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Disentangling Consummated Mergers – Experiences and Challenges – Note by Hungary

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1. Background

1. The Hungarian Competition Authority (GVH) intends to prevent competition problems and unwanted structures of competition primarily by a pre-merger mandatory notification, however, in certain cases the GVH has the power to intervene on implemented mergers as well. It means that the Hungarian merger control regime is *ex-ante*, similarly to the regime of the European Union set up by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR). The basis of the effective legal regime is the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Competition Act). In order to provide explanations to the provisions of the Competition Act and to summarise the practice of the GVH, the President of the GVH and the Chair of the Competition Council of the GVH has delivered Notices, for instance regarding conditions and obligations, the requirements of initiating a proceeding and prenotification.

2. There are several reasons for why implemented mergers can be investigated. There have been many examples in the practice of the GVH for gun jumping cases. In most instances the parties themselves notified the already implemented merger, however, occasionally the GVH *ex officio* also noticed that a concentration was not notified prior implementation and therefore initiated a competition investigation. The GVH also has experience with cases where the decision had to be revoked because the parties provided misleading information during the proceeding.

3. The relevant case law outlines that in case of implemented mergers all information (both pre- and post-merger) available at the time of the decision must be considered, unless there is doubt that the data from the time period of implementation is distorted purposefully by the parties to hide competition concerns.

2. Legal framework for the review of implemented mergers

2.1. Mandatory and voluntary notification

4. In the Hungarian merger control regime, mandatory and voluntary notification is differentiated.

5. When the parties have a joint net turnover of 15 billion HUF (approximately 40.5 million EUR)¹ and at least one of the group of undertakings have a net turnover of 1 billion HUF (2.7 million EUR), the parties are obliged to notify the transaction (mandatory notification thresholds).²

6. If the parties' turnovers do not fulfil the criteria of mandatory notification thresholds, but their joint turnover is above 5 billion HUF (13.5 million EUR) (voluntary notification threshold), the parties have to notify the merger if it is not obvious that the

¹ Calculating everywhere with 370 HUF/EUR rates

² Competition Act Article 24. (1). An exception is, for instance, if the Government declares a concentration of undertakings to be of strategic importance at the national level, because such concentrations shall not be subject to an obligation of notification. (Competition Act Article 24/A.)

transaction would not significantly reduce effective competition in the market concerned, in particular as a result of the creating or strengthening a dominant position.³

7. The main motivation of introducing a voluntary notification regime was to allow the GVH to scrutinise also smaller markets and companies with high potential but lower revenues, for instance companies in digital markets or start-ups. In this regime not only a quality test was introduced, but also a threshold to ensure legal predictability.

8. The legal assessment of an implemented merger depends on whether the transaction fulfils the criteria of mandatory or voluntary notification. If the parties' turnovers fulfil the criteria of mandatory notification, the concentration cannot be concluded until a final clearance decision is delivered, otherwise it constitutes gun jumping. By contrast, in case of voluntary notification, the parties may decide to conclude the transaction without prior notification, therefore the implemented concentration is not considered to be gun jumping.⁴ Although the GVH possesses the necessary tools, it has never intervened in an implemented merger so far to restore the original competition situation.

9. The time limit for initiating investigation of the implemented merger is different in case of mandatory and voluntary notification. In case of mandatory notification, the GVH may initiate an investigation within 5 years of implementation, while in case of voluntary notification, an investigation can only be initiated within 6 months of the completion.⁵

10. The GVH applies the same principles to initiate an investigation in case of mandatory and voluntary notification. Both in case of mandatory and voluntary notification, an in-depth investigation shall be initiated if it is not obvious that the concentration would not result in a significant reduction of competition in the relevant market.⁶ The 7/2017. Notice of the President of the GVH and the Chair of the Competition Council regarding the obligation of notification of concentrations, initiation of competition control proceedings and the interpretation of the term "not obvious" in the initiation of Phase II proceedings clearly outlines at which market shares or increase in size the concentration obviously does not reduce effective competition.

2.2. Informing on concentration

11. One of the latest modifications of the Competition Act⁷ introduced another case where the term not obvious has great relevance.

12. In transactions where a state-controlled monetary fund gains joint control through a state aid declared to be compatible with the internal market over a company having less than 1 billion HUF (2.7 million EUR) turnover, the parties are not obliged to notify the transaction, but they are required to inform the GVH about it within 30 days from implementation. The GVH can decide to examine the merger within 6 months of the completion.⁸

³ Competition Act Article 24. (4)

⁴ Competition Act Article 24. (1), Article 29.

