

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Conglomerate effects of mergers – Note by Hungary

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/conglomerate-effects-of-mergers.htm>

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1. Introduction

1. The Hungarian Competition Authority (GVH) considers the conglomerate effects of mergers if the proposed merger involves products that are either complements or neighbouring goods. Please note that mergers defined by this document as “conglomerate mergers” are referred to as mergers with portfolio effects by the Hungarian Competition Authority.

2. Based on the GVH’s experience, the majority of conglomerate mergers do not raise relevant competition concerns and when compared to horizontal mergers are generally less likely to substantially lessen competition. Nevertheless, in certain circumstances they may lead to anticompetitive effects and it is therefore necessary to assess such mergers on a case-by-case basis, taking into account the ability and incentive of firms to foreclose competition.

2. Regulatory Background

3. Conglomerate mergers are defined in a Notice of the GVH, which is a soft law instrument. Given the soft law nature of the Notice, it has no binding force and serves as guidance, setting out the GVH’s best practices and main principles in this area. While the Notice aims to clarify the conditions for initiating merger proceedings and for qualifying a merger as a conglomerate merger, it does not provide an in depth methodological framework for carrying out this assessment.

4. The Authority also follows the European Commission’s Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (“Non-Horizontal Merger Guidelines”).

3. Trends in conglomerate mergers

5. As mentioned above, the GVH has not dealt with a significant number of cases involving conglomerate concerns and we therefore do not have sufficient experience in the field of conglomerate mergers to be able to draw conclusions as regards to any trends in this area.

4. Assessment of Conglomerate Mergers

6. Given that the GVH has not dealt with a significant number of merger cases giving rise to conglomerate concerns in recent years, the most recent intervention decision based on conglomerate theory of harm was issued in 2012 in case number VJ/66/2011 RTL/IKOT. The details of this case are provided in the Annex.

7. In general the GVH considers conglomerate effects if the proposed merger takes place between producers or distributors of complementary products (players of adjacent markets) or if the involved products belong to the range of products that is generally purchased or used by the same set of customers for the same end use.

8. For example in the above mentioned RTL/IKOT case the GVH concluded that there were separate markets for commercial television channels with a high reach and for television channels which had a supplementary marketing function.

9. The main concern in the context of conglomerate mergers is that of foreclosure. In assessing the likelihood of anticompetitive foreclosure effects, the GVH examines first, whether the merged firm would have the ability to foreclose its actual or potential competitors, second, whether it would have the economic incentive to do so and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers.

10. When it comes to harmful effects, the GVH examines whether the merger would result in foreclosure through tying or bundling. Companies typically use tying or bundling in order to provide their customers with better products or offerings in cost-effective ways. While tying and bundling often have no anticompetitive consequences, in certain circumstances such practices may lead to a reduction in actual or potential competitors' ability or incentive to compete. This may reduce the competitive pressure on the merged entity allowing it to increase prices. In the case of tying, the merged entity would make the purchase of one product (the tying product) conditional on the purchase of another product (the tied product), while in case of bundling the merged entity would sell two products together in fixed proportions.

11. While the GVH has not dealt with many cases involving the digital sector in depth, in a number of cases concerning start-up companies it assessed the mergers' effects on impeding market entry and reducing innovation.. Some of these cases the acquiring company was active in a market which was a neighbouring market to a market where another party was active, and there was the possibility that the aim of the merger was to eliminate a potential entrant. This competition concern has horizontal aspects too, it can be identified as conglomerate theories of harm. However the GVH has not identified any serious competition problem yet regarding to this issue, so there is no case where it has examined this issue in detail.

5. Practical challenges

12. Although the GVH does not have significant experience in this area and has not encountered any difficulties regarding its merger control thresholds, it should be noted that the GVH introduced a secondary voluntary merger notification threshold in 2017. This threshold applies if the transaction in question falls below the mandatory thresholds (HUF 15 billion, approx. EUR 48 million) but the parties' combined Hungarian turnover is above HUF 5 billion (approx. EUR 16 million) and it is not obvious that the contemplated transaction would not significantly decrease competition in the relevant market.

13. As part of the notification process, the merging parties are required to fill out a notification form where they must indicate possible conglomerate effects based on the complementary nature of their products. In the notification form, the parties must specify the related markets where some kind of (other than horizontal or vertical) relationship exists between the products and services in question (e.g. the outputs of certain activities of the merging parties are complementary to each other or the products are typically purchased or used by the same scope of trading parties or consumers for the same purpose). In general merging parties has difficulties to identify the complementary nature of their products and it is therefore often the authority that makes this determination based on the parties' business activity. In such cases, the authority either flags the missed conglomerate connections to the parties in the pre-notification meeting or, if no pre-notification meeting

took place, sends a request for information to the parties to reveal the necessary information about the complementary products and conglomerate connection.

14. Once the conglomerate markets are identified, the GVH uses the market shares of the parties as a primary screening tool to decide whether the GVH needs to take a closer look at the proposed merger and analyse the possible harmful conglomerate effects on the merits. As we mentioned above conglomerate effects may arise if the parties to the concentration are present in closely related neighbouring markets, so when the products are complementary to each other or when they belong to a range of products that are generally purchased by the same set of customers for the same end-use. A significant conglomerate relationship can be identified where the market share of one of the merging parties exceeds 30% on at least one of the complementary markets and on the neighbouring market where other merging party is active, this party holds a market share of more than 5%.

