MERGER CONTROL UNDER THE EC RULES AND HUNGARIAN LAW
- Rules Governing the Merger Remedies-

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Introduction

The European Commission – within the framework of EC merger control – is entitled to prevent those merger activities, which are likely to have a significant anti-competitive impact on the internal market.[1] The Commission use this tool to protect the public interest of the European Union by maintaining effective competition in the internal market, which is held to be the precondition of a low price level and higher living standards for the European citizens.[2] As Landolt notes in his work, the „EC competition law embodies a fully ramified expression of the public interest objectives of modern competition law."[3] Thus the objective of the promotion of effective competition as a major policy goal is „to enhance efficency, in the sense of maximising consumer welfare and achieving the optimal allocation of human resources".[4]

Under the EC Merger Regulation[5] concentrations[6] which have a Community dimension – i.e. which meet the specified turnover tresholds[7], irrespective from the fact that these turnovers are generated in- or outside the territory of the EU – have to be notified to and approved by the European Commission prior to their implementation.[8] The notification requirement is to enable the Commission to assess whether the proposed concentration may

[1] Gordon Blanke: The Use and Utility of International Arbitration in EC Commission Merger Remedies. A Novel Supranational Paradigm in the Making? Europa Law Publishing, Goringen. 2006. p.8.
[2] Gordon Blanke: The Use and Utility of International Arbitration in EC Commission Merger Remedies. p.9.
[3] Phillip Louis Landolt: Modernised EC Competition Law in International Arbitration. Kluwer Law International, The Hague. 2006.
[4] Doris Hildebrand: The role of economic analysis in the EC competition rules. Kluwer Law International, The Hague, New York. 2002. p.14.
[5] Council Regulation (EC) No.n 139/2004 of 20 January 2004 on the control of concentration between undertakings (OJ L 24, 29.I.2004) (*hereinafter: Merger Regulation*)
[6] For a definition, see Article 3 of the Merger Regulation.
[7] See Article 5 of the Merger Regulation. See also the Commission notice on calculation of turnover (OJ 1998 C66/25) and the Commission notice on the concept of undertakings concerned (OJ 1998 C66/14).
[8] See Article 4 of the Merger Regulation.

raise serious competition concerns by putting at risk the Communities competitive market environment, one of the cornerstones of the EU internal market.[9]

The Commission is not enabled to authorise a concentration that it has found to impede significantly effective competition in the Common Market or in a substantial part of it. Although, in the same time, it has power to clear a concentration subject to commitments that will render the concentration compatible with the Common Market, and may attach conditions – which are commitments to implement measures that address competition concerns identified by the Commission – and obligations – which are undertakings to implement meaures necessary to achieve the conditions[10] – to its decision to ensure compliance with those commitments.[11] These commitments can be accepted by the Commission both in phase I and phase II proceedings. The Commission has to determine and communicate the competition concerns associated with a concentration, and the parties have to devise commitments to remedy these concerns to the satisfaction of the Commission.[12]

In this paper I will examine the merger remedies on two level, on the level of the European Union (Chapter I.), and on the level of a Member State, namely Hungary (Chapter II.), from the perspective of the applicable legal acts and also from the perspective of practice.

I have chosen Hungary not only because it is my country, but also because it can be interesting to make a comparison between the well-established Community practice and the relatively new Hungarian experience. Furthermore, Hungary is a transition economy, and also a new Member State of the EU, which makes things more complex. My research method was the analysis of legal acts, cases, and scholarly writings both in the case of the EU and Hungary as well.

[9] Gordon Blanke: The Use and Utility of International Arbitration in EC Commission Merger Remedies. p.11.
[10] Commission notice on remedies acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98 ([2001] OJ C68/3) (*hereinafter: Remedies Notice*), para. 12.
[11] John Cook – Christopher Kerse: EC Merger Control. Fourth Edition. London, Sweet & Maxwell. 2005. p. 282.
[12] John Cook – Christopher Kerse: EC Merger Control. p. 282.

Chapter I - Merger remedies in the European Union

1.1 Legal background

The legal basis for acceptance of commitments by the Commission is the Article 6(2) (phase I) and Article 8(2) (phase II) of the Merger Regulation[13]. These articles deal with the modification of a notified concentration, in order to be declared compatible with the Common Market.[14]

1.1.1 Notice on Merger Remedies

The Commission introduced increased transparency and efficiency into the complex process of negotiating remedies by publishing guidance, when on 21st December 2000, the EC adopted a Notice on merger remedies. This Notice sets both the substantial and the procedural requirements that merging parties must fulfil when proposing remedies to address competition concerns raised by the EC and, therefore, to win regulatory clearance in the European Economic Area. It also summarises the main lines of intervention in the recent experience, offering a coherent picture for the future implementation of the policy. As such, the Notice can be seen as the EC Guidelines on merger remedies.

In order to develop even further the consistency of treatment and best practices in the handling of remedies, in April 2001, it was established an Enforcement Unit within the Competition Directorate General dedicated to advise on the acceptability and implementation

[13] The previous Merger Regulation [Council Regulation (EC) No. 4064/89 of 21 December 1989 on the control of concentration between undertakings (OJ L 24, 395 30.12.1989. at p.1.)] provided only for commitments offered in phase II proceedings, however in practice the Commission has already been accepted such commitments prior to 1997 in order ro resolve the cases.

[14] John Cook – Christopher Kerse: EC Merger Control. p. 282.

of remedies in merger cases. The Enforcement Unit's core objective is to develop and ensure a consistent policy for remedies in merger cases. Members of the Unit join the case-teams of merger cases where remedies may be required or even just discussed, and do so at the earliest possible moment. Their role is to ensure that the general principles set out in the Commission's Remedies Notice are applied in a coherent manner whilst taking account of the specific requirements of each case. The unit's main function is thus to provide guidance for and ensure consistency in both the negotiation phase prior to an Article 6 or Article 8 decision and the implementation phase post decision until full compliance of the parties with the commitments given.[15]

1.1.2 Green Paper on the Review of the Merger Regulation

The Green Paper on the Review of the Merger Regulation adopted by the EC on 11 December 2001 opens a discussion on both issues. It also gives an overview of the main types of remedies that have been accepted in merger cases up to date (such as divestitures, termination of exclusive agreements and licensing agreements to provide access to infrastructure and key technology). In addition, it confirms a clear preference of the EC for *structural* remedies rather than *behavioural* remedies which would absorb scarce resources since they require intensive monitoring by the EC.

[15] Mario Monti: The Commission notice on merger remedies – one year after. Guidelines for merger remedies – prospects and principles. CERNA (Centre d'économie industrielle, Ecole Nationale Supérieure des mines de Paris), 18 January 2001. http://www.cerna.ensmp.fr/cerna_regulation/Documents/ColloqueMetR/Monti.pdf

1.1.3 Standard Models

In May 2003, the Commission published standard model texts for divestiture commitments, and the engagement of trustees (together the „Standard Models"), together with Best Practice Guidelines (the „Divestiture Guidelines") for divestiture commitments.[16]

1.1.4 Merger Remedies Study

In addition to these, an other development also has particular significance in this field: in October 2005 the Directorate General for Competition published a staff paper summarising its Merger Remedies Study.[17] The study examines the design, implementation and effectiveness of 96 remedies (out of a total of 227) imposed in 40 cases (out of a total of 91) under the Merger Regulation from 1996 to 2000. The study focuses on the three most important types of remedies: (i) transfer of a market position (divestiture); (ii) commitments to exit from a joint venture („JV"); and (iii) commitments to grant access. Overall it concludes that commitments to exit from a JV were the most successful and commitments to grant access the least successful of the examined remedies. The Study will be used in upcoming review of the Merger Remedies Notice and of the Model Divestiture Commitments and Trustee Mandate. The Commission is expected to publish for consultation a new draft Remedies Notice in the near future.[18]

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[16] John Cook – Christopher Kerse: EC Merger Control. p. 283.
[17] Merger Remedies Study, European Commission, DG Comp., October, 2005. http://www.ec.europa.eu/comm/competition/mergers/others/remedies_study.pdf
[18] Andreas Weitbrecht: EU Merger Control in 2005—An Overview. [2006] E.C.L.R. Issue 2. Sweet & Maxwell and Contributors. p.48. http://www.lw.com/resource/Publications/_pdf/pub1518_1.pdf

1.2 Basic requirements of commitments

The five main criteria used by the Commission in order to assess whether a proposed remedy is sufficient to address competition concerns is laid down in the Remedies Notice.[19] These are the followings:

1.2.1 Need to eliminate competition concerns

The commitments have to be „proportional to, and entirely eliminate, the competition problem".[20] The Commission assesses the sufficiency of the offered remedies in each and every case individually. In the evaluation process it takes into account several factors, such as like:

- the structure of the relevant market
- specific characteristics of the relevant market
- the position of the parties and other players on the market
- type, scale, and scope of the remedy
- the likelihood of its successful, full and timely implementation by the parties[21]

