

## Recent Competition Policy Developments in Hungary – Merger Control\*

by

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### I. Introduction

One of the most significant enforcement tasks of the Hungarian Competition Authority (hereafter, GVH) is the control of concentrations. Undertakings are

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legally obliged to receive clearance for their transactions from the competition authority if the notified operation meets the turnover thresholds<sup>1</sup> set out in the Hungarian Competition Act.

This article gives a short overview of the most significant procedural and case-law improvements that took place in the GVH's practice in 2012.

## **II. Procedural and structural reforms**

In 2012, the Hungarian Competition Authority undertook to reform its concentration control system. The aim of the reform was to speed up the review procedures, but at the same time, to preserve (and possibly improve) the quality of work conducted by the GVH in this area.

### **1. New notification form, new unit**

As of February 2012, a new notification form is in use that aims to reduce unnecessary administrative burdens placed on the parties, to shorten the review process and to strengthen transparency. The new form contains two main sections although its second part (Chapters VI–VII.) needs to be completed only if the concentration results in significant overlaps or relations (e.g. vertical or portfolio relations). However, the GVH is allowed to place a duty on the parties to complete Chapters VI-VII of the notification form even in other cases, if that seems to be necessary in order to conduct an in-depth analysis of the concentration.

The GVH facilitated also the formal introduction of pre-notification contacts between the parties and itself (such contacts were informally available already before the reform). Their aim is to increase the efficiency and productivity of the review procedures by providing the parties with the opportunity to consult the authority on various questions relating to the notification form before its actual submission. These types of meetings are completely informal and

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<sup>1</sup> In line with Article 24 (1) 'For a concentration of undertakings, the authorisation of the Hungarian Competition Authority shall be sought in cases where the aggregate net turnover of all the groups of undertakings concerned (Article 26(5)) and the undertakings jointly controlled by undertakings that are members of the groups of undertakings concerned and by other undertakings exceeded HUF fifteen billion in the preceding business year, and the net turnover of each of at least two of the groups of undertakings concerned in the preceding business year combined with the net turnover of the undertakings jointly controlled by undertakings members of the respective group of undertakings and other undertakings was more than HUF five hundred million'.

the GVH encourages parties to initiate them. They increase the chances of avoiding requests for additional information being issued at the beginning of the formal procedure, which can lengthen the overall review process.

In addition to the aforementioned measures, a new department was created in March 2012 within the structure of the Hungarian Competition Authority – the Merger Section – in order to deal with merger control cases as well as to facilitate the procedural reforms.

## 2. Simplified decisions

As the last step of the reform, the GVH introduced the use of simplified decisions that do not contain a reasoning or information on legal remedies. Simplified decisions are generally only one page long and contain a very limited amount of information: the names of the parties and the fact that the Competition Council authorised the operation. This particular reform was a consequence of the amendment of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services. According to a notice issued by the Hungarian Competition Authority on the simplified procedures, these types of decisions can only be issued if the authority fully accepts the notification and the case cannot be contested by any other party.

Previously, the GVH specified in Vj/24/2012 which facts can be regarded as circumstances that preclude the use of a simplified decision – the so called “negative list”. The negative list contains several restrictions in this context such as: a decision cannot be issued in a simplified way if the transaction has to be evaluated in Phase II; if it is questionable whether the transaction qualifies as a concentration; or where, due to other reasons, the publication of a reasoned decision serves a legitimate public interest (for instance, if the transaction concerns the Hungarian State). However, simplified decisions (in the sense of applying the amendments of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services) are not necessarily equivalent to Phase I decisions. Unlike the former, the latter must be properly reasoned if the transaction falls into the categories specified in the “negative list”. Simplified decisions can thus be regarded as a sub-category of Phase I decisions that can be only issued under certain, specified (and limited) circumstances.<sup>2</sup>

Currently, there are no publicly available statistics on the average length of Hungarian merger review procedures closed by simplified decisions.

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<sup>2</sup> 13 simplified decisions are available on the GVH’s website from 2012 cases: Vj/48/2012, Vj/61/2012, Vj/71/2012, Vj/76/2012, Vj/80/2012, Vj/81/2012, Vj/83/2012, Vj/85/2012, Vj/87/2012, Vj/96/2012, Vj/103/2012, Vj/107/2012, Vj/110/2012.