15. Exception of special circumstances, the GVH carries on in-depth investigation related to only those mergers which are met these criteria, so the GVH uses the above market share threshold as an initial indicator of competition concerns. However the analysis of the harmful effects depends not only on the market share thresholds, but also on the respective market shares of the parties and competitors and on the concentration of the relevant market as well as on other qualitative aspects, (such as the intensity of the potential competition, barriers to entry and to exit, the market power of competitors and customers)

16. The GVH has no experience in assessing efficiencies through the use of quantitative economic analysis and instead typically relies on a qualitative assessment of efficiencies. Consequently, the main sources of information are the merging parties and their competitors and the costumers of the concerned products. .

17. Based on the GVH's experience the most appropriate remedies are behavioural remedies, particularly those that are contractual in nature. For example a commitment to purchase or licence the products or services on fair, reasonable and non-discriminatory ("FRAND") terms, or a commitment that the merging entity will not discriminate when it offers its services or products to its rivals, or a commitment to make it possible for the products or services to be independently purchased.

6. Efficiencies

18. Concerns about economies of scale or scope either for the merging parties or the costumers will of course make the merging parties more competitive and put additional pressure on competitors. However, one can certainly not presume that buyers will suffer. This only arises if competitors exit from the market as a result of the merger. However potential exit from the market may not sufficient to prove the harmful effects, because in some circumstances efficiency benefits can be so high that consumers gain despite the exit of competitors.

19. So in theory, the GVH would also take merger specific efficiencies into account, since efficiency gains can outweigh the harmful effects of mergers'. However, there have been no cases so far where this aspect would have been of significant importance.

Annex

VJ/66/2011 RTL/IKOT case

In January 2012, the GVH conditionally cleared Magyar RTL Televízió Zrt.'s (M-RTL) acquisition of IKO Television Kft. (IKOT).

The acquirer, M-RTL, is part of the RTL Group Central and Eastern Europe GmbH (RTL CEE), which is an international telecommunication group engaged in operating RTL channels. M-RTL owns the broadcasting and advertising rights of the RTL Klub channel, which is the leading commercial channel in Hungary providing free access to all consumers in Hungary. IKOT is the owner of the broadcasting and advertising rights of the Cool, Sorozat+, Prizma, Muzsika, Reflektor, Film+ and Film+2 channels, which are thematic TV channels with payed content broadcasted in Hungary.

The concentration concerned the market for television broadcasting and the market for advertising in Hungary. The GVH established that the RTL Klub channel of M-RTL and the TV channels of IKOT did not substitute each other on the broadcasting or the advertising market, and that the undertakings' relationship was instead primarily of a supplementary nature. This resulted from the fact that the broadcasters needed the nationwide known channels (RTL Klub, TV2, Cool, Film+) in order to provide their subscribers with appealing programmes. Consequently, it was determined that the extremely popular channels with a huge audience base acted as substitutes to each other, while the less popular channels with a smaller audience base did not act as substitutes to the popular ones, due to their low popularity.

In its investigation the GVH aimed to clarify whether the conglomerate relationship between M-RTL's RTL Klub channel, which is a commercial channel with a nationwide audience and a significant role in advertising, and IKOT's seven thematically programmed channels would lead to conglomerate effects; namely, whether it would be possible to leverage the strong market power from one market to the other or to conclude restrictive practices (mainly by tying). In this case it would mean using the market power of the RTL Klub channel to influence the market power of the channels of IKOT.

The GVH used the following evidence during its assessment:

1. legal framework of the market, and the role of the national regulatory authority
2. the importance of the parties' TV channels for viewers and advertisers,
3. contractual limitations from the existing agreements,
4. an analysis of the market practices of advertisers
5. evolution of the market,
6. market entries,
7. market shares,
8. an analysis of M-RTL's discount policy (agency bonus, share deal)

The main competition concerns that arose regarding broadcasting were (i) the cross-promotion of the RTL Klub channel and the acquired channels, (ii) the transmission of the obligatory programmes to channels with small audiences, (ii) the incentive to sell channels by tying them to each other. Based the information gathered during the proceeding, and GVH established that it was likely that after the transaction the merged entity would be able to foreclose its rivals..

As regards to the market of advertising, the GVH could not exclude the possibility of the occurrence of harmful effects. The reason for this was that as result of the concentration the merged entity owned two types of television channels: one which had significant advertising positions on the market; and the others which were in a supplementary relationship towards each other. Therefore post-merger the merged entity would have the ability to satisfy the requests of advertisers/agencies by alone. A similar mix of television channels would have been very difficult to create and may have only been possible with the joint intention and participation of all the other competitors, with the result that the remaining offers in the market would have been less preferred alternatives from the advertisers' view.

According to the GVH all of the above mentioned facts could have resulted in the strengthening of the advertising potential of the RTL Klub channel and the channels of IKOT, which could not be balanced by actual or potential competitors, or by buyer power. Therefore, the significant impediment of effective competition could not be excluded. M-RTL offered remedies to address the identified competition concerns. The commitments were the following:

1. M-RTL was obliged to make it possible for advertisers/agencies to independently purchase the commercial time slots associated with the RTL Klub channel and the channels of IKOT for a period of two years after the conclusion of the merger (regarding the agreements to be performed by 13 December 2013). The form of the purchasing had to comply with the requirement that prices and conditions could only differ from the prices and conditions of tied purchasing in a way that was reasonable, fair and without discrimination, especially in order to make it economically reasonable for advertisers/agencies to independently purchase the commercial time slots either on their own or together with other channels outside of M-RTL.
2. M-RTL was obliged to inform advertisers/agencies about the applicable prices and other conditions within the framework of its general terms and conditions and also had to justify the specified prices and conditions to the GVH.