A general factor, that the Commission also takes into account the fact that "any remedy, so long as it remains a commitment which is not yet fulfilled, carries with it certain uncertainties as to its eventual outcome."[22] Maybe this last general requirement led to the

[19] John Cook – Christopher Kerse: EC Merger Control. p. 290.
[20] Remedies Notice, para.1.
[21] Remedies Notice, para.7.
[22] Remedies Notice, para.8.

practice, that in the majority of cases divestiture was the only remedy that the Commission found sufficient to eliminate competition concerns.[23]

The Commission does not require unnecessary or disproportionate commitments. In *Tetra Laval/Sidel (II)* the Commission decided that granting an exclusive licence of Tetra Laval's technology was disproportionate to the competition concerns raised and granting an open licence was sufficient. In *Du Pont/ICI* the Commission declared the divestiture of an entire plant disproportionate, and accepted the reservation of only nylon fibre production capacity for a competitor. In *Coca-Cola/Amalgamated Beverages GB* the Commission even refused to accept the behavioural assurances offered by Coca-Cola, considering that however these formal undertakings had been offered by the company, but were not regarded as necessary by the Commission.[24]

It is for the merging parties to demonstrate that the proposed remedies, once implemented, eliminate the competitive problem identified by the Commission[25]. However, under the Art.8(2) of the Merger Regulation remedies are modifications to the notified concentration and the Commission has to assess the modified concentration, not the remedies.

The burden of proof is carried by the Commission, it has to proove that the conditions for a prohibition pursuant to Art.2(3) of the Merger Regulation are fulfilled, therefor the Commission used an inappropriate methodology when it had conducted its evaluation of the commitments offered by the parties, on the assumption that the parties carry the burden of proof for the effectiveness of the remedies, as it was argued by the applicant in the EDP v. Commission case.[26] The Court of First Instance agreed that pursuant to Art.8(2) of the Merger Regulation „in so far as the burden of proof is concerned, a concentration modified by

[23] It is demonstrated by the fact, that in 84 cases out of 96 analysed by the Remedies Study were divestiture commitments applied. Merger Remedies Study, p. 20.
[24] John Cook – Christopher Kerse: EC Merger Control. p. 290.
[25] Remedies Notice, para.6.
[26] Andreas Weitbrecht: EU Merger Control in 2005—An Overview. [2006] E.C.L.R. Issue 2. Sweet & Maxwell and Contributors. p.48. http://www.lw.com/resource/Publications/_pdf/pub1518_1.pdf

commitments is subject to the same criteria as an unmodified concentration".[27] However, the practical effects of this pronouncement are not immediately clear as the Court of First Instance concluded that *in concreto* the Commission's analysis „was equivalent to an analysis of the concentration as modified by the commitments".[28]

1.2.2 Restoration of effective competition

The commitments must also restore the „conditions of effective competition in the common market on a permanent basis".[29] The Commission has refused to accept commitments in many cases on the ground that they did not include the technology, which would make it possible to the divested business itself, to develop new technologies in the future. In *GE/Honeywell*, the Commission rejected one of the proposed divestments, because it included a product without the necessary technology to be competitive in the future.[30]

If there is a reasoned doubt about the capacity of the proposed commitment to recreate effective competition, the Commission seeks a more extensive remedy. In *Total Fina/ELF*, the Commission decided to require the full divestiture of one of the parties' subsidiaries, because there was a negative feedback from third parties. However, the Commission later implied[31] may have gone beyond what was strictly necessary to ensure the sale of viable business.[32]

[27] Case T-87/05, EDP-Energias de Portugal SA v. Commission, September 21, 2005, at [62].
[28] EDP v. Commission case, at [81].
[29] Remedies Notice, para. 6.
[30] John Cook – Christopher Kerse: EC Merger Control. p. 291.
[31] Mario Monti: A European Competition Policy for Today and Tomorrow. June 26, 2000. Commission Press Release SPEECH/02/04.
[32] John Cook – Christopher Kerse: EC Merger Control. p. 291.

1.2.3 Absence of new competition concerns

The commitments should not give rise to „new competition problems”.[33] For example, in *Royal Philips Electronics v. Commission* the Court of First Instance held that the Commission cannot, when applying the Merger Regulation accept commitments which are contrary to the EC Treaty. The Court held that the Commission must assess the compatibility of commitments according to the criteria laid down in the Article 81 (1) and (3) of the EC Treaty.[34]

1.2.4 Timeliness

According to the requirements laid down in the Remedies Notice, the commitments „must be capable of implementation effectively and within a short period”.[35] The Commission believes that a prolonged period of implementation jeopardizes the effectiveness of remedies. Therefore the Commission does not accept commitments which hold a risk that the merged entity will be able to consolidate a dominant position in a period without competition.

Consequently, the Commission developed different mechanism to ensure implementation within a short period. These methods include for example imposing time limits under the „Standard Models”, or the requirement for an „upfront buyer”.[36]

[33] Remedies Notice, para. 49.
[34] John Cook – Christopher Kerse: EC Merger Control. p. 291.
[35] Remedies Notice, para. 10.
[36] John Cook – Christopher Kerse: EC Merger Control. p. 291.

1.2.5 No need to monitor

„Commitments should not require additional monitoring once they have been implemented", as stated in the Remedies Notice[37]. However, it does not mean, that some form of monitoring is precluded by the Commission, it is intended to ensure that once commitments are implemented, they do not require constant or regular monitoring in order to be guaranteed that these commitments can resolve the competition problems occurred.

In some cases commitments were so complex that it would have rendered them unacceptable, because of the impossibility to monitor them. In the *MCI Worldcom/Sprint* the Commission stated that the monitoring if the commitments concerning the divestiture of Sprint Internet would require so considerable staff resources which would result in uncertainty as to the effectiveness of the remedies. The situation was the same in the *ARD v. Commission* case and in the *Airtours/First Choice*, where the Commission rejected behavioural commitments because they would be difficult to monitor and enforce. On the other hand, in the *EnBW/EDP/Cajastur/Hidrocantabrico* case, the Commission accepted undertakings to increase commercial interconnection capacity between France and Spain in accordance with a three-stage construction plan, including participation in user groups and studies. The Commission will not reject commitments on this ground if mechanism can be designed so that the they are self-policing or subject to a complaints procedure or arbitration.[38]

[37] Remedies Notice, para. 10.
[38] John Cook – Christopher Kerse: EC Merger Control. p. 292.

1.3 Main types of commitments

A distinction may be drawn between two groups of remedies:

i. *Structural remedies*

These modify the allocation of property rights and create new firms: they include divestiture of an entire ongoing business, or partial divestiture (possibly a mix and match of assets and activities of the different firms involved in the merger project).

ii. *Behavioural or non-structural remedies*

These set constraints on the merged firms' property rights: they might consist of engagements by the merging parties not to abuse of certain assets available to them. They might also consist of contractual arrangements such as compulsory licensing or access to intellectual property.[39]

The Commission prefers structural to behavioural remedies. Structural remedies are of immediate and permanent effect, while behavioural remedies usually only operate for a fixed period of time. Following the judgment of the Court of First Instance in *Gencor v. Commission*[40], the Merger Remedies Notice expressed a preference for structural commitments (such as the commitment to sell a subsidiary) because[41]:

- they prevent the merger from substantially lessening competition.
- do not require medium or long-term monitoring measures.[42]

[39] Massimo Motta – Michele Polo – Helder Vasconcelos: Merger Remedies in the European Union: An Overview. Symposium on "Guidelines for Merger Remedies – Prospects and Principles", Ecole des Mines, Paris, January 17-18, 2002.
http://www.iue.it/Personal/Motta/Papers/RemediesMPV10.pdf

[40] Case T-102/96, [1999] ECR II-753

[41] Remedies Notice, para 9.

