

OECD-GVH RCC Newsletter

Issue No. 4, February 2015

Contents

Foreword	2
RCC Programme for 2015	3
Event Description July – December 2014.....	5
Report About OECD Activities	7
OECD Competition Committee Meetings, 16-19 June 2014	7
OECD Competition Committee Meetings, 15-18 December 2014.....	9
Does Size Really Matter? Behavioural Merger Remedies and Small Economies.....	12
Aspects of Commitment Decision Policy in Antitrust: Croatian Experience.....	19
GVH Accepts MOL's Proposal on Diesel Pricing	21
Structural and Behavioural Commitments in Merger and Antitrust Proceedings.....	23

Foreword

Dear Readers,

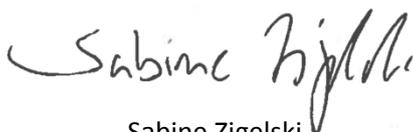
This newsletter is a bit different from the last editions. We have decided to have a “special edition” on remedies and commitments. So all the articles you will find in this newsletter deal with this topic and in many different ways. Remedies and commitments are a tool that is frequently used in merger and abuse of dominance proceedings, but they can also be used to address concerns in cases of horizontal or vertical competition restraints. The complexity of the topic is well reflected in the contributions by Hungary, Croatia and the Russian Federation. Hungary and Croatia describe complex abuse cases that were solved with a commitment solution. Russia gives a comprehensive overview of their practice in merger and abuse cases and shows how structural and behavioural commitments may go hand in hand. Another article reflects more on merger remedies and analyses whether small countries have better reasons for using behavioural remedies.

All this is supposed to provide a taste of the upcoming OECD-GVH Regional Centre for Competition in Budapest (RCC) seminar on “Remedies and Commitments in Competition Cases” scheduled in March 2015. During this event, we will work in detail on many of the relevant questions and will also practice situations that we may encounter when drafting and negotiating remedies and commitments. The relevance and role of trustees will also be highlighted.

We are also very proud to present the 2015 RCC programme to you. Did you know that the RCC will celebrate its 10th anniversary in 2015? We are planning to issue a special brochure for that special occasion.

This edition also includes summaries of the OECD Competition Committee meetings which took place in June and December 2014 with links to all the documents you might find interesting. We encourage you to use them to benefit from the work and experiences of peer competition authorities and from the work products of the OECD.

The GVH, being strongly committed to fostering competition culture, has recently finished its project on translating a European competition law textbook into Russian, written by Mr. Tihamér Tóth, former President of the Competition Council of the GVH. We truly believe that this book will assist its readers to find answers and useful information on EU competition law concepts, which have been widely implemented throughout Europe. The GVH made this book available in e-book format free of charge on the website of the RCC at www.oecdgvh.org. We are happy to receive your comments and contributions! Please contact Sabine Zigelski (OECD – sabine.zigelski@oecd.org) and Andrea Dalmay (RCC - dalmay.andrea@gvh.hu).



Sabine Zigelski
OECD



Miklós Juhász
President of the GVH

**Visit our new homepage:
www.oecdgvh.org**

RCC Programme for 2015

19 – 21 February

Seminar on European Competition Law for National Judges

Advanced level seminar in competition economics for judges. Relevant economic concepts and methods used in competition cases will be introduced. Case studies and hypothetical exercises will help to illustrate the economic concepts.

17 – 19 March

Remedies and Commitments in Competition Cases

A proportionate answer to many competition problems is not a prohibition decision but very often a decision imposing remedies or commitments in order to resolve the competition issues and to allow for an otherwise economically efficient behaviour to proceed. Merger remedies as well as commitments in abuse of dominance cases will be discussed in presentations given by OECD member countries' experts and in case studies from the participants. We will also have a closer look at model texts for commitments, at the use of trustees, at monitoring and at ex-post evaluation of commitments and remedies.

16 – 17 April

GVH Staff Training

Day 1 - Review 2014 and Selected Competition Problems

After a review of the developments in EU competition law in 2014, we will have a closer look at selected competition law topics. This will cover e.g.. vertical competition restraints, minority shareholdings in merger control and procedural questions like hearings and access to file. Experienced practitioners from competition authorities and from private practice will discuss the topics with the GVH staff.

Day 2 – Trainings for Special Groups of Staff

In separate sessions, we will provide dedicated trainings and lectures for the merger section, the antitrust section, the legal section, the consumer protection section and the Competition Council of the GVH.

20 May

Anniversary Event / Heads Meeting

9 – 11 June

RCC – FAS Seminar in Russia – The OECD Competition Assessment Toolkit

As part of their advocacy activities or as part of their legal mandate, many competition authorities are involved in reviewing new and existing laws, rules and regulations with the aim of pointing out where barriers to competition might arise or be reinforced and of showing alternative ways of reaching the same policy goal with less competition restrictive means. The OECD Competition Assessment Toolkit provides valuable guidance for enforcers. We will introduce the toolkit and show where and how it has successfully been used. Experts from the OECD Secretariat and OECD member countries and representatives from FAS Russia and invited CIS countries will present and share their experiences. Practical exercises will complement the sessions and will give an opportunity to practice and apply the toolkit principles.

22 – 24 September

Outside Seminar in Georgia – Evidence in Cartel Cases

The availability and quality of evidence to be used in cartel cases are decisive for the successful initiation and completion of a cartel investigation. We will have a closer look at direct and indirect evidence to be used in cartel cases and at ways of obtaining it. Topics to be discussed will include leniency systems, screening instruments, dawn raids and interviews. This seminar will give insights into best practices of experienced OECD countries with the use of these instruments (preparation, execution and assessment) and will provide opportunities to apply the learnings in hypothetical case exercises.

20 – 22 October

Update in Competition Economics

In this seminar we will present economic methods that can be helpful for competition authorities in the assessment of mergers and of allegedly anticompetitive conduct. The seminar will cover concepts like the SSNIP-test, diversion ratios and UPP indices in merger cases. In abuse of dominance cases, finding the correct counterfactual and carrying out an “as efficient competitor”-test will often be required. With the help of experienced practitioners from OECD countries, we will try to make these economic methods accessible to the participants. We will talk about data-, time- and resource-requirements, minimum and best practice standards for economic evidence and about the participants’ experiences in this field. The “translation” of economic results for lawyers and judges will be an important topic as well. Practical exercises and examples will enable the participants to apply the theory and to develop a better understanding.

19 – 21 November

Seminar in European Competition Law for National Judges

Advanced level seminar on recent developments in EU competition law. The most important developments in the area of Art. 101/102 TFEU will be introduced and discussed with a special focus on how these cases affect private claims before national judges in terms of the scope of legal rules, arguments parties are likely to develop, and economic and other evidence that would be required to support claims.