However, for notifications lodged after 1 December 2012, the fact and date of the notification, the participating undertakings and a short summary of the case made by the applicant(s) is published by the GVH on its website. This information is primarily meant to provide other market participants with the opportunity to comment on the transaction. Indicating the exact date of the notification (coupled with the fact that final decisions are also published on the official website) makes it possible to roughly calculate the length of the overall review procedures.<sup>3</sup> Experience for cases notified after 1 December 2012 show that the overall length of simplified-decision procedures is less than 30 days<sup>4</sup>. This is a significantly shorter time than the 45 calendar days specified by the Hungarian Competition Act as the deadline for Phase I cases.

### III. Cases conducted in the year 2012

35 merger decisions are available on the GVH's website dating from 2012, which is approximately one third of all the procedures closed by the GVH in 2012.<sup>5</sup>

#### 1. Retail markets

A large part of these cases concerned retail markets. According to GVH's press release, the authority received 13 notifications relating to retail markets between June 2012 and February 2013<sup>6</sup>. The high number of retail operations in particular resulted from the fact that the Delhaize group (operating the chains Match, Profi and Cora) left the Hungarian market. As a result, 57 Match and Profi stores were acquired by different groups of undertakings<sup>7</sup>.

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<sup>3</sup> Taking into consideration also the fact that the publication of the notification does not necessarily mean the completeness of the notification and therefore, time limits cannot be easily calculated from the date of notification (for instance issuing request for additional information stops the clock).

<sup>4</sup> See e.g. Vj/110/2012, which was notified on 21/12/2012, and closed with a simplified decision on 18/01/13 and Vj/11/2013, notified on 31/01/2013, and closed with a simplified decision on 22/02/13.

<sup>5</sup> At the closing date of this article (March 2013).

<sup>6</sup> These are the followings: Vj-13/2013; Vj-11/2013; Vj-8/2013; Vj-110/2012; Vj-106/2012; Vj-103/2012; Vj-100/2012; Vj-95/2012; Vj-92/2012; Vj-76/2012; Vj-59/2012; Vj-53/2012; Vj-10/2013.

<sup>7</sup> Delhaize group's market exit also concerned hypermarkets – Auchan acquired sole control over Magyar Hipermarket (which was operating 7 hypermarkets under the brand 'Cora' in

These transactions were motivated by Delhaize's market exit as well as by new Hungarian legal provision that restricts the establishment and extension of retail properties over 300m<sup>2</sup>. This amendment induced market participants to acquire already operating stores rather than building new ones.

### 1.1. Definition of 'parts' of undertakings

By conducting the aforementioned cases, the GVH has formulated a more sophisticated approach towards the definition of 'parts' of an undertaking. According to Article 23 (5) of the Hungarian Competition Act, 'the term "part of an undertaking" is to be understood as assets or rights, including the clientele of an undertaking, the acquisition of which, solely or together with assets and rights which are at the disposal of the acquiring undertaking, is sufficient for enabling market activities to be pursued.'

In some of the 2012 cases, such as Vj/92/2012 and Vj/95/2012, the fact was not questioned at all whether the tangible/intangible assets transferred constituted 'parts' of an undertaking. In both of these two cases, the buyer acquired sole control over the ownership rights to the vendor's real-estate (and other assets), combined with the transfer of the vendor's personnel. The Competition Council went even further in Vj/100/2012 by establishing that even the leasing of real-estate (combined with the acquisition of the vendor's assets and personnel) and the transfer of the ownership rights to a closed store (and related assets) constitutes 'parts' of an undertaking within the meaning of the Hungarian Competition Act.

This approach was generally confirmed in Vj/10/2013 where the GVH authorised the acquisition of control over three closed Bricostore stores by OBI. Importantly, the basis of this transaction was a lease contract and not a sale and purchase agreement. The Competition Council stressed here that the fact that Bricostore conducted DIY activities inside the investigated stores, which activity is pursued by OBI on a national level, meant that these stores carry goodwill, according to which OBI would be able to pursue the same activity previously conducted in those premises by Bricostore with the assistance of OBI's employees, know-how and its own clientele. The Competition Council also noted that the duration of the contract ensures that the acquisition of control will be upheld on a lasting basis. Having regard to all of these facts, the authority established that the leasing of the closed Bricostore stores complies with the definition of 'parts' of an undertaking within the meaning of Article 23(1)(a) and 23(5) of the Hungarian Competition Act. As the transaction did

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Hungary). The transaction was cleared by the European Commission (COMP/M. 6506 – GroupeAuchan/Magyar Hipermarket).

not raise competition concerns, the Competition Council ultimately cleared the operation.