⁵ Competition Act Article 68. (1) c)

⁶ Competition Act Article 67. (4)-(5). In case of mandatory notification, a procedure shall also be initiated if not enough information was provided in the notification form to judge the effects of the concentration or the position statement of the Media Council as special authority must be obtained.

⁷ In effect since 30.09.2021.

⁸ Competition Act Article 25/B., Article 68. (1) ca)

2.3. Gun jumping

13. The Competition Act allows the investigation of “gun jumping” cases only in cases where the mandatory thresholds are met. This covers transactions, on the one hand, which should have been notified, but the parties failed to do so, and on the other hand, in which parties fail to observe waiting period requirements, namely, they notify the transaction but conclude it without waiting for the final decision. There is no clear distinction in the Competition Act between these two situations, because the concentration can be notified anytime until its implementation. Additionally, “gun jumping” occurs also if a decision is withdrawn, but by that time the merger was implemented.⁹ In these cases the GVH may initiate a procedure within 5 years of the implementation of merger to investigate the consequences of implementation.¹⁰

14. In the past few years, no detrimental competition effects were identified in gun jumping cases, therefore the GVH usually merely found that the infringement has been committed and imposed fines.¹¹ Under exceptional circumstances the GVH may grant immunity from fines. Such exceptional circumstances were, for instance, when the parties did not intervene in the market activity of the consumed entity during the gun jumping period, notified the gun jumping case, acknowledged the infringement, and the concentration did not significantly reduce competition.¹²

2.4. Withdrawal of a decision

15. Once a merger is cleared, the decision can only be withdrawn in situations which are explicitly listed in the Competition Act. It serves legal certainty that decisions cannot be revoked for any reason and decisions examined by court usually cannot be recalled. As a general rule, a new procedure to reinvestigate the concentration can only be initiated within 5 years from the implementation of the concentration, regardless of when the decision was revoked.¹³

16. A decision can be withdrawn, and the transaction can be investigated once again, either, if no Phase I or Phase II investigation was initiated due to misleading information in the notification, or, if a decision prescribing conditions, obligations, or accepting commitments was made based on misleading information.¹⁴ In the past few years, there were some occasions, when the decision had to be revoked, as shown in Chapter 3.

2.5. Remedies

17. To avoid the prohibition of the concentration, the GVH may impose conditions – in particular the alienation of certain parts of an undertaking or particular assets, or the termination of control over an indirect participant – to avoid significant reduction of

⁹ This was the situation in the below mentioned VJ/43/2017. Digi/Invitel case, where the original decision had to be revoked because of misleading information. Digi asked for exemption from the prohibition of implementation of the concentration even before the repeated investigation started.

¹⁰ Competition Act Article 67. (3) and (6), Article 68. (1) cb)

¹¹ In cases VJ/44/2017., VJ/23/2018., VJ/5/2020., VJ/15/2020., VJ/3/2021., VJ/43/2020. See more on gun jumping cases in Hungary’s contribution to the OECD’s Gun jumping and suspensory effects of merger notification: [https://one.oecd.org/document/DAF/COMP/WD\(2018\)82/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)82/en/pdf)

¹² In cases VJ/5/2020. V-Híd and VJ/3/2021 AutoWallis/DZL

¹³ Competition Act Article 32. (2), Article 68. (1) c)-d).

¹⁴ Competition Act Article 32. (2), Article 67. (7)-(9), Article 76. (1) b), c), n).

competition or accept commitments relating to certain rules of conduct of the undertakings.¹⁵

18. When detrimental competition effects of an implemented concentration are identified, namely first, if the implemented concentration should have been prohibited if it was notified because it significantly reduces competition on the market affected, second, if the concentration was executed in spite of a prohibition decision, or third, if the parties fail to comply with the prescribed conditions and obligations or their commitments, the GVH may decide to prescribe the termination of the concentration, especially the divestiture or the alienation of the undertaking or a part of the undertaking, assets, interests or shares that were merged, or termination of the joint control. No case has emerged so far in which such an intervention would have been needed. Instead of prescribing termination, the GVH may also prescribe another appropriate obligation or order the parties to comply with the previously prescribed obligation. If the parties failed to comply with the prescribed conditions, obligations or their commitments, the GVH may also impose fines.¹⁶

