The Hungarian Competition Office clears the acquisition of the prospective owner and operator of the gas interconnector between Slovakia and Hungary by two state owned companies

The Hungarian Competition Office (HCO) has approved the acquisition of joint control by Magyar Villamos Művek Zrt. and MFB Invest Befektetési és Vagyonkezelő Zrt. over Magyar Gáz Tranzit Zrt. (MGT), the prospective owner and operator of the gas interconnector between Slovakia and Hungary. As part of the investigation, the HCO examined whether the acquirers belong to separate control centres, despite the fact that both companies are controlled by the state.

The Hungarian Competition Office ("**HCO**") has approved the acquisition of joint control by Magyar Villamos Művek Zrt. ("**MVM**"), MFB Invest Befektetési és Vagyonkezelő Zrt. ("**MFB Invest**") over Magyar Gáz Tranzit Zrt. ("**MGT**"), the prospective owner and operator of the gas interconnector between Slovakia and Hungary.

MGT will develop and operate for 25 years the planned two-way high pressure (75 bar) gas pipeline that should cover a length of approximately 115 kilometres (out of which 94 km is in the territory of Hungary and 21 km in the territory of the Slovak Republic) and will have an annual transmission capacity of 5 billion cubic meters in cooperation with Slovak Eustream a.s.

The planned start of operation is on 1 January 2015. Before the transaction, MGT was solely controlled by MVM, having a share of 99.8865%. The Municipality of Hévíz possessed 0.1135% of the shares. According to the syndicate agreement established between MVM and MFB Invest, MFB Invest purchased 50% of the shares, including the shares of the Municipality of Hévíz. MGT's prospective market share will be around 10-15% after it enters to the market of import-purpose natural gas pipelines in January 2015, beside the MOL Group (via FGSZ Földgázszállító Zrt.), the only undertaking currently active on the Hungarian market. The importance of the interconnector lies in the fact that it allows to diversify the Hungarian natural gas import and reduce both countries' dependence on Russian gas supplies.

The HCO examined the rights of MGT's general assembly and it found that all the relevant decisions are within the competence of this body (e.g. (i) amendment of the bylaws or the nominal capital; (ii) approval and change of company strategy; (iii) election and/or removal the members of the board of directors; (iv) business strategy; and (v) major financial decisions). It noted that MGT already has the licence to deliver natural gas and operate the pipeline but it cannot be considered as an active market player as it does not have any pipeline yet.

Controlling entity by state-owned companies

The majority shareholder of MVM is the Hungarian State (with 99.98 % of the shares). All ownership rights and obligations of the Hungarian State over the enterprise are exercised by the National Development Minister (the "Minister") responsible for the supervision of state assets, who carries out this duty through the Hungarian National Asset Manager Zrt. ("**HNA**"). HNA is a private limited company owned by the Hungarian State. Its bylaws are accepted or amended by the Minister, who appoints and removes the members of the board. HNA's board is bound by the decisions of the Minister exercising the shareholder's rights.

MFB Invest is a wholly-owned subsidiary of Magyar Fejlesztési Bank Zrt. ("MFB"), a state owned financial institution controlled also by the Minister. Although the shareholders rights are exercised by the Minister on behalf of the Hungarian State, the bylaws of MFB expressly stipulate that the Minister is not entitled to make decisions concerning the business plan or other decisions that are within the competence of the board. Hence, the controlling rights of the Minister are limited as the decisions about the business plan are taken exclusively by the board.

Regarding the controlling entity by state-owned companies, the HCO referred to its decision Nr. Vj17/201. issued on 21 March [http://www.concurrences.com/anglais/bulletin/news-issues/march-2012/the-hungarian-competition-office-45894?onglet=1&lang=en].

Pursuant to the Hungarian Competition Act, enterprises belonging to the same group of undertakings, in a management relationship with each other are deemed not to be independent. However, enterprises that are majority owned by the state or local government with independent decision-making power over the determination of their market practices are deemed to be independent. When calculating the net revenue of an enterprise that is majority owned by the state or local government, the revenues of the enterprise itself shall only be taken into account if it has independent decision-making power to determine its market practices.

