was a member of Mathias Corvinus Collegium (2004-2009), where he researched the law of fiduciary transactions and trusts. In 2007-2008 he studied at the University of Groningen in the Netherlands on an Erasmus scholarship, where he studied the law of international organisations, international contracts law and private international law.
He is fluent in English and German.

Szecskay Attorneys at Law

Kossuth tér 16-17, H-1055 Budapest, Hungary
Tel: + 36 1 472 3000 / Fax: +36 1 472 3001 / URL: http://www.szecskay.com

Strategic partners:

www.globallegalinsights.com