8 – 10 December

Competition Topics in Telecommunication and Electronic Communication Markets

This sector focused event will give the participants an opportunity to gain greater insights into the sector of telecommunication and electronic communication and to exchange their experiences. Topics to be discussed include the role of competition in the sector and the interplay between competition and regulation. We will also discuss market definition and antitrust topics pertinent to the sector like bundling and margin squeeze. In addition, mergers between Mobile Network Operators (MNOs) and the role played by Mobile Virtual Network Operators (MVNOs) will be covered. Specialists from OECD competition authorities will present on these topics and discuss case studies from the participating countries.

Event Description July – December 2014

16 – 18 September

Competition Topics in Retail Markets

This seminar focused on retail markets, especially food retail, that pose a lot of different challenges to competition authorities as they are frequently investigated and always meet high public interest. The seminar introduced market definition and methodology, topics in merger control (oligopolistic markets, buyer power), and vertical restraints and typical abuses. The insights given into sector inquiries were of high interest to the participants. Participants shared their experience with experts from OECD countries in lectures and case studies. Hypothetical case exercises complemented the presentations and discussions.



Competition Topics in Retail Markets

16 – 18 September

7 – 9 October

RCC – FAS Seminar in Kazan, Russia, on Airport Competition Topics

Airports are an industry that has a key function for economic development. Airports offer services and facilities to airlines and passengers, freight handlers and ground handling agents as well as to many other businesses that carry out airport related activities. Often airports are state owned or at least closely monitored or regulated by the state. The essential facilities doctrine plays an important role in the application of competition law. In the seminar we compared regulatory approaches and competition cases and looked at competition problems at different levels of airport activity. Studies that analyse the competitive situation of and at airports were introduced by international experts, who also gave an overview of airport related competition case law. FAS Russia introduced its experience and relevant competition cases, while discussions and a case study were aimed at gaining a better understanding of the competition topics and of some approaches for resolving them.



RCC – FAS Seminar in Kazan, Russia, on Airport Competition Topics
7 – 9 October

2 – 4 December

Evidentiary Issues in Establishing Abuse of Dominance

Many evidentiary challenges arise in establishing abuses of dominance. In order to establish a finding of dominance, competition authorities usually rely on indirect evidence such as market shares and barriers to entry. There is typically no single factor that leads to a finding of dominance, so it can be difficult to determine how much and what type of evidence is sufficient. Equally, the establishment of an abuse raises evidential complexities. The types of conduct that constitute an abuse can be difficult to establish and competition authorities face the difficult task of weighing evidence in support of an abuse against evidence suggesting that the conduct was a legitimate practice. The seminar explored these issues through presentations by competition officials from OECD countries, case studies presented by the participants and hypothetical case studies.



Evidentiary Issues in Establishing Abuse of Dominance
2 – 4 December

Report About OECD Activities

OECD Competition Committee Meetings, 16-19 June 2014

Roundtable on Financing of Broadband Networks¹

This roundtable examined how governments are ensuring the deployment of the infrastructure necessary to ensure high speed broadband access across their territory. Since many countries have set very ambitious coverage objectives, investments by private telecom companies may not be enough to reach them, in particular in rural areas. Hence, national and local governments have been exploring alternative solutions to fund this infrastructure. Some are relying primarily on market forces, while others are fostering private investments by allowing joint ventures between competing telecom companies. Another way is the injection of funds into private ventures in exchange for open access, by setting up joint ventures with private partners, or by entering into PPPs. Some public authorities have even completely funded the roll-out of the fibre network in specific areas of their country.

Factsheet on Links between Competition and Productivity²

The Secretariat presented the final version of a “factsheet” that outlines recent evidence about the effects of competition and competition policy on macro-variables, such as productivity, employment, and inequality. This note is based on the most recent economic literature on this topic. Its aim is to provide competition agencies with useful

references and ideas to use in advocating their role.

Hearing on Public-Private Partnerships (PPPs)³

A PPP involves a contract between a public authority (at national or local level) and a private party for the provision of a public service, or the development of an infrastructure, where the private party assumes substantial financial, technical and operational risk in the project. Hence, PPPs are very different from traditional public-private procurement contracts because they involve not just the provision of an infrastructure, but also its operation, and they lead to some form of sharing of the demand risk between the public procurer and the private provider. Usually PPPs are undertaken to exploit synergies between the various stages of the provision process, to provide incentives to the private partners to internalise operational and maintenance costs in their investment decisions, and to benefit from a private partners’ managerial capabilities, technical and sectorial know-how.

The hearing discussed:

- Why governments chose PPPs,
- The major benefits and the major drawbacks,
- How the private parties were selected and what institutional context favours an effective use of PPPs,

¹ <http://www.oecd.org/daf/competition/financing-of-roll-out-of-broadband-networks.htm>

² <http://www.oecd.org/daf/competition/productivity-growth-competition.htm>

³ <http://www.oecd.org/daf/competition/competitionissuesinpublic-privatepartnerships.htm>

- To what extent the design of the contract had an impact on the quality and price of the services provided; and
- How to avoid PPPs leading to profits above those that reward the investments undertaken and the risk assumed for the private parties.

Roundtable on Competition and Generic Pharmaceuticals⁴

Entry by generic pharmaceuticals can enhance competition in the drug market by offering more choice and by lowering drug prices to the benefit of health customers (including all buyers of medicine, from hospitals to end users). At the same time, innovation in the pharmaceutical sector should be sustained, notably by allowing innovators to obtain and to enforce intellectual property rights on their originator drug. Competition concerns arise when originator companies use their intellectual property (“IP”) rights or develop new strategies to delay or to prevent generic entry. Since the 2009 roundtable, pharmaceutical companies have developed new potentially anticompetitive strategies; competition authorities and courts have studied and ruled on specific types of infringements, such as pay-for-delay agreements between originator and generic companies. The roundtable addressed these recent developments, identified the main competition issues and examined what role competition law enforcement has played and could play to promote competition in the pharmaceutical sector. The main focus of the discussion was on competition between originator and generic companies, especially the practices designed by pharmaceutical manufacturers (originator or generic) insofar as they stifle competition to the detriment of end consumers.

⁴ <http://www.oecd.org/daf/competition/generic-pharmaceuticals-competition.htm>

Roundtable on Airline Competition⁵

Air transport has radically evolved in the course of the last two decades as liberalisation and deregulation of the sector at both domestic and international level have facilitated the entry of new firms. This in turn has had a positive impact on competition, both in terms of price and range of services offered to consumers. Many of the innovative business practices devised by airlines are evidence of healthy competitive behaviour; but some may actually be anti-competitive. It is therefore important to ensure that previously existing regulatory barriers are not replaced by anti-competitive mergers, alliances and agreements between airlines or by abusive behaviour by dominant carriers.

This roundtable discussed what the key features of the airline sector are (e.g. pricing models and loyalty schemes); the main competition issues arising in the airline industry (e.g. mergers and alliances, restrictive agreements and unilateral conduct); how these issues are dealt with by competition enforcement authorities; and ways to foster competition and to ensure that innovation and competitive entry continue to improve consumer welfare. It also examined the relationship between competition law and regulation in the air transport sector.