Independent decision-making power to determine market behaviour is not a term related to certain behaviour, but a permanent condition pursuant to which the state does not exercise control based on its majority ownership. According to the HCO, independent decision-making power shall be judged on a case by case basis. The decisions to be assessed in this regard can be categorised as follows: (i) decisions related to the mode of operation, basic policies, liquidation, and disposal of the enterprise; (ii) strategic decisions related to the business policies of the enterprise (business plan); (iii) decisions related to the daily operations of the enterprise.

Regarding the independence of the enterprise from a competition law point of view, only those decisions that are specifically and directly related to business strategy and the competitive practices of the enterprise concerned are relevant. As regards competition law, it does not constitute a lack of decision-making power if the party exercising state ownership rights retains for that party the decisions that are relevant from a company law point of view.

A “business unit” can be interpreted within the framework of the definition of group of undertakings under the Hungarian Competition Act. Enterprises that are majority owned by the state constitute a group of undertakings pursuant to the Hungarian Competition Act. However, enterprises (groups of undertakings) within that group, with independent decision-making power, are separate and constitute so-called business units. The state has the right to delegate the exercise of its ownership rights to several control centres. In the case of a delegation of rights, the enterprises belonging to different decision centres, irrespective of their decision-making powers, do not belong to the same business unit.

With regard to the above, the HCO examined whether MFB Invest and MVM belong to separate control centres, despite the fact that both companies are controlled by the Minister (MFB Invest through MFB, MVM through HNA). As MFB Invest is controlled by MFB, it should be examined in practice whether MFB constitutes an independent control centre. The Minister’s control powers are restricted in the case of MFB: to the approval of business plans (being the main independent decision-making power), which falls within the scope of authority of MFB and this is not permitted not be taken over by the Minister. In this regard, the acting competition council holds the view that MFB constitutes a separate control centre and is independent from MVM.

Effect on competition

The MFB group provides essentially investment banking and insurance services and manages state-owned properties and undertakings.

MVM and the enterprises under its control (the "**MVM Group**") are active in the electric power and gas industry. The activities of MVM Group include electricity generation, transmission, electricity and natural gas trading, i.e. the MVM Group can be regarded as a vertically integrated group of undertakings rendering other services related to the electricity market. MVM is also present on the natural gas wholesale and retail market, but its market share is below 5% on both. MVM's activities are indirectly connected vertically to MGT's profile as its power plants are natural gas-fired. Its market share on the market of electricity generation is about 30-40% but only 0-5% on the market of natural gas based production. The MVM group also provides balancing services, where its market share is above 50% based on the quantity, and 30-40% based on revenues.

In the case of the present concentration, only the services of the MVM group may be in vertical relationship with MGT's activities. MVM Group's share in the Hungarian market of these services does not exceed the benchmark (25%), above which the vertical effects giving rise to competition concerns may arise.

The HCO noted that if the founders are present in other identical markets, then their inevitable cooperation within the framework of the joint venture could entail the risk of market restricting coordination in the other markets in which they are present. As there is no overlap between the activities of MGT, MFB or the MVM Group, the HCO did not identify any horizontal, coordinated or portfolio effects during the investigation. It did not find it necessary to examine the potential conglomerate effects as MGT does not provide any services currently, and its prospective market share will not reach the threshold (30%) above which the conglomerate effects giving rise to competition concerns may arise.

Source: *Zsuzsanna Németh*, The Hungarian Competition Office clears the acquisition of the prospective owner and operator of the gas interconnector between Slovakia and Hungary by two state owned companies (Magyar Villamos Művek/MFB Invest Befektetési és Vagyonkezelő/Magyar Gáz Tranzit), 21 March 2012, e-Competitions, N°49212, www.concurrences.com

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