

## Competition - Hungary

Key issues in pre-notification consultations and new merger clearance form

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March 15 2012

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### New merger clearance form

Following a public consultation in 2011, the Competition Office published its new merger clearance application form on February 1 2012. The new form incorporates many elements recommended by market participants and practitioners with the aim of amending and simplifying the original form. Probably the most significant amendment is that extensive details need be provided only for markets that are either horizontally or vertically affected by the merger.

For the purposes of the clearance application, a market is considered to be 'horizontally affected' if there is at least one market in which both the acquirer and the target group of undertakings (or target assets) are present, or might reasonably be present - that is, the entities are in competition with each other and the combined market share of the merging groups of undertakings is more than 15%.

A market is considered to be 'vertically affected' if:

- either the acquirer or the target group of undertakings (or target assets) is (or might reasonably be) active in the market;
- such market is either downstream or upstream of another market where the other party is (or might reasonably be) active; and
- the relevant entities' individual or combined market share at either level is at least 20%, regardless of whether a supplier-customer relationship exists between them.

If there are no horizontally or vertically affected markets, the parties can file a simplified merger form. The market definitions for Hungarian merger control purposes are substantially equivalent to those used in Section 6.III of Form CO in the European Commission merger clearance procedure. However, for the commission's purposes, the relevant market share threshold for vertically affected markets is 25% - the Hungarian merger form gives no reason for this lower 20% threshold.

It is surprising that the thresholds above which markets are considered to be either horizontally or vertically affected differ from the Competition Office's defining thresholds for a first-phase procedure (ie, for simple cases in which competitive concerns can clearly be excluded) and a second-phase procedure (ie, for complex cases in which greater scrutiny is required). According to the Competition Office, a merger may be dealt with in a first-phase procedure if there is:

- no horizontally affected market in which the combined (ie, acquirer-plus-target) post-merger market share would be greater than 20%; and
- no vertically affected market that connects the acquirer and the target group of undertakings (ie, in which one party is a vendor and the other is a buyer) in which any relevant party has an individual market share of more than 25%.

This leads to the strange conclusion that parties will be ineligible to use the simplified merger form, despite the fact that their merger qualifies for the simplified review procedure, if:

- their combined post-merger horizontal market share is between 15% and 20%; or
- there is at least one vertically connected market in which one or more of the parties holds a market share of between 20% and 25%.

It remains to be seen whether the Competition Office will provide an explanation for this

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anomaly. Without one, competition practitioners may struggle to make clients understand why they must prepare a lengthy and complex merger application form, even though their merger is subject to first-phase review. However, the new form allows parties to apply for derogation. Thus, if they believe that some of the questions are irrelevant or unnecessary in the context of their merger, they may request permission to leave them unanswered.

In focusing predominantly on the relevant Hungarian markets, the form differs from its predecessor, which required parties to provide an analysis of all market activities, regardless of location. Nonetheless, the rationale for some of the new form's requirements is hard to fathom. Even when using the simplified form, the parties must disclose their turnover worldwide, for the European Union as a whole and separately for each EU member states. Anyone who has helped to prepare a merger application form will know how difficult it is to compile these turnover figures, especially for a Hungarian clearance procedure in which only Hungarian net turnover is relevant.

### **Pre-notification consultations**

Previously, no official rules applied to pre-notification consultations, and although the Competition Office never refused to enter into such discussions, they were understood to be informal and non-binding. In the interests of legal certainty, the Competition Office has now issued guidelines for pre-notification consultations.

The guidelines state that the purpose of such a consultation is to correct the imbalance in the information available to the Competition Office and to the parties. The process allows the parties to seek feedback from the Competition Office on the required level of disclosure, the potential competition concerns raised by their merger and the applicability of remedies offered before notification. The aim is to allow the parties to bring their transaction into line with the requirements of the Competition Office.

Perhaps surprisingly, the guidelines contain almost no procedural requirements, leaving the parties free to determine the rules, the frequency and the agenda of the consultations. The Competition Office considers that this provides flexibility for the parties to address all individual aspects of their merger. However, the guidelines stress that merging parties or their legal representatives should not expect the consultations to serve as a 'how to' guide to the preparation and filing of a merger application form and its annexes. The only fundamental formal elements in the guidelines are the requirement to comply with the procedure in good faith - a duty to which the parties are committed in any case - and the non-binding nature of the results.

The guidelines provide that the Competition Office will be represented by a case examiner. However, in complex cases the parties may ask the chief economist or even a member of the Competition Council - the Competition Office's ultimate decision-making body - to take part. Consultations are intended to help the parties to:

- identify whether their intended transaction constitutes a concentration;
- assess the scope of information and data to be supplied or disclosed in the merger application form; and
- discover competitive concerns that the intended transaction may pose, together with possible remedies.

From a practitioner's point of view, the non-binding nature of the results does not prevent a pre-notification consultation from being a potentially significant tool in structuring complex transactions and simplifying the merger clearance procedures.

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