⁵ <http://www.oecd.org/daf/competition/airlinecompetition.htm>

OECD Competition Committee Meetings, 15-18 December 2014

Hearing on Auctions and Tenders⁶

In this Hearing, Working Party No. 2 discussed how to design auctions and tenders to ensure efficient outcomes and provide the winners with the appropriate incentives to deliver high quality, cost-efficient services and to invest to maintain the assets. The focus was on auctions and tenders for public procurement and concession awards. The mere use of tenders does not ensure an efficient allocation of the rights, and their design and implementation play a major role in determining the outcome. The challenge of ensuring quality and incentives to invest adds complexity to tenders and auctions design. Furthermore, it often entails trade-offs with price and competition. In the case of concessions, there is an added problem of ensuring that investments receive an adequate return, particularly when there is asset specificity. The discussion also included the ex-post renegotiation risk, how it relates to the degree of complexity of the project and how it can be minimised.

Roundtable on the Use of Markers in Leniency Programmes⁷

The roundtable discussed the purpose and benefits of marker systems in leniency programmes for both enforcement agencies and leniency applicants. The roundtable discussion also touched upon the principal components of markers and the differences existing in various national regimes.

⁶ <http://www.oecd.org/daf/competition/tenders-and-auctions.htm>

⁷ <http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>

Many competition authorities rely on leniency policies to detect, investigate and prosecute hard-core cartels. To encourage leniency applicants to come forward as early as possible, many authorities have adopted “marker” systems. Marker systems allow a prospective leniency applicant to approach the authority with some initial information about their participation in a cartel in exchange for a commitment by the authority to hold the applicant’s ‘place in line’ for amnesty/leniency (i.e. grant a “marker”), for a finite period of time, while the applicant gathers additional information to complete its amnesty/leniency application. Markers can therefore be seen as a mechanism to spur the race for leniency by reducing the initial barriers to entry into the leniency programme and by providing transparency and predictability to parties regarding their leniency status (first-in, second-in, etc.). At the same time, commentators have noted that there are differences in marker policies across jurisdictions with respect to their availability, the information requirements, timing, and scope, which may dis-incentivise companies engaged in international hard-core cartels from using the leniency programmes.

Report / Inventory on Provisions Contained in Existing International Co-operation Agreements⁸

On 16 September 2014, the OECD Council adopted the Recommendation concerning International Co-operation on Competition Investigations and Proceedings, which instructs the Competition Committee to

⁸ <http://www.oecd.org/daf/competition/provisions-incooperationagreementsoncompetition.htm>

consider developing model bilateral/multilateral agreements on international co-operation. To date, a considerable number of co-operation agreements have already been concluded to promote co-operation between competition enforcers. As part of the ongoing work on International Co-operation, delegates discussed an inventory of the main provisions in existing international co-operation agreements between competition authorities. The discussion focused in particular on provisions which are common to many existing co-operation agreements, as well as provisions which are more innovative and/or atypical. The session aimed at starting the process for considering a possible model co-operation agreement that would provide useful inputs to member countries when they negotiate bilateral or multilateral co-operation agreements with their counterparts, and would contribute to greater convergence among the various agreements.

Hearing on IP and Standard Setting⁹

Standard setting, the process of determining a common set of characteristics for a good or service, often promotes competition to the benefit of consumers. Standards are particularly important in the Information and Communication Technologies (ICT) sector because they allow products to interoperate and therefore make networks more valuable. However, ICT standards also raise challenges because they often rely on patented technologies. A tension arises because patents protect the owner's exclusionary right to exploit an innovation, while standards are intended for widespread use. In particular, anti-competitive harm can arise when the holder of a patent that is essential to

⁹ <http://www.oecd.org/daf/competition/competition-intellectual-property-standard-setting.htm>

implement a standard (SEP) excludes implementers from accessing the patented technology (e.g., by refusing to license, by refusing to license on "reasonable" terms, or by seeking an injunction). This has led many standards bodies to require SEP holders to disclose their SEPs and commit to licensing them on fair, reasonable and non-discriminatory (FRAND) terms during the standard setting process. Nevertheless, disputes may arise ex-post as to the meaning of FRAND.

This Hearing provided an opportunity for delegates to engage with experts on recent competition issues raised by standards in the ICT sector, in particular on issues related to SEPs, FRAND commitments, and the use of injunctions.

Roundtable on Changes in Institutional Design¹⁰

Institutional design is a critical component of competition law and policy. Good competition laws on the books are meaningless without well-designed institutions to enforce them. At the same time, working out the optimal institutional design is complex because the menu is vast; many agencies have found success with very different designs; and what works well in one jurisdiction may not always work well in another. Against this backdrop, many jurisdictions have recently made, or have considered making, changes to their institutional design, which provided useful insights. For example, a number of jurisdictions have created new multifunction agencies by merging the competition agency with the authorities responsible for other economic policy functions, such as consumer protection, sector regulation or public procurement control. Other jurisdictions have

¹⁰ <http://www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm>

made changes designed to enhance the independence of the competition authority from government.

This roundtable provided an opportunity for delegates to discuss issues which triggered

recent changes in institutional design, to review the pros and cons of various options, and to share experience on how those changes have worked out.

Does Size Really Matter? Behavioural Merger Remedies and Small Economies*



Sabine Zigelski
Senior Competition Expert
at the OECD Competition
Division
sabine.zigelski@oecd.org

“Antitrust’s touchstone should be the preservation or restoration of competition in the affected market. Nothing less....if a remedy fails to pry open the market to competition, then the government “has won a lawsuit and lost a cause.””

*Bill Baer, Assistant Attorney General,
Antitrust Division, US Department of
Justice¹¹*

If a question like this is asked it is usually obvious what the author’s answer to it will be. And this will be no different this time. This article will give a brief overview of the discussion on merger remedies with a special focus on small economies. We will search for supporting evidence for the necessity for and benefits of behavioural remedies and why so far – to the author’s knowledge and not to her surprise – there is hardly a convincing case to be made to concede a greater leeway or to even recommend a greater use of behavioural remedies to these economies.

Merger Remedies in General

* The opinions expressed and arguments employed herein are those of the author and do not necessarily reflect the official views of the governments of OECD member countries. This document is without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

¹¹ Bill Baer, “Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes”, Remarks as Prepared for the Georgetown Law 7th Annual Global Antitrust Enforcement Symposium (25 September 2013), the quote in the quote refers to the US Supreme Court Judgement in International Salt, International Salt Co. v. United States, 332 U.S. 392, 401 (1947).