19. When the GVH intends to prescribe conditions and obligations in an implemented merger, the GVH considers primarily the potential effects and the market situation at the end of the procedure, regardless of whether intervention would have been needed at the time of implementation. The main consideration behind this is that the goal of the merger investigation is not a posterior examination of a market behaviour. The aim is to examine what kind of potential effects can the implemented structural changes have on the future market courses. Therefore, it would be unreasonable to analyse potential future effects based on such market conditions which no longer exist.¹⁷ The Budapest-Capital Regional Court of Appeal (Fővárosi Ítéltábla) confirmed that the effects of a concentration must be analysed with respect to the facts existing at the time of the decision.¹⁸

20. The GVH *ex officio* investigates if conditions, obligations and commitments are fulfilled in a so called “*follow-up investigation*”.¹⁹ Such a procedure can be initiated within 5 years from the expiry of the time limit for performance or in case of continuous obligation, the last day of the duration of the obligation. The “*follow-up investigation*” is considered to be a separate investigation from the original merger investigation since 2014.²⁰

2.6. Other tools of intervention

21. The GVH may use interim measures prior the final resolution in case of noticing detrimental competition effects.

¹⁵ Competition Act Article 30. (3)

¹⁶ Competition Act Article 77. (6) a)-b), Article 31.

¹⁷ 8/2017. Notice of the President of the GVH and the Chair of the Competition Council on the conditions and obligations prescribed in non-prohibiting merger decisions, paragraph 19.

¹⁸ 3/2021. Notice of the President of the GVH and the Chair of the Council of the GVH on certain questions of the application of the law in connection with the investigation of concentrations, paragraph 208. and the Budapest-Capital Regional Court of Appeal’s decision No. 2.Kf:27.604/2011/7. in case VJ/158/2008.

¹⁹ See more on prescribing conditions, obligations and commitments in chapter 4 below.

²⁰ Competition Act Article 77. (1) a)-b), Article 77. (4), 8/2017. Notice of the President of the GVH and the Chair of the Competition Council regarding the conditions and obligations prescribed in non-prohibition merger decisions, paragraph 44.

22. If the GVH becomes aware of a presumably illegally conducted concentration, the GVH may by interim measures order control limitation provisions to reduce the harmful competition effects and to ensure the enforceability of the measures of the final resolution.²¹

23. If (upon the request of the undertakings) the GVH had granted its consent to the acquirer to exercise its right of control before a final decision was made, the GVH may use interim measures to withdraw its consent or to modify the control limitation provision ordered, if the concentration is likely to result in a significant lessening of competition.²²

24. Ultimately, if detrimental competition effects of an implemented concentration can be identified and it cannot be proven that it is a result of e.g. misleading information, the GVH may reach for the tools of the antitrust regime to resolve the competition problem. Finding an infringement, however, is not an automatism in such a case either. The competition situation needs to be examined with respect to the relevant legal institution's criteria. With other words, if abuse of dominance is investigated after an implemented merger, the GVH would have to examine on the one hand if the undertaking (or group of undertakings) has a dominant position, and on the other hand if their actions qualify as abuse. An important connection point between the two types of investigation is that GVH has the possibility to use in an antitrust case all the information and documents gathered in a merger case (and *vice versa*).

3. Decisions on implemented mergers

3.1. VJ/3/2019. Media Markt/Tesco Győr business

25. Media Markt is mainly active in consumer electronics retail. Tesco also deals with the retail of consumer electronics. Media Markt and Tesco had short-term lease agreements regarding the Tesco store in the city of Győr prior the long-term lease agreement, which constitutes the transaction in the present case. According to this agreement, Media Markt sells consumer electronics in Tesco in Győr city, in a so-called shop-in-shop construction.

26. The transaction did not satisfy the criteria of mandatory notification, but the parties decided to notify the transaction shortly after implementation because of the relatively high market shares in the local market of the city of Győr (voluntary notification).

27. In the final decision, it was stated that the GVH analysed the future effects of permanent structural changes and its decision is based on facts available at the time of the decision, which included data both prior and post transaction. If there are short-term relationships between the parties prior the permanent concentration, the data relating to the time period of short-term agreements can formally be regarded as a test period of a later formed, permanent concentration, except if it is revealed that the parties distorted the relevant facts with respect to a possible concentration investigation or if it can be proven that a permanent concentration would change on the merits of the market structure and the behaviour of the parties.

28. The concern about data distortion is not only relevant in connection with cases of voluntary notification, where the GVH may initiate investigation 6 months after implementation at the latest. It may also be a problem in gun jumping cases, especially when the parties intentionally did not notify the transaction, which should have been notified.

²¹ Competition Act Article 72/A. (1) b).

²² Competition Act Article 72/A. (1) c).