[42] William Baer- Luc Gyselen: Merger Remedies Policy In The EU and USA. Practical Law Company's Cross-border Competition Handbook 2006/07. October 2006. http://www.arnoldporter.com/publications_articles.cfm?publication_id=1437

Other distinguished scholars are in the favour of different categorisation. For example Lindsay categorise remedies according to the aspect of market operation which is addressed in order to ensure that remedy prevents the creation or strengthening of a dominant position.[43]

The Court of First Instance took a position in *Gencor Ltd. v. Commission*[44] according to which the question of whether the remedy is categorised as „behavioural" or „structural" is immaterial, the question in each case whether the remedy in question satisfies the criteria laid down in the Remedies Notice. However, the Commission has in several cases rejected remedies simply on the grounds that they were „behavioural".[45]

The Remedies Notice reviews the main types of commitments acceptable by the Commission dividing them to groups, these are the divestitures and the other remedies.[46] This paper will follow this categorisation in order to show the specific requirements these commitments need to fulfil in order to satisfy the Commission's competition concerns. The examination is based on the analysis of Massimo Motta, Michele Polo and Helder Vasconcelos in the study „Merger Remedies in the European Union: An Overview".[47]

1.3.1 Divestitures

1.3.1.1 Basic requirements

As already mentioned the EC will try to obtain divestments of overlapping assets where possible. Indeed, "the most effective way to restore effective competition, apart from

[43] Alistair Lindsay: The EC Merger Regulation: Substantive Issues. Sweet & Maxwell, London. 2003. p. 455.
[44] Case T-102/96 [1999] E.C.R. II-753, para. 318-319.
[45] Alistair Lindsay: The EC Merger Regulation: Substantive Issues. p. 454.
[46] John Cook – Christopher Kerse: EC Merger Control. p. 292.
[47] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. In: Merger Remedies in American and European Union Competition Law. Edited by François Lévêque and Howard Shelanski. Edward Elgar, Cheltenham, UK., Northampton, MA, USA. 2003. p. 106.-127.

prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture".[48]

As the quotation indicates, divested assets can either create a new firm or be acquired by an existing competitor.[49] In the first case, „the divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis. Normally a viable business is an existing one that can operate on a stand-alone basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitory period."[50]

This implies that the acquirer will have the possibility to purchase „all the elements of the business that are necessary for the business to act as a viable competitor in the market: tangible (such as R&D, production, distribution, sales and marketing activities) and intangible (such as intellectual property rights, goodwill) assets, personnel, supply and sales agreements (with appropriate guarantees about the transferability of these), customer lists, third party service agreements, technical assistance (scope, duration, cost, quality), and so forth."[51]

The EC is aware that the viability of a firm is sometimes determined by the possession of complementary assets, and that economies of scope or network effects make it profitable to produce a certain good or service only if there is joint production of other goods or services.[52] Accordingly, „in order to assure a viable business, it might be necessary to include in a divestiture those activities which are related to markets where the Commission did not raise competition concerns because this would be the only possible way to create an effective competitor in the affected markets."[53]

[48] Remedies Notice, para. 13.
[49] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 109.
[50] Remedies Notice, para. 14.
[51] Remedies Notice, para. 46.
[52] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 109.
[53] Remedies Notice, para. 23.

1.3.1.2 Divestitures in the practice of the Commission

An example of a case which illustrates both these points is the *Unilever/Bestfoods*[54] case. To remove the competition concerns raised by the EC, the parties undertook to divest a significant number of brands (such as Lesieur, Royoco and Oxo). First, to ensure the viability of the divested businesses, the divestiture package also included elements such as appropriate supply arrangements, manufacturing facilities, sales forces and intellectual property rights associated with the individual businesses. Second, in order to assure that the acquirer would be able to fully compete with the merging entity, the merging parties had to divest a full range of products, including products for which the EC had not raised competition concerns.[55]

Another case which is related to this second remark is the *Total Fina/Elf Aquitaine* case[56]. There, the parties had first proposed to sell several assets to eliminate competition concerns in the LPG (liquefied petroleum gases) industry. However, due to the negative feedback obtained through the EC market test about the viability of the proposed remedy, the merging parties had to divest a full subsidiary, a remedy that went clearly beyond the elimination of the identified overlap. It is conceivable that the acquirer of divested assets is a firm already active in the market. If this is the case, then it would not need all the assets, resources and contracts listed above, but the divestiture can be limited to particular production plants, or retail outlets, or brands, or more generally assets that would be integrated in the business of the acquirer.[57]

However, the EC does not look favourably at this “mix-and-match” approach: “a divestiture consisting of a combination of certain assets from both the purchaser and the target

[54] Case No. Comp/M. 1990 – Unilever/Bestfoods; Article 6(2). Decision of 28/09/2000.
[55] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 109.
[56] Case No. Comp/M. 1628 - Total Fina/Elf Aquitaine, Article 8. Decision of 9/02/2000.
[57] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 110.

may create additional risks as to the viability and efficiency of the resulting business. It will, therefore, be assessed with great care.”.[58]

This is certainly a sensible approach, since the likelihood of successful entry was much higher when an entire ongoing business was divested, whereas entry was significantly more problematic in case of divestiture of selected assets.[59] A case which is related to this approach is the one involving the world’s leading provider of Internet connectivity (MCI WorldCom) and one of its main competitors, Sprint (*MCI WorldCom / Sprint* case).[60] The EC concluded that this merger would have resulted in the creation of a dominant position in the market for top-level universal Internet connectivity. To try and remove the EC competition concerns, the parties proposed to divest Sprint’s Internet business. However, the EC decided to prohibit the merger since its investigation showed that Sprint’s Internet business was completely intertwined with the rest of Sprint’s telecom business. In other words, the divested business would have never constituted a strong and viable competitor of the merged entity.[61]

Of course, the viability of the business might also depend on the identity of the purchaser. If the latter does not have any experience in the market, or does not have appropriate know-how or financial standing, there might be a problem. In normal circumstances, a Competition Authority is not a consulting firm and should not care whether a firm is viable or not. However, when it comes to merger remedies, the viability of the acquirer is crucial because the degree of competition of the market depends on the competitiveness of the acquirer.[62] Therefore, „in order to ensure the effectiveness of the commitment, the sale to a proposed purchaser is subject to prior approval by the Commission. The purchaser is normally required to be a viable existing or potential competitor, independent of, and

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58 Remedies Notice, para. 18.

59 Richard G. Parker & David A. Balto: The Evolving Approach to Merger Remedies. Antitrust Report, May 2000. http://www.ftc.gov/speeches/other/remedies.htm

60 Case No. Comp/M. 1741 - MCI WorldCom / Sprint, Article 8(3). Decision of 28/06/2000.

61 Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 110.

62 Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 110.

unconnected to the parties, possessing the financial resources, proven expertise and having the incentive to maintain and develop the divested business as an active competitive force in competition with the parties."[63]

For these reasons, the EC Notice states that in some cases the merger will not be authorised unless „the parties undertake not to complete the notified operation before having entered into a binding agreement with a purchaser for the divested business (known as ″upfront buyer″), approved by the Commission".[64]

The first case in which the EC imposed this condition was the *Bosch/Rexroth* case.[65] The EC investigations revealed that the merged entity would have a dominant position on the market for hydraulic piston pumps. Rexroth produces only axial piston pumps and Bosch radial piston pumps. However, the EC's review showed that there was a high degree of substitutability between the two types of products. To address the EC concerns regarding the potential creation of a dominant position, Bosch proposed to sell its radial piston pumps business to a competitor. None the less, the investigation showed that to restore effective competition, it was not sufficient to sell. The EC had to make sure that the acquirer was a strong competitor. Otherwise, over time, Bosch would have been able to win back the market shares lost through the sale. This is so because Bosch benefits from strong costumer's relations in the industrial hydraulics field and this could be used to persuade its former consumers to switch from radial to axial piston pumps.[66]

[63] Remedies Notice, para. 49.
[64] Remedies Notice, para. 20.
[65] Case No. Comp/M. 2060 – Bosch/Rexroth; Article 8(2). Decision of 4/12/2000.
[66] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 111.

1.3.1.3 Possible disadvantages of the divestitures

Structural remedies are, in general, the best corrective measures for potentially anticompetitive mergers, and the Commission also prefers divestment of entire businesses to a mix-and-match approach. Structural remedies, contrary to the behavioral or quasi-structural measures, have also the additional advantage that they do not occupy further the scarce resources of a Commission after they have been implemented. Once the buyer has been identified and the transaction relative to the divested assets finalised, the EC will not have to monitor further the deal (unless of course suspected infringements of Articles 81 or 82 of the EC Treaty arise).[67]

Nonetheless, structural remedies can go wrong in a number of respects, due to a combination of informational asymmetries and incentives of the parties not in line with the objective of restoring competition. First of all, it is clear that the merging parties have all the incentive to make sure that the purchaser of the divested assets will not be a competitive firm. This might result in several problems. For instance, in the period the assets are for sale and it still manages them, the seller might have an incentive to decrease their value, by transferring valuable personnel, disposing of certain brands, patents and activities, or not maintaining properly the production plants or the shop premises. The divesting firm has also little incentive to find a proper buyer (not so say to sell at all), and it would probably use very different criteria than the Commission to select the buyer. The EC is aware of these problems, and to this end the Remedies Notice establishes the figures of the ″holdseparate trustee″ and of the „divestiture trustee" [68], that replace the Commission in ensuring that the seller does not engage in activities that could reduce the value of the assets or hinder the sales.[69]

[67] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 111.
[68] The trustees, as well as their mandate, has to be approved by the Commission. See Remedies Notice, para. 50-58.