Merger remedies need not be explained here in great detail. There is a large body of papers and literature dealing with this topic and if one tried to summarise the discussion it would be somewhere along these lines:¹²

Merger remedies can and should be imposed if they fully solve the competitive problem that a merger may create, after having thoroughly investigated the proposed merger and being sufficiently confident about the results of the analysis. Mergers will in most cases be efficiency enhancing and overall beneficial to an economy. If a competition problem created by a merger can be solved by imposing appropriate, proportionate and effective remedies, this will be the path to take. There is also great uniformity in the general expression of a preference for

¹² E.g., OECD (2011), Remedies in Merger Cases, Issues Paper and National Contributions, DAF/COMP (2011)13, available at <http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf> ; OECD (2011), Cross-Border Merger Control: Challenges for Developing and Emerging Economies, Background Note and National Contributions, DAF/COMP/GF (2011)13, available at <http://www.oecd.org/daf/competition/mergers/50114086.pdf> ; OECD (2003), Merger Remedies, Background Note, DAF/COMP (2004)21, available at <http://www.oecd.org/daf/competition/mergers/34305995.pdf> ; ICN Merger Working Group (2005), Merger Remedies Review Project, Report for the fourth ICN annual conference, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf> ; European Commission (2008), Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, available at [http://eur-lex.europa.eu/legal-content/EN/ALL/;ELX_SESSIONID=KtvzJF9JK6p8Tq7Jy2JYnQ2Tym21vFKKJV0hLW6BhpzB1n2nwPNX!1387304436?uri=CELEX:52008XC1022\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/;ELX_SESSIONID=KtvzJF9JK6p8Tq7Jy2JYnQ2Tym21vFKKJV0hLW6BhpzB1n2nwPNX!1387304436?uri=CELEX:52008XC1022(01)) .

structural remedies – divestitures, sales of business units or assets or intellectual property rights (IPR) – or semi-structural remedies like access to key infrastructure or inputs. And most jurisdictions also express a very critical view towards purely behavioural remedies¹³ that prescribe a certain future behaviour to the merging entities. Good reasons given as to when and how to use behavioural remedies are usually that they might be an appropriate instrument to use in vertical merger cases in order to reap efficiencies from vertical integration at the same time preventing foreclosure effects. Often an intelligent combination or package of structural and behavioural remedies will be advocated. They might also be used when a divestiture is not feasible or a prohibition is not possible for jurisdictional reasons or when the competition problem is foreseeably of a limited duration. And in particular in jurisdictions with a post-merger review of consummated mergers, behavioural remedies might effectively be the only feasible alternative, considering that it will be virtually impossible to effectively bring about a de-concentration in many of these cases.¹⁴ But whenever a structural remedy is within reach, most jurisdictions would prefer to use it – it will be more effective and it can actually be implemented with relatively little cost for the competition authority.¹⁵

¹³ Please note that this article does not refer to any kind of behavioural remedies that can be imposed as interim measures in order to put structural remedies into practice – like trustee monitoring provisions or hold separate obligations. These are from their very nature limited in time and ancillary to the structural remedy.

¹⁴ See also OECD discussions on “Investigations of Consummated and Non-Notifiable Mergers” (2014), available at <http://www.oecd.org/daf/competition/investigations-consummated-non-notifiable-mergers.htm>.

¹⁵ It should not be forgotten that little cost often still means that a considerable amount of time and

What is special in the case of so-called “small”¹⁶ economies?

The implications of smallness have been discussed in much scope and detail, remedies being just one aspect of the considerations.¹⁷

resources has to be invested by the competition authority in order to safeguard the implementation of a structural remedy. Compared to the monitoring over a long period of time and potential arbitration requirements often going along with behavioural remedies these costs are, however, relatively small.

¹⁶ “Small economies include jurisdictions with absolutely small population and high natural and artificial barriers to foreign trade (e.g., Israel) or jurisdictions with dispersed populations and high entry barriers to foreign trade (e.g., Australia).” from OECD (2003), Global Forum on Competition, Small Economies and Competition Policy: A Background Paper, CCNM/GF/COMP(2003)4, p 5, available at <http://www.oecd.org/competition/globalforum/globalforum-february2003.pdf>.

¹⁷ Gal, Michal S., (2001) “Size Does Matter: General Policy Prescriptions for Optimal Competition Rules in Small Economies”, Southern California Law Review, Vol. 73, 2001, NYU Ctr for Law and Business Research Paper No. 01-004, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=267070 ; (2003) Competition Policy for Small Market Economies, Harvard University Press, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=456560 ; (2009) “Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and by Developing Jurisdictions”, Fordham International Law Journal, Vol. 33, No. 101, 2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155128 ; OECD (2011), Cross-Border Merger Control: Challenges for Developing and Emerging Economies, supra n. 12; OECD (2003), Global Forum on Competition, Small Economies and Competition Policy: A Background Paper, supra n. 16; Paas-Mohando, Katri, (2013), “Do Small Economies Need Specific Rules for Substantive Aspects of Merger Control?”, European Competition Law Review, Vol. 34, 2013, 260 – 266; Svetlicinii, Alexandr and Lugenberg, Külliki, (2013), “Merger Remedies in a Small Market Economy: Empirical Evidence from the Baltic States”. Baltic Journal of Law & Politics 6, 1 (2013), 1-26, available at

With regard to merger control and remedies a number of factors can be named that tend to be seen more often in small economies:

- Markets tend to be more concentrated and domestic demand can only sustain the efficient operation of a very limited number of market players due to (the lack of) economies of scale.
- Divestiture remedies are harder to implement. There might be no suitable buyers in an already very concentrated market.
- The undertakings involved in a merger with effects on a small jurisdiction might not have a local presence/subsidiary in that jurisdiction.
- The economic relevance of a small jurisdiction to a multinational supplier can be very limited, so the supplier might consider the option of leaving the country if he does not like the competition authorities' interference.
- Competition authorities might lack the standing and the "gravitas" to enforce effective structural remedies within the country – and even more so for extraterritorial remedies. This is also often characterised as large companies having the "upper hand" in the negotiations. This can be due to the limited economic relevance of the country to the multinational undertaking.
- Industrial policy goals may favour larger national champions to enhance the competitiveness of national players.
- Tight relationships between major market players and political decision

http://www.centrumbalticum.org/sites/default/files/raportit/merger_remedies_in_a_small_market

makers give powerful incumbents a strong political leverage.

These arguments can be separated into at least two categories, one pertaining to more objective reasons like efficiency based arguments, unavailability of buyers and no extraterritorial enforcement powers; the other referring more to the political side – political and enforcement priorities, competition culture and (in)experience¹⁸. The case in favour of a more flexible approach towards behavioural remedies for small economies is as follows; in order to realise scale economies that might in the end actually benefit consumers or be in line with a total welfare approach, more tolerance for higher concentration is required in the first place. But since unilateral or co-ordinated effects might result from higher concentration, behavioural remedies might be called for to ensure that the post-merger dominant undertaking behaves reasonably well. The behavioural remedy is also often considered a worthy second best approach if there are no appropriate buyers for a potential divestiture or no domestic assets to be sold. If the problem is more on the political side, it is also this kind of "second best" argument that is being made: a behavioural remedy is regarded to be better than nothing if a "tough" structural remedy cannot be enforced for whatever reasons.

A couple of general observations can already be made here. First of all it seems slightly contradictory that economies that are already prone to higher concentration due to their limited size should be more lenient towards

[economy_0.pdf](#).

