

PROCEDURAL FAIRNESS
HUNGARY
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7. *In most jurisdictions the competition agency decides whether a merger notification or compliance with a request for information is sufficient to permit applicable waiting periods to begin to run. What should be the standard for such a decision? Should it be subject to independent review, and if so, how can such a review be conducted in a timely fashion?*

For a contract resulting in the concentration of undertakings to come into effect, the authorization of the Competition Authority (GVH) shall be required. The carrying out of the deal is not prohibited during the review however it is the concerned parties responsibility if they proceed with the transaction.

Consequently there is no waiting period and the parties may complete the transaction. Based on the advice of their lawyers and on the legal practice of the Competition Council that is available for all parties they can consider the possible outcome of the proceedings. It is on the parties to decide the prompt implementation of the agreement with the risk of a possible prohibition or to wait until the decision of the Council undertaking the losses resulting from the delay. Such preliminary implementation often happens if an other authority has already approved the merger or if the part of the merger affecting the Hungarian market is insignificant related to the whole of the transaction.

In their notification the parties shall fill the application form. Incompletely filled forms often lead to delay in the proceedings as the investigator does not initiate the proceedings until the necessary basic information has not arrived. In theory the investigator has the possibility to start the proceedings before the fulfilment of the completion but in the absence of the most important documents and data it would not happen.

Supplemental requests for information can impose significant burdens on the merging parties (and on the competition agency). Virtually all competition agencies are willing to engage in negotiations with the parties to reduce burdens relating to a request. Should there be more formal procedures to which the parties can turn if they feel that a request is unduly burdensome? Should there be the possibility for "in-house" review, perhaps by an ombudsman within the agency? Is review by an independent authority either necessary or practical?

Parties to a merger should provide information at the initiation of the proceedings. Additional request for information might cover data considered unnecessary by the parties. However at the stage of the request it is not possible to decide which information would be useful and which would be useless. As the investigator is in the best position to decide the necessity of the information requested no formal proceedings are established for the overruling of its decision.

The notification system of the GVH includes several possibilities to reduce the burden imposed on the undertakings.

- Decisions of other countries may be submitted in English if no authentic Hungarian translation is available.
- Business documents related to the information requested, their analysis, professional estimations related to the merger and other documents may be submitted in English or in the original language if no authentic Hungarian version is available.
- The Vice-President's Secretariat may be consulted on how to answer the questions of the application form. The consultation possibility aims at helping to resolve concrete interpretation problems related to the application form and the method of answering and to identify the relevant information. Consequently, the GVH will not assume the work and responsibility of answering, and cannot be consulted for this purpose.
- Currently there is no possibility to submit the application form and the documents containing information requested therein solely in electronic form. However in the case of a supplement to the application form, which exists only on an electronic data carrier (eg. CD-Rom) and cannot be reproduced in a traditional form (eg. cannot be printed out) it is possible to submit the document solely in electronic form.
- The parties are also asked to present their view on the effects of the merger on the market and on the advantages deriving from the concentration. The parties may also submit commitments to remedy the negative effects the agreement would have on competition as identified in their notification.

Ensuring the possibility to appeal a request for information at an independent authority would not be practical. Firstly it would further prolong the proceedings. Secondly this is typically a question that the parties and the authority should and could discuss in the case of disagreement.

In most jurisdictions, less than 10% of all notified mergers proceed to a second phase, suggesting that competition agencies are generally conservative in making such a decision.

Still, given the burdens that second phase procedures can impose on the parties, to what extent should they have input on that decision by the agency before it is made?

There are no 'real' two-phase proceedings in the Hungarian Competition Law but the investigator of the case may prolong the proceedings from 45 to 120 days. The proceedings ends in 45 days only if the authorisation may clearly not be refused (or if the agreement is not covered by the merger rules for other reasons). The application of the longer proceedings in some cases may result in request for further information, but it is not necessary. In some cases the cause for the prolongation of the proceedings is that the parties have not provided the necessary information. Therefore the parties have influence on the proceedings through the level of their co-operation.

Procedural fairness at the decisionmaking stage in the agency

8. *It is generally agreed that if the competition agency is considering blocking the merger or asking a court to block it the merging parties should be informed of this fact and invited to provide facts and arguments as to why the agency should not do so. In order to respond properly, the parties must have some knowledge of the agency's concerns. How should the agency inform the parties of its concerns, and at what level of detail?*

If the investigator proposes the prohibition of the deal and the Competition Council, based on the report, also finds it likely the parties receive a notice on it, including a reasoning of the planned decision as detailed as the final decision would be. This ensures the parties the possibility to submit their opinion on the concerns of the GVH.

To what extent should the merging parties have access to the investigative file or to the evidence against it in the agency's possession? How can the rights of third parties to the confidentiality of the information that they provide to the agency be protected? How should the proceedings in which the parties participate be structured? Should they be formal, in which both sides present evidence? Should such procedures differ according to whether the initial, enforceable decision is made by the agency or by an independent body? If the initial decision is made at the agency or an affiliated commission, should there be any structural separation between those parts of the agency/commission responsible for conducting the investigation and preparing recommendations and those parts responsible for the decision? If so, what should it be?

Rights of appeal

9. *Is a right of appeal from an adverse decision by a competition agency/commission a fundamental procedural safeguard in the merger context? Are there circumstances in which it is not necessary?*

Assuming that timeliness is an indispensable element of a fair and effective appeals process in the merger context, is it possible to articulate what the maximum time for resolving appeals should be? What types of procedures can help to ensure a speedy process? What of appeals from a lower to a higher court?

Decisions of the Competition Council of the GVH can be appealed at the court. This right is considered fundamental and although in some cases it might be unnecessary (cleared acquisitions are rarely appealed) it should be ensured in all cases. Proceedings of the courts in Hungary are not restricted by deadlines and therefore the revision of a decision refusing to clear a merger could take a long time.