

Kluwer Competition Law Blog

Merger remedies – Hopes for a new approach

Robert Gago (Hogan Lovells) · Monday, November 10th, 2014

The recent practice of the President of the Office of Competition and Consumer Protection (the “OCCP”) shows that conditional clearance decisions are becoming more common. In 2014, the OCCP issued four conditional merger decisions, which is more than the total number of conditional decisions issued in 2012 and 2013.

In this post we will discuss the conditions imposed on companies in 2013 and 2014 by the OCCP, as well as referring to the procedure of imposing the conditions and the execution of said conditions by companies, taking into account the current regulations and the new provisions coming into force on 18 January 2015.

Preferred structural remedies

If a notified merger would lead to a significant restriction of effective competition, the OCCP could issue a clearance, subject to the conditions. Such conditions should be designed to remedy the above mentioned negative effect on the competition in the market. These conditions (remedies) may be undertakings offered by the parties, or specific conditions determined by the OCCP. The conditions could, for example, include the obligation to sell assets, to divest control of certain undertakings, or to grant exclusive licence rights to a competitor. The conditions could also require that the undertaking submits reports on whether said conditions have been met.

The Polish Competition Act does not specify an exhaustive list of conditions. However, two examples of divestment conditions provided by the Polish Competition Act, i.e. the sale of assets, and the disposing of control over another company are, in practice, those applied most often. In our opinion this can result from the fact that structural conditions are quite easily monitored by the OCCP. These conditions are also easier to formulate and their effects on the market are more predictable than in the case of behavioural conditions.

In the Auchan/Real case (dated January 21, 2014, DKK-4/2014), the OCCP obliged Auchan to sell eight Real hypermarkets located in local markets where the transaction caused competition concerns. In this case, similarly as in other cases, the party was obliged to find an investor who could guarantee the continuation of the operation of the sold supermarkets. The investor should first be accepted by the OCCP. Such an additional obligation has become common OCCP practice. It mitigates the risk of the acquirer discontinuing the business operations of assets bought as elements of a divesture package.

In some cases, the OCCP imposes additional, guaranteeing conditions the aim of which is to

protect the competition during the interim period until the main divestment condition has been satisfied. In the Henkel case (dated February 6, 2014, DKK – 11/2014), competition concerns arose in relation to such washing powders as “Rex”, a brand owned by Henkel, and “E” and “IXI”, which were close substitutes. The OCCP obliged Henkel to sell the already owned IP rights to REX products in Poland and to grant an exclusive, irrevocable licence for the use of the packaging for Rex products for five years. Henkel has 12 months in order to find a reliable purchaser. During this period, in order to prevent a significant decrease of the recognisability and availability of “Rex” products, the producer should maintain the sale of Rex products at an 80% level in terms of both value and volume, as well as a level of expenses for marketing expansion no lower than in 2013. Similarly, in the decision for the ACP Pharma/Neuca case (decision DKK-40/2014, dated March 31, 2014) regarding the transaction in the Polish market for the wholesale distribution of pharmaceuticals, the buyer has undertaken to dispose all its rights to a single wholesale outlet. The OCCP obliged ACP Pharma not to make organizational, personnel or financial changes in this outlet, nor to refrain from any activities to ‘poach’ the customers of this outlet within the first year since performing the concentration, as well as to maintain the specified level of sales made through the outlet. The last condition seems to be controversial since the OCCP assumed that the notifying company would be able to predict and control the demand for the products offered by the given wholesale outlet. On most of the markets such an assumption would be unrealistic.

New types of conditions

The OCCP applied new types of conditions in the Gaspol/Orlen Gaz (dated May 20, 2013, DKK-63/2013) decision, and in the recent KDWT/Kolporter (DKK 121/2014) case.

The first transaction was related to the acquisition of the liquid petroleum gas (LPG) infrastructure assets of Orlen Gaz in the local markets in Poland. Due to the risk of the distortion of competition as a result of the concentration, the OCCP imposed the condition to remove the contractual non-compete obligation and other contractual obligations restricting competition between the parties. Most importantly, the OCCP obliged the notifying party to exclude part of the assets being subject to concentration. Furthermore, Gaspol was undertaken to refrain from any activities that could result in the acquisition of Orlen Gaz’s customers in the affected markets. Part of the imposed conditions should be implemented before the completion of the concentration.

In the most recent case, KDWT/Kolporter (dated September 18, 2014, DKK-121/2014), concerning the Polish market for tobacco products, the OCCP approved the transaction on the condition that the party to the proceeding undertook to exclude from the transaction wholesale outlets located in the market where the transaction could cause competition concerns. The condition does not oblige the buyer to sell newly acquired assets, but instead requires a modification of the transaction.