Secondly, the mix-and-match approach is not very successful in fostering entry. One of the reasons why this occurs lies in the significant informational asymmetries between the seller and the buyer, and the problem also concerns sales of ongoing businesses. When the latter is not already operative in the industry, it often does not know what are the crucial assets to be an effective competitor in the industry, and it might end up with a package of assets that falls short of what is needed to be successful. The problem is made more serious by the fact that the seller has all the incentive to design a package that does not include the right (from the point of view of the competitor) assets, and that a competition authority is not an industry regulator and has thus limited expertise in any given sector.[70]

Thirdly, whenever some relationships were needed between the seller and the buyer of the divested assets (for instance, if the buyer needs supply of certain inputs or technical assistance) the remedy did not manage to restore competition. The same difficulties arise when technology transfers are an integral part of the divestiture: the combination of the informational disadvantage of the buyer, who does not know the technology, and the seller's lack of incentives to provide the buyer with assistance and know-how, imply that technology transfers often do not achieve the desired results.[71]

Fourthly, it is obvious that the merging parties have all the incentives to select a buyer that does not jeopardise its market position, but – perhaps less obvious – it is far from clear that an „aggressive" buyer will be the one who will secure the divested assets. Suppose that there are two potential buyers, identical in other respects but who differ in their market attitude. If it secures the assets, one expects that it will use a soft pricing policy, share the markets, or (tacitly or overtly) collude with the seller. The other instead is a firm that is

[69] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 112.
[70] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 112.
[71] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 112.

planning an aggressive price strategy. It is likely that the expected profit of the former is higher than the latter, and it will accordingly be willing to pay more to obtain the assets. An auction will therefore not guarantee the best possible outcome from welfare's point of view. Again, the identity of the buyer is therefore crucial, not only for the viability of the business, but also to make sure that the purchaser will be an effective competitor. In order to evaluate these aspects, it seems to us that resorting to an upfront buyer should be systematic: the Commission should lead a full assessment on whether the buyer is more or less likely to engage in effective competition, whereas a trustee is not in the position to decide on such aspects.[72]

Fifthly, the use of structural remedies, especially when the divested assets are used to strengthen an existing competitor, might increase the risk of collusion in the industry due to two problems: symmetry and multimarket contacts, two features that facilitate collusion. To understand better this point, recall that to ensure the viability of the business to be formed, the Commission would give preference to an existing competitor or to a potential entrant, the latter probably consisting of a firm active in a related product market or another geographic market. Consider first the case where the buyer is a firm already active in the market. By purchasing the assets divested by the merging parties, the risk of single-firm dominance decreases, as a competitor is made more powerful. However, to the extent that capacities, market shares and other assets become more symmetrically distributed, the risk of a collusive outcome (the so-called joint or collective dominance) increases.[73]

One well-known case of a merger involving asset transfers amongst rivals is the *Nestlè/Perrier* case[74],21 in the French mineral water industry. The EC authorised (subject to a set of commitments) the purchase of Perrier by Nestlè and the contemporaneous transfer of

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[72] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 113.
[73] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 114.
[74] Case No. Comp/M. 190 – Nestlè/Perrier; Article 8(2) (b). Decision of 22/07/1992.

ownership of one of the major Perrier brands (Volvic) to the main rival of Nestlè, BSN. Surprisingly, the EC cleared the concentration as well as the Volvic parallel sell-off deal, even though it helped Nestlè and BSN to restore the symmetry in the industry which would have been lost had Volvic not been transferred to BSN.[75]

Where the buyer is a firm active in a neighbouring product market or in the same product market but in another geographic area. Again, such a firm will probably be a viable market participant if given the appropriate set of assets. Relative to a new entrant, it should have more expertise and suffers less from informational disadvantages. However, it is possible that entry into this particular market will make the buyer and the seller operate in the same markets. If this is so, there exists the danger that a collusive outcome will arise.

The *EDF/EnBW* case[76] concerns the acquisition by Electricité de France (EDF) of a stake of 34 percent in EnBW, therefore taking joint control with OEW in Germany's fourth largest electricity firm. Before the merger, EDF enjoyed a dominant position for the supply of eligible customers (i.e., large customers) in France. EnBW, due to its location, is one of the most likely potential entrants in the French market for eligible customers. Its supply area is in the Southwest of Germany, therefore having a long common border with France. To solve competition concerns raised by the EC, EDF undertook to make available to competitors 6,000 MW of generation capacity located in France. Access to this capacity will be granted via auctions prepared and operated by EDF under the supervision of a trustee and will enable foreign suppliers to have access to a large share of the French market. However, if this capacity was bought by a strong German competitor there would be the risk of multimarket contacts that might favour collusive outcomes. Therefore, the solutions that seem more easily implementable to solve the problem of the viability of the firm created or augmented by the divested assets are often likely to be conducive to more collusion in the sector. Furthermore,

[75] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 114-115.
[76] Case No. Comp/M. 1853 – EDF/EnBW; Article 8(2). Decision of 07/02/2001.

the new entity receives assets, including human capital, that previously were in one of the merging firms. The informal linkages with the old firm are therefore very strong, something that might allow to implement subtle schemes of tacit collusion quite easily. Moreover, finding the buyer among the existing competitors can give the direction of this new entity to one of those who have been in the market for a long time. Although this is not equivalent to reinforcing the attitude to collude, the destabilizing role of mavericks is rarely found among the existing long run competitors.[77]

All this points to a tension between two problems. On the one hand, Commission have to guarantee the reinforcement or the creation of a viable firm to avoid problems of unilateral effects (single firm dominance by the merging firm). On the other hand, they also have to avoid pro-collusive effects after the merger (joint dominance). The implementable rules to solve unilateral effects emphasise the problem of pro-collusive effects. The EC is aware of this danger, when it recommends[78], among the ancillary clauses of a remedy, divestiture of shareholding in joint ventures and minority cross-ownership and the removal of interlocking directories.27 But unfortunately cutting these structural linkages among competitors is only part of the story: divestiture might create a fertile environment for collusion.

An example of a case in which the EC cleared a merger after the merging parties complied with the commitment of divesting their shareholdings in a Joint Venture was the *Kali&Salz MdK/Treuhand* case.[79] The EC argued that the proposed concentration would create a situation of joint dominance on the part of the merged entity and the French (state-owned) producer SCPA. The EC decision was based on three criteria: the degree of post-merger concentration; the structural factors regarding the nature of the market and characteristics of the product; and the existence of "structural links" between the two leading

[77] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 115.
[78] Remedies Notice, para. 24-25.
[79] Case No. Comp/M. 308 – Kali&Salz MdK/Treuhand; Article 6(1) (b). Decision of 09/07/1998.

firms in the industry.29 As a result, the EC required the merged entity to eliminate its structural links with SCPA to clear the proposed concentration. In response to appeals against the EC decision, the European Court of Justice found, however, that the EC had not proved, using a detailed and prospective economic analysis, that an oligopolistic dominant position would be created or strengthened by the links and, consequently, annulled the EC decision.[80]

To sum up, whereas structural remedies, if available, are the easiest solution to competitive concerns created by a proposed merger, there exist several reasons why such measures might have more difficulties in restoring competition than one would think at first sight. Despite the EC shows awareness with some of these difficulties and it appears to have taken safeguards to face them, these measures might not be enough. In particular, information disadvantages and lack of incentives on the seller's side to collaborate might result in widespread difficulties for new firms to successfully enter the industry. Furthermore, successful entry by the acquirer of the divested assets is not synonymous of restored competition: first, both the buyer and the seller of the assets have all the incentives not to fiercely compete to each other; second, the new configuration of the industry assets after divestiture might structurally favour a collusive outcome because of more symmetric distribution of the assets or the creation of multimarket contacts. Therefore, the EC should take extra care not only that the assets go into the hand of a viable firm – as it was emphasised in the Remedies Notice – but also that the conditions for a collusive outcome after divestiture are eliminated or alleviated.[81]

[80] France and Others vs. Commission (Joined Cases C-68/94 and C-30/95): [1998] E.C.R. I-1375 [1998] 4 C.M.L.R. 829-953.
[81] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 115.

1.3.2 Other types of remedies

1.3.2.1 Basic requirements

In some situations, divestiture is not feasible, for instance because a buyer for the divested assets cannot be found (this was the case for instance in *Boeing/McDonnell Douglas*), cannot solve the problem (the Remedies Notice mentions the existence of exclusive agreements, network effects and the combination of key patents), or would entail inefficiencies.

It is also possible that divestiture must be complemented by additional measures to ensure competition will be restored. In these circumstances, behavioural or quasistructural remedies might be used.

Behavioural remedies consist mainly of commitments aimed at guaranteeing that competitors enjoy level playing field in the purchase or use of some key assets, inputs or technologies that are owned by the merging parties.[82] Therefore, this situation mainly arises when the merged entity is vertically integrated. When this is the case, by linking up positions in the upstream and downstream markets, firms may be able to foreclose the access to existing or potential competitors at both levels of the vertical chain.