¹⁸ The latter ones, lack of competition culture and lack of experience, of course do not go necessarily hand in hand with smallness; they are more a problem of young authorities in jurisdictions in transition. But sometimes the two tend to go together.

an even higher concentration. The “economies of scale” argument is certainly not invalid but for many industries it a) represents a rather static view of the economic process or is b) not relevant. It is static because it excludes the future opening of markets to trade and/or growth of markets from the analysis. In these cases the opened or grown markets would be able to support more domestic players. It further excludes ingenuity and flexibility that might decrease technology based scale economies in favour of small players. And this innovative pressure might come from the smaller and potentially more innovative undertakings. If, however, higher concentration would be deemed to be acceptable for economy of scale reasons, this will decrease the number of active players and reduce the incentives of the remaining small competitors to innovate and to fight against powerful incumbents already dominant¹⁹ on the markets. So the case for a greater use of behavioural remedies might not necessarily be a good one, even if in the short run a merger may generate efficiencies. The creation of a dominant undertaking cements the state of the market and leaves little room for dynamic and more competitive solutions or the opening of markets to trade. This can further be aggravated if the dominant undertaking fights any threat to its position. And in small economies it will often have a good leverage to do so. Other views that hold that it might be better to have one efficient monopolist with behavioural controls (even if these are difficult to implement) than two inefficient competitors, also seem to be a bit short-

¹⁹ In the text the argument is made only with reference to “dominance”. But it will also hold if the standard is a Significant Impediment to Effective Competition (SIEC) or Substantial Lessening of Competition (SLC) – which involve at least strong and powerful market players and market structures allowing for a decrease of consumer welfare.

sighted.²⁰ They severely underestimate enforcement problems and overestimate incentives for a powerful monopolist to realise dynamic efficiencies and to pass on resulting gains to consumers. For other markets, when no efficiency-based arguments can be made, there are even less justifications for letting concentration increase. The “no suitable buyer” argument should only work in a failing firm context²¹, not in any other. And these cases are quite rare, but might be more relevant in a small economy context. As for the more political reasons, like industrial policy and/or national champion arguments, there seems to be widespread agreement by now that there is little cause for national champions in small and developing economies. To the contrary, firms grow better if they compete than if they are protected.²²

²⁰ See e.g., Paas-Mohandri (2013), supra n. 17.

²¹ The failing firm defence has to be used under strict conditions and has been accepted in only a very limited number of cases. It can be invoked if three conditions are cumulatively met: the target of an acquisition would absent the merger exit the market as a result of its financial difficulties; there is no feasible alternative transaction or reorganisation that is less anticompetitive than the proposed merger; and absent the merger the assets of the failing firm would inevitably exit the market. The burden of proof is always on the merging undertakings. Some jurisdictions go even further. They consider it a less anticompetitive alternative if the market shares of the firm exiting the market are being spread on a number of competitors that are competing for them. In these jurisdictions the defence can only be invoked if absent the merger the market shares would fall to the acquiring firm anyway, at least to a very large extent. Only in these cases would they accept that there is no causality between the merger and the deterioration of the market conditions. See more in: OECD (2009), The Failing Firm Defence, Background Paper, DAF/COMP (2009)38, available at <http://www.oecd.org/daf/competition/mergers/45810821.pdf>.

²² OECD (2009), Competition Policy, Industrial Policy and National Champions, Background Note and National Contributions, DAF/COMP/GF

This leaves us with competition authorities that are too inexperienced or too weak to impose effective structural remedies. Why these authorities should be any better placed to impose, enforce and monitor an effective behavioural remedy often for extended periods of time will probably forever remain the secret of the proponents of behavioural remedies as a second best option in cases like this. But we will come back to this point.

Empirical evidence

Before moving on, it will be worthwhile to give a brief summary of a short survey of the remedies, and the underlying cases, that we in fact see being imposed in small economies. The questions that are relevant in this context are:

- a) When behavioural remedies were imposed, did any of the efficiency based arguments (e.g., scale economies, vertical mergers) or a failing firm defence apply?
- b) Was there a lack of a sufficient national presence of the merging parties? and
- c) Was the behavioural remedy effective?

This summary is based on the National Contributions of a number of countries to OECD roundtable discussions²³, to the Global Forum discussions²⁴ and a few articles²⁵ referring to small economy remedy cases. None of the cases that are being described in

(2009)9, available at <http://www.oecd.org/daf/competition/44548025.pdf>.

²³ OECD (2011) Remedies in Merger Cases, supra n. 12.

²⁴ OECD (2011), Cross-Border Merger Control: Challenges for Developing and Emerging Economies, supra n. 12.

²⁵ Gal, Michal S. (2009); Svetlicinii, Alexandr et al. (2013), both supra n. 17.

any of these sources provides sufficient information to draw final conclusions on the underlying cases and/or the remedy. And even worse, in almost no case when a behavioural remedy has been applied do we find an ex-post appraisal with regard to its effectiveness and enforcement record. So it will not be possible to do justice to any of the cases and to give a detailed assessment with regard to all criteria mentioned above. However, a distinct impression emerges when one looks at all these cases and which is described in what follows.

First of all, almost all contributions, including from small economies, start with the statement that they would clearly prefer structural remedies. As a mantra this seems by now to be well established in the competition law world. When describing what they actually do, however, quite a few of these economies report a number of behavioural remedies.²⁶

Secondly, what is notable when one looks at these behavioural remedy cases described by the small economies is that there seems to be hardly a case where behavioural remedies were imposed because there was no domestic presence of the merging parties. So, even if the merger was effected outside the country by international/multinational undertakings, they usually had local subsidiaries and it was their direct or indirect merger that caused the domestic competition problems. And these local subsidiaries were the targets of the behavioural remedies. At first glance one would think that they would have been equally suited as divestiture objects to remedy a local competition problem, without blocking

²⁶ In OECD (2011), Remedies in Merger Cases, supra n. 12, see for example: Austria, Estonia, Israel, Lithuania. In OECD (2011), Cross-Border Merger Control, supra n. 12, see for example: Lithuania, Chinese Taipei, Ukraine.

a merger on a much larger scale.²⁷ In none of these cases is an explicit mention made of a failing firm situation. And we can assume that all countries reporting cases to the OECD are sufficiently familiar with the concept and would have put them under this heading.

Thirdly, there does not seem to be one single small economy case of a behavioural remedy where efficiencies in the form of scale economies had been found or even argued. This is a very relevant result given that the “economies of scale”-argument is the one most frequently quoted. A number of cases applied to vertical mergers, however, where a behavioural remedy might be more appropriate. But from what can be seen in these cases – and again, we have only very limited insights – the solution was more often than not just a general obligation to supply on a non-discriminatory basis, for a limited number of years. This is usually what the abuse of dominance provisions of the respective jurisdictions provide for anyway.

These findings mirror some of the cases that are being presented by participating countries in the seminars given by the OECD-GVH Regional Centre for Competition in Budapest (RCC)²⁸, where many participants fit the small economy description. What can be observed are authorities that are struggling with the substantive analysis and with very sophisticated and often international undertakings, at the same time strongly lacking resources and political support.