The OCCP argued that in many cases the typical structural conditions (i.e. the sale of a business to an independent investor who guarantees the continuation of the operation of the business) might be insufficient for the competition. As an example, the authority referred to the Eurocash decision dated October 27, 2011 where such typical, structural conditions were imposed. The OCCP pointed out that after almost three years since the decision only four out of 12 Eurocash wholesale outlets being subject to the conditions set out in the decision were operating. Thus, in the long term, the remedies imposed by the OCCP turned out to be inefficient in terms of the competition. It was indicated that as a result of exclusion of one of the outlets from the transaction, the problems of finding a proper buyer were eliminated. In our opinion, this condition should not be seen as a

condition imposed on the seller to constantly operate the outlet since the seller is not a party to the proceeding. These kinds of conditions might be an indicator of the OCCP's new approach in accordance with the "fix-it-first" rule, and are seen as a significant novelty in the Polish competition authority's practice. "Fix-it-first" remedies, which are to be implemented before a merger is carried out, actually eliminate the competition's concern at the stage of the merger proceedings.

Proposal of the conditions

Under Polish law it might be the OCCP, or the company itself, who offer the conditions. However, the recent decisional practice shows that remedies are usually offered by the authority. In recent cases only Henkel proposed a remedy. However, even in the situation where the OCCP proposes the conditions, they cannot be imposed without the consent of the company. The reasons for the low activity of the companies during the entire process are complex. To a great extent it can be attributed to the practice of the OCCP not inviting parties to open negotiations, but rather imposing its own standpoint. The companies are also not eager to present proposal of remedies since they are usually not informed early enough that the OCCP is aware of competition concerns. As yet, the OCCP has not recognized the need to implement a pre-notification phase as a rule, and specifically, in more complex transactions. In most of the cases the notifying party learns about the negative approach of the authority to a concentration at a very late stage in the proceedings. In recent cases, companies were informed of the OCCP's objections on an average of more than six and a half months after the institution of merger proceedings and one and a half to two and a half months before the conditional merger clearance was issued.

Implementation of the remedies

The time-frame to implement the conditions differs from 12 months (Henkel) to 18 months (Real/Auchan). In the OCCP's view, such a time-frame enables the company to find a reliable purchaser for those assets subject to divestiture. The OCCP, in the Henkel case, when refusing to grant an 18 month deadline to perform the conditions, pointed out that in the case of structural remedies the concentration should be restricted until the condition has been performed. Thus, a deadline to perform the conditions should not be too excessive.

The practice shows that it can be problematic for a company to meet the deadline. This is due to the fact that the information on the deadline is currently publicly available, and this has the effect of weakening the seller's negotiating position. In the Carrefour case, the company missed the deadline for implementing the remedies regarding two outlets by 22, and 26 days. The OCCP imposed a fine on the company in the amount of EUR 5,000 for each day of delay (i.e. approximately EUR 130,000). In the authority's view, the cessation of business activity in these outlets did not substitute for the obligation to sell them. The company argued that its negotiation position was weakened due to the fact that the other party to the negotiation knew that Carrefour had no choice.

Furthermore, companies need to face the OCCP's strict approach concerning the acceptance of potential third party purchaser. The criteria applied by the authority encompasses, most of all, the ability to continue the business, however, in practice, some proposals are dismissed by the authority. As has already been noted, such concerns are removed in cases of upfront modifications of a transaction.

Conditional merger clearance under amendments to the Competition Act

A recent amendment to the Competition Act, entering in force on January 18, 2015, introduces changes that will facilitate merger proceedings, including the issuance of a conditional merger clearance. The merger procedure will comprise of two stages. Transactions that do not raise significant competition issues will be reviewed in stage I, within one month. More complex transactions will be reviewed in stage II within an additional four month period. It is assumed that cases of such character are those which can be completed with conditional merger clearance.

The company will receive a preliminary statement from the OCCP as to any competition concerns along with the competitive assessment of the transaction. This will enable companies to offer modifications to a proposed transaction at an earlier stage of the proceedings and take time to prepare such conditions that are more suitable for them from a business perspective.

Furthermore, at a company's request, the deadline for achieving divestments constituting part of any remedy package must now be kept confidential. This provision addresses the concerns mentioned above that the disclosure of the deadline for divestments could potentially weaken the seller's negotiating position. During the consultations for the amendments to the Competition Act, the business representation society also raised the arguments that, not only should the divestment deadline be kept confidential, but the entire condition itself. However, they were disregarded and this proposition was not included in the amended Act.

Comments

The growing number of conditional decisions might be an indicator of the OCCP's more flexible approach to transactions that cause competition concerns. It seems that we can expect further developments in the field of conditional decisions due to the changes in competition law and the OCCP's currently declared more open approach to negotiations of different types of remedies. We also hope that the planned introduction of pre-notification contacts with the OCCP will bring a significant change since this would allow competition concerns to be identified at a very early stage so the parties can be much better prepared to propose creative solutions.

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