Typical remedies might then be purely behavioural, as when the parties commit to give access to rivals and/or accept non-discrimination provisions, that is they agree not to make offers to competitors that are less attractive in quality and price than those made to the

[82] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 116.

own subsidiary. In some recent cases, commitments of this type were offered by parties to clear the proposed concentration.[83]

1.3.2.2 The practice of the Commission

One prominent example is the *Vodafone Airtouch/Mannesmann* merger.[84] This merger gave rise to the creation of the first single Europe-wide mobile network. The Commission thought that since after the merger, the new entity would have sole control of mobile operators in eight Member States and joint control in three, it would be in a unique position to build an integrated network which would enable a quick implementation of seamless pan-European services. Other operators, on the other hand, would not be able, in the short to medium term, to replicate the merged entity network footprint through mergers and/or agreements. To grant other mobile operators the possibility to provide pan-European seamless services, the parties offered access to their integrated network, for a period of three years. The idea was that by granting access to its network on a non-discriminatory or favourable terms, the merged entity would not be able to make third party offerings of advanced seamless services across Europe unattractive or simply not competitive.

A second recent example where purely behavioural commitments have been proposed is the *Vivendi/Canal+/Seagram* case.[85] In this case, competition concerns were raised regarding the European pay-TV market. Seagram has control over content through its subsidiary Universal, one of the six major Hollywood studios. Canal +, on the another hand, is the largest pay-TV operator and also the first acquirer of premium films for pay-TV signed with the US major studios and in particular with Universal. The EC worried that upstream

[83] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 117.
[84] Case No. Comp/M. 1795 - Vodafone Airtouch/Mannesmann; Article 6(1)(b). Decision of 12/04/2000.
[85] Case No. Comp/M. 2050 - Vivendi/Canal+/Seagram; Article 6(2) Decision of 13/10/2000.

content providers could deny or limit the access to premium films to some downstream active users or potential entrants. In a first round of negotiations, the parties tried to address these concerns by proposing a mechanism to single out the winner of an output deal for broadcasting of Universal films which would not discriminate against rivals. The EC, however, showed scepticism towards such type of ″essentially behavioural″ remedy and considered it unsatisfactory. The concentration was afterwards cleared subject to the parties' commitment not to grant Canal+ ″first-window″ rights covering more than 50% of Universal production and co-production. This commitment covers the territories where Canal+ is active, for a period of 5 years after the expiration of the current output deals (the EC considered 5 years the necessary period rivals need to adapt to the new market structure).[86]

The *AOL/Time Warner* case[87] is another interesting example of vertical integration. The merger would create the first Internet vertically integrated content provider distributing Time Warner's branded content (music, news, films, etc.) through AOL's Internet distribution network. Because of the structural links and some existing contracts with Bertelsmann, the merged entity would have had access to Bertelsmann content and would have controlled the leading source of music publishing rights in Europe. The parties offered a package of commitments whose ultimate goal was to break the links between AOL and Bertelsmann.

Non-structural remedies may also be of a contractual type, and therefore „quasi-structural". For instance, the merging parties might be obliged to license a given technology to a rival. Or, in case the merging parties' key assets are not owned but were secured by exclusive long-run contracts, the remedy might involve giving up or shortening part or the

[86] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 117-118.
[87] Case No. Comp/M. 1845 - AOL/Time Warner; Decision of 11/10/2000.

totality of such contracts. This specific type of commitment was used both in the *Astra/Zeneca* case and in the *Lufthansa/SAS* case.[88]

In the *Astra/Zeneca* case[89], the EC investigations showed that, in the market for plain betablockers in Sweden and Norway, Zeneca is Astra's main competitor. In particular, Zeneca has been very actively promoting its plain betablockers (*Tenormin*) as a competitive alternative to Astra's largest selling betablocker in those countries. Therefore, a merger between the two companies would certainly rule out the competition between these two alternative products. This concern was addressed by the parties' undertaking to "grant a viable independent third party exclusive distribution rights for *Tenormin* in Sweden and Norway for a period of at least 10 years."

The *Lufthansa/SAS* case[90], on the other hand, regards a cooperation agreement to create a long-term alliance between the two airlines, establishing an operationally and commercially integrated air transport system. The agreement provides a setting up of a joint venture to act on behalf of the two airlines as their exclusive vehicle for offering integrated air transport services between Scandinavia and Germany. The EC decided to authorize the cooperation agreement for a period of 10 years subject to certain conditions. One such condition was that the involved airlines should give up slots at saturated airports in case there were potential entrants. This commitment clearly intends to diminish the risk of foreclosure by the incumbents.

Another category of behavioural remedies might consist of the so-called „vertical firewalls". When the merger creates a vertically integrated firm, say one where the upstream unit supplies not only the downstream unit but also the rivals, it is possible that competitively sensitive information about downstream rivals be passed from the upstream to the

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88 Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 118.
89 Case No. Comp/M. 1403 - Astra/Zeneca; Article 6(1)(b). Decision of 26/02/1999.
90 IV/35.545 LH/SAS. Decision of 16/01/1996.

downstream unit of the merged entity, thereby distorting the competitive process. It might then be required by the Commission that no such information is circulated within the different units of the firm (non-disclosure provisions).[91]

1.3.2.3 Possible disadvantages

Most of these remedies by their nature require some type of ongoing regulation or monitoring, and they are therefore likely to engage the resources of a Commission long after the merger has been cleared and carried out. Some of these measures are relatively easy to evade unless there is a careful monitoring and the regulator knows the industry very well, which is not likely to be the case for a competition authority.[92]

When the Commission identifies the risk of foreclosure, for instance, short of divestiture (that might be unfeasible, as the very reason behind the merger might precisely be to integrate vertically related or complementary activities) behavioural remedies are difficult to administer and not likely to be successful unless there is heavy monitoring. Foreclosure or discriminated access might take different forms, from obvious (refusing to supply an input) to more subtle ones (increasing prices, reducing quality, blaming insufficient capacity to justify missed shipments, delaying supplies, reduce accessory services and so on). Therefore, a remedy that calls for an obligation to supply is tantamount to an empty promise, but even a seemingly more sensible obligation to non-discrimination might not be easily enforceable. As just mentioned, discrimination might often occur at different levels and with different features, and it is probably rare the case where one can just look at transaction prices to determine whether discrimination has occurred or not. Furthermore, even when prices were the only relevant variable, it cannot be excluded that transfer prices, allocation of common

[91] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 118.
[92] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 119.

costs, or other compensatory measures might occur between vertically units of the same firm, so as to hide a different treatment between a subsidiary and a rival.

Vertical firewalls might be a reasonable remedy to solve the competitive problems involved, but there are some doubts on specific aspects of their implementation. In particular, it is not clear to us how one can guarantee that no such communication will take place between different units of the same firm and, if it does, that it will not be misused.

Behavioural remedies may also be problematic when they aim at facilitating market entry by ensuring competitors will have access to a key technology. Often, the implementation of this kind of remedy requires a (transitory) period of collaboration between the merged entity, on the one hand, and a third party to which access is going to be provided, on the other. In such cases, this third party is usually an actual or potential competitor and, therefore, it is extremely difficult to ensure that the merged entity will have the right incentives to effectively collaborate during a pre-defined transitory period to make entry by this third party successful.[93]

A good example of a case which illustrates this potential problem is the *Astra/Zeneca* case. In the market for local anaesthetics, Astra's *Bupivacaine* is the most widely used longer acting local anaesthetic and is already long off patent. In addition, although until 1998 Zeneca was not present in this market, in March 1998 it concluded an exclusive world-wide (except for Japan) agreement to license-in *Chirocaine*, a longer acting local anaesthetic. As shown by the EC investigations, due to the inexistence of other strong competitors in the market, the exclusive license for *Chirocaine* constituted the only potential source of competition in this market segment. To address this concern, Astra committed to reverse all the agreements relating to *Chirocaine* (surrender of license, trademark, etc.). Astra also undertook to support a third party, during a transitional period, in the process of launching *Chirocaine*. However,

[93] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 119.

the merging partners have little incentive to make the buyer of *Chirocaine* successful. Hence, given that a collaboration between them is necessary during the launching period, problems could arise.[94]

[94] Massimo Motta- Michele Polo- Helder Vasconcelos: Merger Remedies in the European Union: An Overview. p. 119-120.

Chapter II - Merger remedies in the Hungarian merger control procedure

2.1 Merger control in Hungary after 1989

From 1989 onwards, Hungary and other Central and Eastern European countries have succeeded in transforming their political regimes into a democratic system. The Hungarian Competition Act was formulated among the first pieces of legislation establishing the legal framework for a market economy in Hungary after 1989. The competition act was a modern, market economy oriented law, which covered the three main traditional areas of antitrust, namely restrictive agreements, abuse of dominant position and concentrations. According to the enforcement experience, the Competition Act of 1990 was satisfactorily applied during six years when a new Competition Act replaced it in 1996.

In the early 1990s the number of concentration cases was relatively low. There were basically two reasons for that. Firstly in the early 1990s, after the collapse of the Socialist régime, the Comecon and the Soviet Union and its markets the Hungarian companies lost their basic markets. There was a certain deconcentration tendency in the economy. In practical terms, this meant that large undertakings were divided into small parts which were still viable.