So when a case is made in favour of behavioural remedies as being an appropriate and acceptable choice for small economies,

²⁷ This is also true for two cases involving Unilever that Gal (2009), supra n. 17, mentions as examples for Israel.

²⁸ For more information on the RCC and its participants: www.oecdgvh.org or www.oecd.org/competition/budapestrcc

this is based rather on the empirical observation that they are in fact being more readily applied in these jurisdictions. The case can hardly be made on the basis of the examination, if any of the specific efficiency related or jurisdictional reasons apply. From the material that was the basis for this little survey at least no overwhelming case can be made in favour of behavioural remedies in the context of small economies.

What can be observed though is that young and inexperienced authorities – who often coincide with small jurisdictions, tend to undergo an evolutionary process. While they seem to be ready to accept, to put it mildly, unconventional behavioural remedies in the beginning, often even without there being a competition problem, they seem to be more reluctant to do so once they have reached a stage of greater maturity. And this does exactly mirror the learning process that most competition authorities seem to have to go through. To give just one example: “We have also found that firewalls are virtually impossible to monitor.” This is a statement by the European Commission in a roundtable contribution.²⁹ We feel relatively safe in assuming that it was preceded by dire learnings.

On the other hand, there are also quite a few very encouraging examples of competition authorities from small economies standing their ground firmly and who do not shy away from structural remedies or from prohibitions. It seems to be worth remembering that the alternative to a behavioural remedy, if structural remedies do not work, is in fact a prohibition. Slovakia³⁰, Jersey³¹ and

²⁹ OECD (2011), Remedies in Merger Cases, Country Contributions – European Union, supra n. 12.

³⁰ Ibid. Country Contribution – Slovakia; OECD (2011) Cross-Border Merger Control, Country Contribution – Slovakia, supra n. 12.

Singapore³² are just an arbitrary selection of jurisdictions with a more assertive approach.

Some general remarks and conclusion

It is interesting to see that while academics may be able to make a good intellectual case in favour of granting greater leeway for small jurisdictions for the use of behavioural remedies, in reality the conditions on which they base these findings are rarely met when small economies do in fact impose behavioural remedies. More often than not these remedies merely reflect a lack of experience and/or political support. So it seems to be appropriate to encourage these jurisdictions to free-ride on the mistakes all mature jurisdictions have abundantly made (and continue to make) and to learn from these, instead of going through a trial and error process of their own.

These learnings could be:

- The monitoring of behavioural commitments can be very time and resource consuming. Even large authorities do not think they can effectively do it. At the same time it is extremely difficult to phrase commitments in a way that there are no ambiguities or any wiggle-room left. The targets of the commitments will very often and successfully try to find the loopholes. The difficulties in proving that their action did not comply with the commitment are comparable to that of proving an abusive behaviour. It may take years, while all the time causing harm to competition.

³¹ Gal (2009), supra n. 17, p 38.

³² OECD (2011) Cross-Border Merger Control, Country Contribution – Singapore, supra n. 12.

- Something is badly wrong if the behavioural remedy is just a transcript of the abuse of dominance provisions of the law. The existing abuse provisions will apply to a dominant undertaking in any case. The purpose of merger control is to prevent dominance in the first place in order not to have to resort to abuse proceedings at a later stage.
- It is hard to not get caught in the action. In not so clear-cut cases, one will be tempted to accept a small, not so effective behavioural remedy. This might even be offered quite generously by the merging parties and might serve as a little face-saver to the authority that invested a lot of resources in the case only to see that it had no case. What would seem as not very harmful in the specific case might, however, prove to be a very harmful precedent in the long run. In future cases it will be left to the authority's discretion to explain why this kind of remedy was acceptable in one case but not in the other. And the next case might be more important.
- The same holds true for most behavioural remedies applied as "second bests", for whatever reason. They will inevitably have an afterlife and resurface in future cases where you might not want to be reminded of past "sins". And zombies never die...
- If behavioural remedies are used, the authority should ensure they are neatly tailored to the case – this might in fact solve the competition problem and will not create so much of a dangerous precedent. The "best" behavioural remedies do not require long-term action – e.g.; once off free provision of interface information, free licensing of IP – and are self-

monitoring. This means that if the merging undertakings do not comply with the remedy, the authority can be sure that other market participants will register this immediately and bring it to the authorities' attention.

- Lastly, it should be kept in mind that failure to comply with a remedy in a merger case should result in the reversal of the merger. A commitment decision is always a prohibition decision in disguise and conditional

upon the fulfilment of the remedies. It can be guessed how burdensome it will be to break up a merged undertaking. It borders on the impossible – another good reason for structural and fix-it-first remedies.

The RCC will provide a new opportunity for experts and participant countries to come together and to look into merger and non-merger remedies and to discuss cases and experiences. The March 2015 seminar will be dedicated to this topic.

Aspects of Commitment Decision Policy in Antitrust: Croatian Experience



Ljiljana Pavlic
Member of the Council
at the Croatian Competition
Agency
ljiljana.pavlic@aztn.hr

The revised Croatian Competition Act that entered into force on 1 October 2010 has for the first time enabled the Croatian Competition Agency (CCA) to accept commitments from the parties in cases that tackle antitrust issues. The application of the commitment decision procedure does not imply a softer approach to restrictions of competition. Far from it, the new provisions should provide a shift towards a quicker resolution of potentially harmful anticompetitive practices by facilitating cooperation between the undertakings and the CCA and thereby enabling immediate compliance with competition rules, at the same time saving the cost and time of rather lengthy prohibition proceedings.

The Competition Act stipulates that the commitment proposal may be addressed to the CCA at any moment during the

investigation procedure but before the statement of objections is issued. In general, commitments should be offered within 6 months from the date of launching the official probe in order to reach the objectives of a quick restoration of competition and of procedural efficiency. Such a provision encourages undertakings to express interest in discussing commitments with the CCA at the earliest possible stage. The CCA has broad discretion in deciding whether or not to accept the offered commitments.

If the commitments are inappropriate for a certain type of infringement, such as hard-core cartels, in which an application for leniency is the preferred route, or where they do not address the initial competition concerns, the CCA will not accept the proposed commitments.

Since 2010 the CCA has taken seven commitment decisions addressing alleged abuses of a dominant position and restraints related to vertical practices in the cases that covered various markets – purchase and servicing of laboratory equipment, provision

of outdoor advertising services, provision of technical assistance to road drivers, setting the retransmission fee for broadcasting operators etc.

One of the commitment decisions issued so far was related to the national public service broadcaster – the Croatian Radio-Television (HRT), which addressed two competition concerns – that of excessive pricing and a refusal to deal.³³

The CCA had opened the proceedings based on a complaint filed by the satellite operator Digi. HRT had refused to give the rights related to retransmission of HRT programmes via Digi's satellite platform to Digi. At the same time these rights had been given to other operators using IPTV and cable platforms.

