

Hungarian Competition Authority revokes its decision clearing Digi's acquisition of Invitel and imposes a significant fine

The Hungarian Competition Authority (HCA) cleared the acquisition of sole control over Invitel Távközlési Zrt ("Invitel") by Digi Távközlési és Szolgáltató Kft ("DIGI") conditionally - with commitments - in May 2018. A few months later, it established that DIGI had intentionally misled HCA officials and therefore revoked the decision and imposed a fine on DIGI of HUF 90 million (approx. EUR 280,000). It then reopened the proceeding to assess the relevant markets affected by the misleading information. Revoking a merger clearance decision is not without precedent in the HCA's recent practice, as the HCA has invoked three clearance decisions in the last two years. What is new, however, is that the HCA granted a derogation from the suspension clause to prevent negative market consequences from interfering with the already closed transaction. The HCA also resorted to a dawn raid during the original proceeding, which is a new instrument in merger control cases.

Original clearance decision containing commitments

In the original proceeding, DIGI undertook, among others, to sell the Invitel cable network to a designated buyer, and that its cable television services subsidiary (i-TV) will not renew its rental contracts with the local owners of the cable networks and will not offer its contractual partners to conclude a contract with the Invitel network in those areas where the services of i-TV and Invitel overlap. The HCA has granted DIGI six months to undertake the commitments.

Review proceeding ending in revocation of the clearance decision

The HCA received market indications suggesting that the commitments undertaken by DIGI did not cover all the municipalities where i-TV and Invitel were both present. The HCA initiated a competition supervisory proceeding to investigate the matter and found that the original decision – and therefore the commitments – covered only 23 overlapping areas, and established that there were in fact 89 overlaps, i.e. DIGI misled the HCA by not signalling that the proposed commitments do not cover the entire overlapping area. The HCA stated that the list of overlapping areas based on which the overlaps between the parties' activities could be ascertained is a significant fact, which also forms part of the mandatory content of the filing form. In fact, DIGI did not provide a full list of the overlapping areas, only a link to the specific place on DIGI's website. The HCA based the list of areas in the commitment on a document obtained from DIGI during a dawn raid (which has only recently been allowed in merger control investigations) and did not realise that it was not a full list. The HCA classified this as an unlawful omission of a significant fact, which is a condition for revoking a decision.

DIGI argued that it did not intentionally mislead the HCA and that it believed the HCA wanted to limit the scope of commitments with respect to the overlapping areas. During the review proceeding, it asked the HCA to amend the decision (including the commitments) instead of revoking it, to prevent several negative consequences, including insecurity in the market by customers. The HCA rejected DIGI's arguments and revoked its clearance decision, imposing a fine on the company of HUF 90 million (EUR 280,000, less than 10 % of the turnover realised in the non-reported areas by i-TV and less than around 2 % of DIGI's turnover in the previous year).

The legal consequences of revoking the decision

Revoking the decision meant that both the clearance decision and the commitments ceased (became null and void), i.e. the transaction had to be assessed and ruled on again by the HCA. DIGI had already closed and implemented the transaction, and therefore was in breach of the suspension obligation. Since the acquisition of control was

unlawful, the situation had to be resolved. The HCA accepted DIGI's request for non-separation and allowed it to continue the already initiated steps of the implementation of the concentration (e.g. the transfer and development of the networks and services, and Invitel's integration into DIGI) under the supervision of the trustee, until a new decision is adopted. It therefore granted a derogation from the suspension clause. The proceeding to reassess the merger is still ongoing.

This decision falls in line with other recent revoking decisions which highlight the HCA's scrutiny of data provided by the companies in merger control proceedings. Companies must be aware that the decrease of the deadline to rule on mergers (in simple cases eight days) places a bigger burden on them and requires more diligence on their part to provide correct and sufficient data for the merger assessment. If the HCA receives information from any source on potentially incorrect or omitted information which it deems significant (especially information which affects (potential) horizontal overlaps and thereby the market shares and potential market position of the parties), it will not hesitate to apply the most severe consequence of revoking the decision and imposing a fine. Pre-notification talks before a merger control with the HCA are useful to discuss open issues or the scope of the required information, but are necessarily limited to the information provided by the parties and to a quick review of the provided information. They are not binding on the HCA, and therefore do not provide ultimate certainty about the outcome of the HCA's detailed assessment.