Secondly, because of the lack of national capital and the decision of the Hungarain government to proceed a “real” privatisation the foreign capital played the main role in that process. According to the Competition Act of 1990 most privatisation transactions did not fall under the scope of the Hungarian concentration rules. The reason for that was that the 1990 Competition Act did not apply to foreign investors. Since most of the privatisation transactions were connected to acquisitions carried out by foreign investors they fell out of the scope of the Act. However, the Hungarian Competition Authority (Gazdasági Versenyhivatal, hereinafter referred to as GVH) did have some indirect influence on these transactions. The GVH was represented in the work of the privatisation agency, since one of the Vice-Presidents of our authority took part on the meetings of the privatisation agency's board of directors and, if it was necessary, advocated for pro-competitive privatisation solutions.[95]

When speaking about amendments of the Competition Act one should not forget about Hungary's early aim to join the European Union. Hungary was thus closely observing the acquis communautaire. From the signing in December 1991 of the so-called Europe Agreement (which was the Association Agreement to the European Communities), the approximation of Hungarian competition rules towards EC competition law was carried out systematically until the accession of Hungary to the EU in May 2004.

Contrary to the early 1990's, from 1995 there were a rapid change in the number of concentration filed to the GVH. From 1995 it received gradually increasing number of requests for authorisation than in the preceding years. In fact, as a consequence of the great number of vertical deconcentrations of state owned companies in the early 1990s an opposite process began in 1995. The previously separated parts of the undertakings started to merge.

Between 1991 and 1996 the Hungarian law applicable to concentrations focused on the impact of mergers on competition and balanced gains against disadvantages. However, theoretically, it was also possible to approve concentrations which were inbalanced disadvantageous to competition since under the heading of gains, various elements were listed which were only indirectly related to competition policy. As an example a positive impact on the environment or international competitiveness could also be considered to be a gain.

[95] Mergers and efficiencies – a case of transitional economy. (Egyesülések és hatásuk- egy rendszerváltó ország tapasztalatai) Speech of Zoltán Nagy, the President of the GVH. Vienna, 15.06.2006. http://www.competition06.com/NR/rdonlyres/BE2DD1E3-5FA3-48CE-A333-D136515D1FE4/25956/Becskonfeloadas20060615NKIkornelkul.doc

From 1997, after an amendment to the Competition Act, the criteria of decision-making became much more clear-cut and priority was given to the dominance-test. However, the previous wording of the test contained some implicit contradictions. Firstly, the test did not specify the relation between the “creation and strengthening of competition” and the “non-preclusion of competition”. Namely, it did not make clear whether these two conditions should be met simultaneously, or whether meeting one of the conditions would be sufficient.

Secondly, the wording makes the impression that the balancing the “gains” against – “disadvantages” and the dominance-test are of equal importance, which might lead to consideration of criteria lying not in the area of competition policy. Therefore, a decision in a concentration case may result in permitting mergers disadvantageous or in prohibiting mergers not disadvantageous from the point of view of competition. It happened only in exceptional cases that the authority approved mergers based on “gains-disadvantages balancing” and in these cases gains were fundamentally of a competition policy nature.

There was a further clarification of the criteria in 2001. As the law became effective since that date, it provides that no concentration may be prohibited if the dominance-test is negative. Furthermore, it was also clarified that the “gains-disadvantages” criterion has no equal weight with the dominance-test. However, efficiency gains may still be considered. Therefore, under Hungarian law a positive dominance-test does not necessarily lead to the prohibition of a concentration, which has benefits in order to counterbalance the disadvantages deriving from the creation or reinforcement of the dominant position.

Among the criteria for evaluating gains and disadvantages in a concentration case, the elements of the definition of the term “dominant position” are present in the Hungarian Competition Act. These include the structure of the relevant market; existing or potential competition on the relevant market; the costs, risks and technical, economic and legal conditions of market entry and exit; the prospective effects of the concentration on competition on the relevant market, and so on.[96]

Improvement in competitiveness (meaning efficiencies) is a typical attribute to all reasonably carried out concentrations. This is due to the economies of scale: in simplified terms, in the case of a larger scale of production, unit costs are lower. Therefore, decreased costs of the merged undertakings make a relative reduction in the price possible, which is indeed beneficial for consumers. To make this benefit permanent and real, there must be a force deriving from economic competition which guarantees that prices stay on that lower level in the long term.

[96] Mergers and efficiencies – a case of transitional economy.

2.2 Legal background

The merging parties shall notify their transaction and apply for the authorisation of the Hungarian Competition Authority provided that their transaction meets the concentration thresholds laid down in Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter referred to as Competition Act), and it falls outside of the scope of the EC Merger Regulation. As an effect of a relatively small number of mergers effective market competition is impeded. The Joint Notice of the President of the GVH and of the Chairman of the Competition Council on providing guidelines for distinguishing between Phase I and Phase II proceedings (Notice 1/2003) introduces the various potential competition problems.[97]

GVH intervention is needed to protect market competition if the transaction is likely to create or strengthen a dominant position of one or more companies. One way of doing this is by the prohibition of the concentration. According to the practice of the GVH there are other types of competition concerns though, where the injurious effects of the planned transaction can be remedied by conditionally approving the merger (merger remedy) and hence allowing the realisation of its efficiencies and potential benefits for consumers.[98]

In every case – including those involving merger remedies – the ultimate objective of the GVH is to improve consumer welfare in the long run by the provision of effective competition. By applying merger remedies the emphasis of the GVH's work is not merely to find a compromise with the merging Parties but to authorise a welfare enhancing transaction in a manner that protects effective competition.[99]

Clearly not all competition problems can actually be remedied by requiring commitments from the merging parties. There remain cases where the specific characteristics

[97] Remedy discussion paper. Discussion paper of the Hungarian Competition Authority on imposing conditions and obligations in decisions authorising the concentration of companies. para.1. http://www.gvh.ionlab.net/index.php?id=4452&l=e
[98] Remedy discussion paper. para.2.
[99] Remedy discussion paper. para.3.

of the transaction may only allow the competition problems to be resolved by prohibiting the transaction. Instead of using merger remedies in these occasions the GVH shall not authorise the concentration.[100]

[100] Remedy discussion paper. para.4.

2.3 Delineation between conditions and obligations

If a concentration raises competition concerns, which the GVH does not intend to address with a prohibition, the GVH shall decide to include conditions or obligations in its authorisation. The Competition Act distinguishes the two categories (condition and obligation) by the legal consequences resulting from them.[101]

If a transaction is approved conditionally, failing to meet the conditions will result in the voidness of the authorisation. For pre-conditions it means that the authorisation shall not enter into force before the Parties implement the condition; failing to implement a post-condition will result in the authorisation becoming void without further action from the GVH (Section 30, paragraph 4, Competition Act). In case of imposing an obligation on the parties, the authorisation will enter into force automatically but the GVH shall revoke its authorisation as a consequence of failing to fulfil those obligations.[102]

There is no substantial difference between the two categories. The GVH may impose conditions or obligations for achieving the same remedying effect. For example a divestiture provision may be formed as a condition and as an obligation as well. Behavioural remedies, where it can be difficult to identify compliance will typically be designed as obligations.[103] The GVH has a preference for pre-conditions if there are serious doubts about the enforceability of the condition. In the absence of such doubts the GVH may attach a post-condition to its decision, which allows the efficiencies deriving from the merger to be realised before meeting the conditions laid down in the authorisation.[104]

The necessity of distinguishing between conditions and obligations might be attenuated by the fact that the GVH has the instruments in both cases to ensure that companies

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[101] Remedy discussion paper. para.5.
[102] Competition Act, Article 32, paragraph 1, point b.
[103] See cases Vj-181/2001 (Bayer AG / Aventis Crop Science Holding SA) and Vj-210/2005 (Magyar Telekom Távközlési Nyrt. / Dataplex Infokommunikációs Infrastruktúra Szolgáltató és Ingatlanhasznosító Kft.)
[104] Remedy discussion paper. para.7.

will act lawfully. Failing to implement pre-conditions will prevent the authorisation from entering into force and therefore the transaction will not be effected. Failing to implement post-conditions will cease the effect of the authorisation leading automatically to the voidness of the transaction. As a result of not complying with an obligation the GVH shall revoke its approval.[105]

As the two categories do not separate in the GVH's practice, conditions and obligations will hereinafter be referred as conditions except where particularly referring to pre- and post-conditions or obligations.[106]

[105] Surd Kovács – Péter Ormosi: Elimination of competition problems arising out of mergers I. *(A fúziók versenykorlátozó hatásainak orvoslása I.)* Külgazdaság, Budapest. 2006/3. p. 26.
[106] Remedy discussion paper. para.9.