During the investigation the CCA established that HRT had changed its pricing policy in the following way: it had terminated the General Licencing Agreement (GLA) – an agreement that HRT had previously concluded with the European Broadcasting Union (EBU) and had decided to unilaterally determine the prices for retransmission of its programmes. The new prices were up to 19 times higher compared to the prices previously set by the GLA. After several revision rounds in November 2012, HRT submitted its commitment proposal to the CCA that was then subject to the market test.

The market test revealed that competition concerns identified by the CCA had not been fully addressed by the commitment proposal. As the commitments were inadequate, opinions from third parties were brought to the attention of HRT. In order to address the concerns from the market participants and the CCA, HRT submitted a new revised version of the commitments that was again tested.

³³<http://www.aztn.hr/uploads/documents/odluke/TN/UPI-034-032012-01002.pdf>

These revised commitments fully addressed in a proper manner all competition concerns raised by the CCA and no further objections were received.

The new “General Terms and Conditions” levelled the conditions for all the platforms retransmitting the HRT signal (satellite, IPTV, cable and others) and HRT restored the EBU prices.

In March 2013 the CCA decided to accept the commitments from HRT as they were sufficient to remove the expressed concerns and to restore competition in the relevant market. The CCA concluded that there were no longer grounds for any further action. The decision making the proposed commitments legally binding was issued.

Undertakings are attracted to commitments and settlements in antitrust cases. For them it means avoiding the fines and possible negative publicity. In addition, this makes follow-on actions for damages less likely.

Considering the high level of fines that could be imposed, and the fact that the relevant courts have so far upheld practically all the CCA decisions, undertakings may understandably prefer to offer commitments rather than take the risk of fully-fledged investigations resulting in infringement decisions and defending their case later in court.

Commitment decisions do not establish the infringement. However, for the undertakings it does not mean that the risk of being subject to private enforcement claims is completely eliminated, just significantly reduced. Due to the fact that the final decision does not contain a detailed assessment of the infringement, the follow-on damages claimants will have less information available

than in a case where an infringement decision is issued.

So far, commitment decisions have proved to be an efficient and effective tool in the enforcement of competition law in Croatia for certain types of alleged infringements. The

challenges that remain can be seen in the broad discretion of the CCA, proportionality issues and practical difficulties inherent in applying the commitment procedure and its principles to complex cases.

GVH Accepts MOL's Proposal on Diesel Pricing



László Bokor
Chief Economist
at the Hungarian Competition
Authority
bokor.laszlo@gvh.hu

In June 2014, the Gazdasági Versenyhivatal (GVH – Hungarian Competition Authority) accepted commitments offered by Magyar Olaj- és Gázipari Nyrt. (MOL – Hungarian oil company). According to the commitments, in the next five years the changes of the diesel wholesale list prices of MOL will better reflect the changes of Platts reference prices. The commitments have been accepted because it is expected that they will result in a more foreseeable pricing policy, and that they will facilitate the entry of potential competitors into the wholesale fuel market. This may ultimately result in more favourable prices for consumers.

MOL has a dominant position in the wholesale fuel market: it controls the only refinery and the vast majority of storage facilities available for commercial use on Hungarian territory, and it has a market share of 80%. During its investigation, the GVH scrutinised the market behaviour of MOL under EU and Hungarian legal provisions on the prohibition of the abuse of a dominant position.

MOL determines its wholesale list prices based on import price parity: to the Platts³⁴ reference prices additional cost elements which would arise if an undertaking was to import fuel into Hungary are added. Nevertheless, MOL's weekly *announced* list prices can be higher or lower than the previously outlined and not communicated "*calculated* list prices".

According to the assessment of the GVH, entry of competing wholesalers into the Hungarian market of imported fuel is highly dependent on predictability. The key concept is the necessity of stable and continuous supply. Retailers and large customers, such as transportation or agricultural companies cannot take the risk of running out of stock. Thus, they will contract only wholesalers who ensure continuous supply. Who can guarantee this? MOL can, since it has the refineries, storage facilities and a product pipeline system. Competitors theoretically have two options: buying fuel from MOL, or importing fuel from regional (non-MOL affiliated) refineries. In the first case, if the selling price is based on MOL's list price, expectations on returns are clear. However, in the second case, an importer faces several challenges. There are only a few refineries in the closer region, moreover, their capacities are mostly

³⁴ Leading energy news and data provider agency (<http://www.platts.com/>)

absorbed.³⁵ Relocation of the fuel sales based on these sources should be underpinned by reasonable profit expectations. Since, in the past, MOL could significantly and permanently deviate with its list prices from IPP, it was very risky to import fuel and sell it based on MOL's price. Theoretically it could be pegged to the price of the source, but it would have added additional risks (e.g. exchange rate) to the buyer, and so was not a favoured option.

Thus, it is not surprising, that MOL's list price was, is and – in long term – remains the headline price of the Hungarian fuel market, and so, it is essential for potential importers that these prices evolve in a foreseeable way. This requires that the relation between announced list prices and some transparent benchmarks (e.g. international reference prices) must be sufficiently predictable.

The GVH examined whether MOL follows the changes in Platts prices. It concluded that the impact of significant changes in market conditions (i.e. sudden changes in Platts prices and/or foreign exchange rates) was built into the announced list prices gradually, thus MOL was trying to mitigate these effects.

However, the GVH found that there were longer periods in which the published list prices of diesel, on average, persistently exceeded or stayed below the calculated list

prices. According to the GVH, it is related to the unpredictable pricing scheme of MOL that is contributing to the uncertainty when calculating the potential return on imports. It is a game-theoretical problem: if the follower firm knows that the leader can take countermeasures (or even unintentional moves) affecting its profit negatively, it will not enter the market even though it seems profitable in the present. In itself, within certain limits, if the announced list prices deviate from the calculated list prices this does not raise any concerns. The lack of justification is based on the fact that the deviations in the case of diesel could not be explained solely with price mitigation.

Consequently, the Competition Council concluded that it was not necessary for the announced and calculated list prices to be exactly identical. It is sufficient that the deviations, on average, remain relatively small, thus eliminating a large amount of the uncertainty affecting only other participants of the market. If the deviations remained small, it would make no crucial difference to competing importers if they set their prices according to Platts prices or to the announced list prices of MOL. Thus the risk of investing in imports could decrease and, consequently, diesel coming from non-MOL affiliated oil refineries of neighbouring countries might strengthen competition with MOL on the wholesale market. The Competition Council found MOL's commitment not to deviate more than +/-1% from the calculated list price of diesel to be sufficient to realise the abovementioned positive effects on competition.³⁶ Considering that in the case of gasoline they remained within these limits in the whole period under investigation, no commitment was required on that product.

³⁵ Due to absorbed capacities, a spot fuel market virtually does not exist in the region (including Hungary). However, since a spot market does not exist, it spurs buyers to term contracts absorbing all the capacities, eventuating in a mutually reinforcing process. Generally speaking, a spot market is for selling the surplus. Since the amount is usually relatively small in this market, unbranded petrol stations are the typical buyers. This market could have the positive effect that – since the product traded is a surplus – unbranded stations would face lower cost, and so, through competition, they could keep the consumer prices of branded stations down. A spot market has also a signalling role, as it adumbrates price changes.

