

Competition - Hungary

Competition Office weighs responses on simpler merger form

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Introduction

Foreign undertakings frequently criticise the Hungarian merger notification form as being unreasonably complex. In its 15-year evolution it has grown to 30 pages, containing 81 difficult questions and 19 charts to be completed by the applicant. The required information is extremely wide ranging and in many cases proves impossible to provide - for example, the applicant is asked to describe in great detail not only the market affected by the transaction, but also all other markets in which any of the undertakings involved is active. In addition, an extensive set of supporting documents must be filed, including original versions (or notarised copies) of the acquisition agreement and the balance sheets of all direct and indirect participants. The form is regarded as one of the most difficult of its kind in the world.

From a practitioner's perspective, it is usually even more difficult to convince merging undertakings that the notification form must be completed carefully. Foreign companies often believe that a mistake has been made - surely another, much simpler form must be available? In one case an acquirer decided not complete further acquisitions that would trigger mandatory merger clearance in Hungary until the notification form had been radically simplified.

Public consultation

Until recently, the Competition Office had done little to rectify the problem, but it has finally taken a more active approach. As a first step, it has launched a public consultation in the form of a questionnaire.⁽¹⁾ Market participants are asked about their experience of using the notification form and are invited to suggest how it - and the merger clearance procedure as a whole - could be amended. To date, four comprehensive reports have been filed with the Competition Office: three from law firms (ie, the Hungarian affiliates of DLA Piper, White & Case and Schönherr) and one from the Hungarian group of the International League of Competition Law (LIDC).

Responses

All of the respondents report predominantly negative experiences in using the notification form. In their common view, the most problematic issue is that the form must be completed for every transaction - regardless of the merger's impact on the market or the extent thereof - which they regard as unreasonably burdensome and unnecessary. The other key problem is the scope of the requested information - this, in the respondents' opinion, goes far beyond what is reasonably required to assess the merger in question.

Furthermore, two of the reports (from the LIDC and Schönherr) argue that the time limits for stages of the merger procedure, although determined by law, are unpredictable in practice. The time limits are automatically suspended if the Competition Office requests additional information from the merging parties, and do not start running again until the necessary information has been submitted. This, in the view of the two respondents, makes the fixed periods meaningless.

Recommended changes

All reports recommend the introduction of an additional simplified merger notification form, similar to the European Union's so-called 'short form'. This simplified form would

be used for mergers that do not raise competition issues. Furthermore, all reports suggest relaxing the strict filing requirements by limiting the scope of the supporting documentation and simplifying the formal requirements - for example, removing the requirements to submit individual balance sheets for all participants if a consolidated balance sheet is available and to file originals or notarised copies. The LIDC also recommends that the clearance period should not be subject to unpredictable suspensions.

There are some conflicting recommendations in the reports. For example, White & Case would replace the 30-day notification deadline with a specific prohibition against closing the transaction before clearance - the existing regime requires parties to give notification within 30 days, but does not explicitly prohibit them from concluding the transaction. Thus, the parties would be released from the mandatory filing deadline, which often proves difficult to meet; however, the ban on pre-clearance closing would encourage them to file as early as possible. The LIDC report takes the opposite view, suggesting that parties should be free to close a transaction without merger approval at their own risk. On this basis, the often lengthy merger control procedure and the absence of clearance from the Hungarian regulator would no longer pose a legal obstacle to implementing a multinational transaction. The parties would run the risk that the Competition Office might reject the merger (or impose certain structural conditions), but they would be able to assess their exposure and decide whether to take the risk.

Another difference of opinion relates to formalising interaction with the Competition Office. The LIDC and White & Case propose the creation of a pre-notification phase, during which the parties could approach the Competition Office before the conclusion of the acquisition agreement; however, they differ on whether such a consultation should be formalised. The LIDC argues that the rights and obligations of the parties in the consultation should be set out in detail, so that the system is transparent and the applicants know what to expect. However, White & Case suggests that the informal nature of the consultations should be maintained in the interests of flexibility.

All respondents propose a reduction in the extent and quantity of market information to be supplied. They criticise as disproportionate the existing rule whereby parties must describe all product markets in which any member of any of the affected groups of undertakings is present, in any member state of the European Union. Instead, the respondents argue that the form should focus on horizontally or vertically affected markets.

Next steps

The Competition Office will assess the reports and initiate legislative change along the lines recommended therein. It has promised to give the consultation results serious consideration and seems determined, after 15 years, to rectify the irrational features of the merger notification procedure.

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Endnotes

(1) Available at www.gvh.hu.

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