2.4 General principles for devising merger remedies

2.4.1 Remedies should be able to solve the competition problem

The purpose of conditionally approving a concentration is to remedy the competition problems arising from the merger in a manner that only impedes the social benefits deriving from that concentration to the extent that is absolutely necessary for preserving effective competition. Nevertheless the GVH cannot apply merger remedies for fixing those competition concerns that exist irrespectively of the notified merger transaction.[107]

2.4.2 Relying on commitments

Remedying the competition concern shall be done in cooperation with the Parties based on their commitments. Although the initiation of the commitments can come from both the notifying Party or the GVH, the condition to the authorisation of the concentration shall always be based on commitments that the merging parties previously agree to implement. Absent this agreement it is very unlikely that the merger remedy would attain its intended goal. However, the GVH will have to prohibit the notified concentration should the Parties and the GVH fail to find an agreement on the choice and design of the condition.[108]

2.4.3 Effective, enforceable and verifiable remedy

The content of a merger remedy shall always be determined by the competition problem. The GVH aims to find a merger remedy that is proportionate, and fixes the competition problem in an enduring, timely and effective way. In order to avoid consequent

[107] Remedy discussion paper. para.10.
[108] Remedy discussion paper. para.11.

disputes over the interpretation of the merger decision the GVH defines the conditions and obligations in a precise, clear and unambiguous manner.[109]

2.4.4 Flexibility

The decision of the GVH on the application of merger remedies is always done on a case by case basis, relying on a firm economic and legal analysis. Due to the complexity of the cases and the variability of circumstances, the assessment of a concentration can only be completed in the time frame provided by the law if it is accompanied by the continuous negotiations between the Parties and the GVH, and if the adequate merger remedy is formed in a flexible way.[110]

[109] Remedy discussion paper. para.12.
[110] Surd Kovács – Péter Ormosi: Elimination of competition problems arising out of mergers I. p. 27.

2.5 Content of merger remedies

The Competition Act[111] does not provide sufficiently clearly what the content of a condition or obligation shall be. The GVH defines the content of a condition based on the specific circumstances of the case at issue and on the characteristic of the competition problem.[112]

Merger transactions alter the structure of the market. Through its merger control activity the GVH is dedicated to prevent the creation of a market structure that is less favourable to effective competition by virtue of creating or strengthening a dominant position.[113]

Should the GVH decide that imposing conditions on the parties is capable of remedying the competition threats of a merger, it seems evident that a detrimental change in the market structure is to be remedied with imposing a condition affecting the structure of the market. Hence the abovementioned provision of the Competition Act, which prescribes that when imposing a condition or obligation the GVH "may, in particular, demand by its decision the divestiture of certain parts of the undertakings or certain assets or the relinquishment of control over an indirect participant, setting an appropriate time limit for the carrying out of these requirements."[114]

Conditions resulting in the change of ownership rights with regards to certain businesses or business assets are called structural conditions or structural remedies. Given

[111] Article 30, paragraph 3.
[112] Remedy discussion paper. para.14.
[113] Remedy discussion paper. para.15.
[114] Remedy discussion paper. para.16.

their transparent, easy to monitor and rapid nature, the GVH has a preference for applying structural conditions when imposing a merger remedy.[115]

In certain market circumstances (e.g. rapidly changing, innovative markets) the application of structural interventions may not be feasible though, either because the effect of such interventions cannot be adequately pre-assessed or because a full-stop prohibition of the merger would sacrifice significant efficiencies and a structural remedy would also sacrifice such efficiencies or is infeasible. In such cases the GVH may apply a conduct relief or in other words a behavioural condition. In case of behavioural remedies the onus of the intervention is not on the structure of the market but on the conduct of one or more market agents: in these occasions the merging parties are obliged to behave in a manner defined by the GVH, which is indispensable in avoiding the detrimental effect of the merger to competition.

The most commonly used behavioural conditions are those requiring the merging parties to provide access to certain non-divisible facilities, for example obliging the parties to provide non-discriminatory access to "essential facilities" or to provide access to certain technologies or other means of production.[116] The GVH also prescribes behavioural obligations that are aimed at creating firewalls between two separable parts of a business, thereby avoiding the information flow and coordination between these information remedies. These are normally applied as a complementary condition to other conditions, have a pivotal role in ensuring the implementation of structural and behavioural conditions: these provisions intend to make certain information available for the GVH showing whether the conditions were implemented or whether they have to be modified, revoked or the authorisation shall be

[115] See cases Vj-62/2001 (Friesland Coberco Dairy Foods Holding N.V./ Koninklijke Numico N.V.), Vj-39/2003 (UTA Pharma Beteiligungs GmbH/ Pharma Concept Részesedési és Szolgáltató Kft.) and Vj-127/2001 (Raffinerie Tirlementoise S.A./Financiere-Franklin Roosevelt S.A.S.)
[116] See case Vj-182/2001 (Hungaropharma Gyógyszer-nagykereskedelmi Rt).

repealed.[117] The different types of conditions may not only be applied exclusively. On a case by case basis the GVH may deem a complex remedy package (containing both structural and behavioural provisions) necessary.[118]

Conditions shall only be imposed on the parties involved in the transaction. The addressees of the GVH authorisation shall solely be responsible for the implementation of the condition if the obligation falls on one of the parties but a third party approval, an endorsement or cooperation of another authority is necessary for implementing that condition. Parties therefore are required to provide a fall-back solution up-front that applies in case the third party action is not forthcoming.[119]

[117] See cases Vj-181/2001 (Bayer AG/ Aventis Crop Science Holding SA) and Vj-182/2001 (Hungaropharma Gyógyszer-nagykereskedelmi Rt).
[118] Remedy discussion paper. para.19.
[119] Remedy discussion paper. para.20.

2. 6 Divestiture as merger remedy

Divestitures are conditions resulting in a structural change in the market, and are purported to mitigate the market power of the merged entity so that the divested asset(s) may allow a new competitor to enter the market or may strengthen an incumbent competitor and therefore enabling it (them) to restore the loss of competition in the market at issue.[120] The emphasis about divestitures is not on "deprivation" but on the creation of a market structure which best serves the objective of effective competition, i.e. on the strengthening of an incumbent competitor or on the creation of a new effective competitor.[121]

Divestitures are typically applied for transactions affecting more products and/or more geographical markets, where the competition concerns concentrate on particular products and geographical markets, which allows the delineation of a business asset, the divestiture of which solves the competition problem. It is especially appropriate for remedying problems deriving from horizontal overlaps or for ceasing the organisational relationship with one of the competitors (e.g. exiting from a joint venture[122]).[123]

2.6.1 Content of the divestiture

The divestiture package may not only include certain production tools but other business assets, facilities, or intellectual property rights of the companies concerned that can enable the purchaser of the divestiture package to effectively compete in the market concerned.[124]

[120] Surd Kovács – Péter Ormosi: Elimination of competition problems arising out of mergers I. p. 31.
[121] Remedy discussion paper. para.21.
[122] See case Vj-39/2003 (UTA Pharma Beteiligungs GmbH/ Pharma Concept Részesedési és Szolgáltató Kft).
[123] Remedy discussion paper. para.21.
[124] Remedy discussion paper. para.22.

One of the principles of divestiture is to define the divestiture package in a way so that its divestiture together with other conditions[125] – if applicable – shall remedy the competitive concern. As a general rule at least the anti-competitive overlap between the merging parties shall be divested.[126]

In order to allow the purchaser of the divested assets to immediately and effectively compete in the market concerned, it is generally required that the content of the divestiture is a stand-alone economic entity. In a given case this means that the GVH will insist on a divestiture that exceeds the problematic horizontal overlap provided that the connected businesses or business relations are necessary to enable the divested entity to start competing effectively with the shortest delay possible. When defining the content of the divestiture the GVH has a preference to avoiding a mix-and-match approach and it favours a solution where the assets to be divested are exclusively owned by one of the merging parties pre-merger, which can assure that the divested assets are viable, and is suitable to stop the merging parties from "cherry-picking" among the assets to be divested.[127]

Not knowing the buyer at the time of the divestiture decision increases the risk that no buyer for the divested assets will be found even though these assets would be capable to remedy the competition concern. In these cases it is recommended that alternative divestiture proposals are drawn up in the authorisation decision, which are applied only in case of failure of the implementation of the primary condition. This can save up time as in these cases it is not required to amend the GVH's decision. Alternative divestiture proposals usually involve a set of assets that is well wider than the initial proposal (crown-jewel), which can advance the success of the divestiture.[128]

[125] Surd Kovács – Péter Ormosi: Elimination of competition problems arising out of mergers I. p.33.
[126] Remedy discussion paper. para.24.
[127] Remedy discussion paper. para.25.
[128] Remedy discussion paper. para.26.

2.6.2 Selecting the buyer

It is vital for the success of the divestiture that the divested assets are bought by a buyer that is able and willing to compete effectively in the market concerned. For this reason the selling agreement needs the GVH's approval even though it is the merging parties who select the buyer and find an agreement with them.[129]

The authorisation decision shall already include the name of the buyer if it is known before the GVH's decision, and the above criteria are met (upfront buyer).[130] In certain cases, where the finding of a suitable buyer is very doubtful, the GVH may require an upfront buyer. Provided that there is no upfront buyer the GVH decision prescribing the divestiture as a condition shall refer to the procedure of approving the buyer by the GVH.[131]

If the divestiture transaction itself meets the notifying threshold for concentrations, the divestiture condition can only be implemented if that transaction is authorised in a (separate) merger procedure.[132]

The buyer of the divested asset should be capable of providing a relief for the competition concern. For this reason the buyer shall be independent of the merging parties and shall be able to lastingly operate in the industry. For the latter, the industry experience, the economic background and the financial standing of the buyer bear with utmost importance.