³⁶ The one-year moving average of the deviations (in %) should be within this band at the end of every even month.

The Competition Council also considered it important that the commitments were developed through negotiations with MOL, as this will likely result in a better equilibrium between potentially antagonistic policy goals (following Platts prices more accurately – dampening price fluctuations) than if the Council had excluded MOL from the negotiations.

The investigation process was protracted for many reasons. On the one hand, in addition to the behaviours that the GVH originally planned on investigating, other market conducts were also scrutinised and this resulted in a large number of time consuming requests for information to MOL and third parties. On the other hand, MOL only made its list pricing practices clear to the GVH after one and a half years and this took the proceeding in an entirely new direction (the GVH imposed a procedural fine of 150 million HUF – 500 thousand EUR – on the undertaking).

In addition, the obligatory consultation between the GVH and the European Commission under EU Regulation 1/03 took longer than usual, because of the complexity of the case. Now that the competition proceeding has been concluded, the Hungarian authority is responsible for ensuring that the undertaking complies with the commitments. This will be achieved via a post-investigation, namely through continuous monitoring. Until the end of 2018, in the end of every even month, MOL provides the time series needed for the calculations to the GVH. For unexpected situations (market shocks, legislation changes), there is also a saving clause: if it can be foreseen that the commitment cannot be held, MOL is liable to indicate the problem in advance immediately, justifying it with a reasonable cause.

Structural and Behavioural Commitments in Merger and Antitrust Proceedings



D. A. Gavrilov
Master of Legal Sciences,
Deputy Head of the Legal
Department
of the FAS Russia
Lecturer
at the Antimonopoly Law
Department of Moscow State
Law University named after
O. E. Kutafin
gavrilov@fas.gov.ru

If an undertaking abuses its dominant position or if clearance for a merger transaction is requested by its parties, the Russian Federal Antimonopoly Service (FAS) is authorized to impose on the abuser, or on the parties to the transaction in question, structural and (or)

behavioral requirements aimed at ensuring competition, including a requirement to:

- provide access to production assets and information;
- give rights to industrial properties
- transfer property rights or to block transfer of property rights;
- give prior notice to the antimonopoly body of one's intent to take actions envisaged by the prescription;
- sell a certain amount of products through an exchange;
- obtain prior clearance from an antimonopoly body for elements

forming the starting price of a product if it is sold through an exchange.

For example, when FAS was asked to clear the acquisition of control over TNK-BP Holding by OJSC Rosneft (horizontal merger in the Russian petroleum industry), FAS issued to Rosneft a prescription to ensure competition, which included the following behavioral and structural requirements:

- to make sure that undertakings, which do not belong to the group of undertakings of the parties to the transaction, have opportunities to enter into direct wholesale contracts to sell gasoline and diesel fuel on the same non-discriminative terms, as they will be provided to commercial entities belonging to the group of undertakings of the parties to the transaction;
- to sell certain amounts of gasoline and diesel fuel at a commodity exchange in accordance with the procedures set forth by Russian law;
- to develop the price formation procedures and general principles of sale of gasoline and diesel fuel at Russian wholesale markets for the new group of undertakings created as a result of the transaction; and
- to reduce the number of gas stations in those Russian regions, where the aggregate market share of the new merged undertaking (upon its completion) exceeds 50%, down to a level not exceeding 50%, including through sales to third parties.

When FAS cleared a horizontal merger transaction on the Russian retail household appliances market by its two largest retailers (the MVideo retail network announced its intent to acquire another retail network, Eldorado), FAS issued a prescription to

MVideo with the following structural requirement: within 6 months after the completion of the transaction, either MVideo or Eldorado shall terminate the operations of some of their retail shops located in 35 constituent territories of the Russian Federation in order to reduce their aggregate share in the audio, video and household appliances retail market in each such territory down to 35% and to allow their competitors to use the shops vacated by them.

To stop infringements of antimonopoly law by entities abusing their dominant positions FAS also issues prescriptions to such abusers aimed at securing competition.

In the case of Teva Pharmaceutical Industries Limited FAS concluded that the company abused its dominant position on the market for the Kopakson Teva drug. FAS issued a prescription to Teva instructing the company to take actions aimed at ensuring competition. In particular it required it to refrain from economically and technologically unjustified refusals to enter into contracts with third parties to supply the Kopakson Teva drug to them. This way FAS ensured non-discriminatory access to the product.

In another case, FAS uncovered that Rexam had abused its dominant position on the market of aluminum cans and lids (used as containers for beverages, such as beer): (i) by forcing onto OJSC Suninbev (a beer producer) an economically unfavorable condition of delivering such cans to Suninbev (not allowing Suninbev itself to pick them up ex works), and (ii) by creating unequal terms for some of its customers by using different adjustments to can prices, different minimal order requirements for a single type of products and different currencies in which such prices were fixed. FAS issued a prescription to Rexam instructing Rexam and its group of undertakings that: (i) when they enter into

any can sale contracts, or any additional agreements to such contracts, they should provide to all their customers non-discriminatory terms, including price terms, regardless of whether or not such customer belongs to Rexam's group of undertakings; (ii) they should develop a model sales contract without discriminatory terms and with a definitive list of factors influencing the formation of prices for its products and submit such model contract to FAS; (iii) they should upload the form of such model contract and the current base prices of Rexam's products on Rexam's website; (iv) thereafter, they should conclude all their subsequent contracts based on such model contract; and (v) they should stop forcing on their customers any unfavorable conditions or any conditions not relevant to the subject matter of the contract. The Presidium of the Supreme Arbitration Court of the Russian Federation later held that the said FAS decision and prescriptions are in compliance with the rule of law.

The cases described above show that in such prescriptions an antimonopoly body may

require an undertaking to take a one-time action aiming at achieving a certain result, which will ensure competition in the long-run. In such a case, the prescription may set a deadline for its fulfillment (for example, a requirement that a commercial entity should develop a set of rules of its trade practices).

If a commercial entity is required to regularly submit data or information to an antimonopoly body, the prescription will set forth a time period (a quarter, six months), upon completion of which such an entity should submit the required information.

And, finally, such prescriptions may contain behavioral requirements, and such requirements will continue to be effective for as long as such commercial entities have dominant positions in the respective product market and, if their market shares decline, until they request the antimonopoly body to reconsider its prescriptions due to such a change of circumstances.

CONTACT INFORMATION
OECD-GVH Regional Centre for Competition in Hungary (Budapest)
Gazdasági Versenyhivatal (GVH)
Alkotmány u. 5.
H-1054 Budapest
Hungary

Sabine Zigelski, Senior Competition Expert, OECD
sabine.zigelski@oecd.org

Andrea Dalmay, Senior Consultant, GVH
dalmay.andrea@gvh.hu