29. In the present case, the GVH analysed not only the market shares of the last full year (2015), when the parties did not have any short-term lease agreements, but also all the data available after this time (until 2019), because in the present case, no doubts were raised regarding the accuracy of data. The GVH considered the time period of short-term lease agreements as an adequate test phase of the permanent concentration to judge the effects of the concentration.

3.2. The Digi/Invitel cases

30. The Digi/Invitel cases affected the telecommunication sector. Digi provides television broadcasting, internet and telephone services for residential customers in a vast number of cities. Digi is also active in mobile telecommunication and mobile internet services, as well as content providing. Digi only provides a limited circle of wholesale telecommunication services. Invitel provides television broadcasting, content providing, internet and telephone services for residential customers. Invitel also provides wholesale telecommunication services on its networks. Digi became the sole owner of Invitel through the transaction.

31. In case VJ/43/2017. Digi/Invitel (the first investigation), the GVH intended to prescribe conditions and obligations in connection with every city, where the parties' activities overlapped. Although the parties recognised that the decision did not cover every overlapping city and they had several occasions to signal this, they withheld this information. For this reason, the decision was revoked, Digi was fined (approximately 243 000 EUR)²³ and a new decision was delivered²⁴ to handle the competition problem.

32. By the time the decision was withdrawn, the merger was implemented, which is regarded to be gun jumping. Digi asked for exemption from the prohibition of implementation of the concentration. The GVH granted the exemption and applied interim measures. The GVH applied control limitation provisions to secure the financial operability of certain communication networks.²⁵

33. In the new investigation,²⁶ the competition effects of the concentration were analysed with respect to all data available at the time of the new decision, including the affected group of undertakings' structures and activities. Both the original and the new procedure was cleared with accepting commitments by the parties. The two main elements of the commitments were similar in the original and the new case.

34. One of the main elements of the commitments was the divestiture of Invitel Network in the cities where the parties' activities overlapped. It was also important to include relating guarantee rules, for instance to secure that Digi cannot purchase back the divested entity within a short period of time, and Digi actively contributes to the divested entity to maintain its operability and competitiveness in the divestiture period.

35. The other main element of the commitment was the termination of certain lease and operation agreements in connection with television broadcasting services. In the new investigation, the GVH took into consideration the fact that the original deadline of the termination was proven to be too short. Therefore, in the new procedure the time frame was extended.

²³ Case VJ/31/2018.

²⁴ Case VJ/42/2018.

²⁵ Decision No. VJ/42-3/2018.

²⁶ Case VJ/42/2018.

36. The same person was ordered to be the trustee in the original and the new procedure. The trustee's role is and was fundamental in checking the fulfilment of the commitments. The trustee is obliged to prepare monthly reports in writing in connection with the fulfilment of the obligations. If the trustee notices circumstances, which threaten the viability of the divested entity, the trustee must immediately inform the obliged undertaking and the GVH.

3.3. VJ/33/2016. Diófa/Euro-Mall

37. Besides the DIGI/Invitel case, there was one additional case where the GVH revoked its decision after the merger was implemented. In case VJ/33/2016. Diófa/Euro-Mall the GVH revoked²⁷ the decision, because in another investigation Diófa provided different information on its related group of undertakings and acknowledged that the information originally provided in VJ/33/2016. was false. The GVH found that information on the related group of undertaking is essential to be able to identify which undertakings and activities must be evaluated during the assessment of competition effects.

38. The new investigation was initiated on the same day as the original decision was revoked, in order to avoid an exlex situation, where there is neither a final decision, nor an ongoing procedure. In the new investigation²⁸ it was found that the concentration has no horizontal, vertical or portfolio effects, therefore the GVH approved the concentration without any conditions or obligations.

4. Conclusion

39. A solid legal regime exists in Hungary to examine implemented mergers and the GVH has gained relevant practical experience especially in connection with gun jumping and withdrawal cases. Due to the absence of harmful competition effects, strong intervention has never been needed in implemented mergers. The Digi/Invitel cases are the only exceptions to this, however, these cases are special in the sense that the new investigation was mostly about actualising and strengthening the guarantees of the original decision and not about revealing and dealing with further competition problems.

40. The present case-law already outlines that one of the most important rules in connection with analysing the effects of implemented mergers is that all the relevant data available at the time of the decision shall be taken into consideration. This rule enables the GVH to investigate both pre- and post-merger data, but makes it clear, that the data on the actual effects of the transaction are of foremost importance. The data from the time period of implementation should be carefully checked for accuracy. If it is found that the data has been manipulated, it should be excluded from the assessment.

²⁷ Case VJ/14/2017.

²⁸ The revoked decision was VJ/33-14/2016., the new decision was VJ/33-24/2016.