The buyer of the divested assets should be willing to provide a relief for the competition threat. Therefore the GVH endeavours to limit the cooperation (such as long-term supply agreements) between the seller and the buyer of the assets following the transaction; when selecting the buyer the GVH prefers those with adequate business plans showing how

[129] Remedy discussion paper. para.27.
[130] Surd Kovács – Péter Ormosi: Elimination of competition problems arising out of mergers I. p. 33.
[131] Remedy discussion paper. para.28.
[132] Remedy discussion paper. para.29.

they intend to operate the divested asset. It is possible for the GVH to ensure the accomplishment of the divestiture by adopting interim measures (such as maintaining the viability of business assets by the provision of hold separate measures) in those cases where a delay in imposing obligations on the parties would threaten the success of the implementation of the condition.[133]

2.6.3 Time frames

In case of upfront buyers the parties will name the buyer during the merger procedure, which can be approved by the GVH in its authorisation decision. In any other case the GVH will prescribe a reasonable deadline for implementing the divestiture. The GVH sets the deadline for divestiture according to the thorough assessment of market circumstances. For this purpose it considers the number of potential buyers and the dynamism of the given industry. The GVH intends to find the optimal balance between two conflicting interests; the parties want to sell their assets at the highest possible price while the public is concerned about promptly remedying the competitive threat. As a general rule the GVH does not accept a divestiture period longer than six months but this period can be extended in well-founded cases following the parties' request. The deadline for divestiture shall constitute as a business secret.[134]

2.6.4 Interim measures

For the transitional period between the date of imposing the divestiture and its final closure the GVH shall prescribe that the merging parties are obliged to keep the assets to be

[133] Remedy discussion paper. para.31.
[134] Remedy discussion paper. para.32.

divested separately and to preserve its initial value. For this reason the GVH shall prescribe hold separate measures that are purported to maintain the viability and value of the assets to be divested during the transitional period.[135] If applicable, the GVH may appoint a “merger trustee” for this reason, upon whom the parties confer their administrational and voting rights. The trustee shall use these rights without any limitation.[136]

[135] Surd Kovács – Péter Ormosi: Elimination of competition problems arising out of mergers I. p. 26.
[136] Remedy discussion paper. para.33.

2.7 Procedural provisions

2.7.1 Authority to define the content of the commitments

The GVH shall identify the competition concern arising from the concentration of the Parties. However, if the Parties are aware that their transaction is posing a competitive threat and they have clearly identified it, they may submit their commitments (to remedy the competition concerns) attached to the notification of their transaction in order to speed up the merger procedure.[137]

The case handler shall inform the Parties about the competition problems if the notification of the transaction is not accompanied by such commitments. The case handler may also provide assistance in forming suitable commitments.[138] Should the Competition Council identify the competitive concern, it may either directly warn the Parties about the necessity of adequate commitments, or decide to refer the case back to the case handler thereby following the principal rule, i.e. the negotiations on the commitments shall be done in the investigational phase of the proceedings.[139]

The GVH's decision about the commitments and the forming of the conditions shall be based on the widest possible range of information. For this reason the assessment of the commitments shall always be based on thorough market testing. The opinion of other market agents regarding the appropriateness and enforceability of the conditions shall be taken into account. One possible way of gathering such information may be through hearings[140] in accordance with Article 62 of the Act of Administrative Proceedings.

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[137] Remedy discussion paper. para.34.
[138] Surd Kovács – Péter Ormosi: Elimination of competition problems arising out of mergers II. *(A fúziók versenykorlátozó hatásainak orvoslása II.)* Külgazdaság, Budapest. 2006/4-5. p. 49.
[139] Remedy discussion paper. para.35.
[140] See case Vj-210/2005 (Magyar Telekom Távközlési Nyrt./ Dataplex Infokommunikációs Infrastruktúra Szolgáltató és Ingatlanhasznosító Kft.)

2.7.2 Submitting the commitments, conditions in Phase I proceedings

The Parties shall submit their commitments in a manner that leaves sufficient time for the GVH to assess them – it is recommended to do so in the earliest possible phase of the proceedings in order to actually shorten the procedure. Should the Parties submit their commitments at a later stage of the proceedings it might result in the GVH not being able to assess their market effects. A commitment that the GVH could not assess properly is not guaranteed to remedy the competition concern and therefore might lead to the prohibition of the concentration. Newly presented commitments directly affecting the competitive threat shall be submitted not later than the 30th day preceding the deadline for the GVH's decision; in exceptional and well-founded cases simple commitments may be submitted following the above deadline provided that they are easily assessable.[141]

The Competition Council shall prescribe the conditions and the obligations in the authorisation decision. Generally, in cases involving conditions and obligations the GVH proceeds in a Phase II proceeding; however, Phase I proceedings are sufficient if:

- the competition problem and the remedies adequately addressing this problem are easily identifiable; and
- the commitments are already attached to the notification of the concentration, and
- the requirements for Phase I proceedings, laid down in Notice 1/2003, are met.[142]

2.7.3 Monitoring the conditions and the use of trustee in implementing the conditions

The GVH monitors the implementation of the condition *ex officio*. The implementation of the pre- or post-conditions or obligations included in the authorisation is

[141] Remedy discussion paper. para.36.
[142] Vj-210/2005, point 60.

monitored by the GVH in the framework of a post-investigation.[143] The timing of the post-investigation is determined by the special deadlines included in the authorisation.[144]

The approval of the commitments and their transformation into conditions may be facilitated if the Parties – in accordance to the international practice – undertake to use an independent monitoring trustee. The authorisation shall prescribe that the GVH's approval is necessary for entering into contract with the trustee. The Parties bear the fees and charges related to the trustee.[145]

The trustee's mandate may involve the entire implementation of the condition or only some parts of it. In case of a divestiture, if the Parties fail to sell the divestiture package the trustee may sell it provided that she has the mandate to do so.[146]

The GVH's approval is needed for the appointment of the trustee if it is not known at the time of the authorisation decision.[147]

2.7.4 Amending the condition

The acting Competition Council may amend the authorisation decision where the obligee is in breach of any obligation, or unable to satisfy any of the conditions, attached to the decision but where the obligee has not been found negligent.[148] The amendment of the GVH's decision shall be initiated by the Parties as soon as they become conscious that they are unable to comply with it. The addressees of the decision shall initiate the amendment of the condition at least 30 days preceding the deadline for the implementation.[149]

[143] Competition Act, Article 76.
[144] Remedy discussion paper. para.39.
[145] Remedy discussion paper. para.40.
[146] Remedy discussion paper. para.41.
[147] Remedy discussion paper. para.42
[148] Competition Act, Article 32, paragraph 2.
[149] See case Vj-39/2003 (UTA Pharma Beteiligungs GmbH/ Pharma Concept Részesedési és Szolgáltató Kft)

Conclusion

Few major mergers are completed without some conditions being imposed by an antitrust authority. Looking at the experience of the EU, the importance of merger remedies is evidenced by the fact that 191 of the 2,592 merger cases (around 7%) notified to the European Commission (EC) until the end of 2004 have been decided as being compatible with the common market only with commitments. More than half of phase II decisions (72 out of 121 – 59%) are compatible only with commitments, yet only 19 mergers have been blocked since 1990.[150]

With just one prohibition decision adopted between 2002 and 2005[151], remedies continue to be the preferred instrument for solving competition issues that present themselves at the end of an investigation. During 2005, the many remedies accepted by the Commission evidence a clear preference for divestitures and the cutting of links to other companies.

However, the efficency of the merger remedies is a highly disputed topic in the literature.[152] It would be crucial to the European Union to review its practice also from the point of view of economic efficency, and adopt the new Remedy Notice and also Standard Models, which could serve as Guidelines for a revised practice of the Commission.

It would also be important for the single Member States, since they are mainly follow the practice of the Commission, as we could see from the example of Hungary as well. In my opinion a new, more flexible and efficency-centered modell would be in favour of the better market conditions and thus in favour of the consumers all over Europe.

[150] Tomaso Duso- Klaus Gugler- Burcin Yurtoglu: EU Merger Remedies: A preliminary Empirical Assessment. Discussion Papers 81, SFB/TR 15 Governance and the Efficiency of Economic Systems, Free University of Berlin, Humboldt University of Berlin, University of Bonn, 2006. http://www.gesy.uni-mannheim.de/dipa/81.pdf p. 1.

[151] Case COMP/M.3440 EDP/ENI/GDP, December 9, 2004.

[152] See for example Massimo Motta – Michele Polo – Helder Vasconcelos: Merger Remedies in the European Union: An Overview., and also Tomaso Duso- Klaus Gugler- Burcin Yurtoglu: EU Merger Remedies: A preliminary Empirical Assessment.

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