## 1.2. Establishing relevant markets

The aforementioned retail cases have brought about some novel insights into relevant market definition. Case Vj/53/2012 deserves closer scrutiny in this context where the Pékó group acquired control over Integrál-M and Mába Invest (both operating on the wholesale market). The case took the form of a Phase II procedure due to the competition problems identified – the party's activities overlapped in five Hungarian settlements (Zalaegerszeg, Keszthely, Lenti, Nagyatád, Fonyód and in two subregions of Nagykanizsa and Letenye). Many questions have arisen in this case such as the possibility of substitution between different retail outlets (traditional shops, super- and hypermarkets) in the field of daily consumer goods<sup>8</sup>. The latter issue relates to the determination of the relevant geographic market. The Competition Council applied here a complex analytical method whereby the distance between the stores and the settlements concerned were taken into consideration while evaluating the notified operations' effect on competition. As a consequence, the authority focused on the location of the stores, the distance between them and the existence of nearby competitors.

## 1.3. Interdependent transactions

With respect to the aforementioned retail cases, that the Competition Council emphasised also that it is irrelevant how many transactions were actually concluded in order to implement a given concentration. If the same buyer acquires control over the target by way of multiple interdependent transactions that are not far apart in time (this means generally maximum 30 days)<sup>9</sup>, then these operations can be regarded as a single concentration. As a result, they do not have to be evaluated in several different procedures but can be unified into one assessment. This approach was confirmed and further developed in Vj/88/2012 where the applicants have concluded several

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<sup>8</sup> Relating to hypermarkets, the Competition Council established that they generally operate with lower prices and with a greater range of products on the one hand, but, on the other hand, they are situated in the outskirts and thus they cannot be regarded as a viable alternative for daily shopping for a significant part of consumers.

<sup>9</sup> See Vj/106/2012 at: <http://www.gvh.hu/domain2/files/modules/module25/230007E04CFE64D84.pdf>. The Competition Council noted here that the period between the first and the last step of the transaction cannot exceed 30 days; therefore, the 30 day-period complies with the requirement of “not far apart in time”.

contracts with different vendors in order to reach their real economic goal. The Competition Council stressed here that the use of a unified procedure is not precluded if a concentration is realised through many transactions with different vendors. The authority established overall that if the different transactions depend on each other (meaning that one transaction will not take place without the other), they could be unified into one review procedure, as one concentration.

## **2. Concentrations with the participation of the Hungarian State**

A significant part (approximately one fifth) of the notifications submitted to the GVH in 2012 related to the concentrations that concerned the Hungarian State<sup>10</sup>.

### **The notion of independent undertakings and decision-making centres**

The Vj/17/2012 case deserves utmost attention here whereby Magyar Posta (the Hungarian Post), Magyar Villamos Művek (Hungarian Electricity Ltd; hereafter, MVM) and MFB Invest (subsidiary of the Hungarian Development Bank; hereafter, MFB) notified their intention to create MPVI Mobil company. The motivation of the parties to create MPVI Mobil company was that they filed a joint auction package (as a consortium) to the frequency application issued by the National Media and Infocommunications Authority (hereafter, NMHH)<sup>11</sup>.

Article 23(1) (c) of the Hungarian Competition Act stresses that undertakings, which are jointly creating another undertaking, have to be independent from each other. The Competition Council closely evaluated in this case whether the notifying parties could in fact be regarded as independent from each other (if not, than their transaction does not constitute a concentration subject to pre-emptive merger control).

To do so, the Competition Council took into consideration that in line with Article 15(3) ‘undertakings under majority state or municipality ownership have to be regarded as independent undertakings if they are empowered with autonomous decision-making power in determining their market conduct’. If an undertaking requires the approval of the state/municipality in order to adopt its business plan, then it has to be regarded as not independent from the

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<sup>10</sup> See Vj/3/2012, Vj/17/2012, Vj/23/2012, Vj/51/2012, Vj/70/2012, Vj/109/2012 at the website of the GVH.

<sup>11</sup> See the website of the NMHH at: [http://english.nmhh.hu/cikk/150052/Decision\\_on\\_the\\_registration\\_of\\_applicants\\_for\\_the\\_auction\\_of\\_the\\_900\\_MHz\\_band](http://english.nmhh.hu/cikk/150052/Decision_on_the_registration_of_applicants_for_the_auction_of_the_900_MHz_band).

State. The Competition Council has also stressed that the State may endow the practicing of its ownership rights to decision-making centres. Undertakings controlled by different decision-making centres do not belong to the same group of undertaking in the sense of Article 15(2) of the Competition Act and thus they shall be regarded as independent.

Having regard to all the above-mentioned facts, the Competition Council established in this case that the controlling rights of the State (the Minister) are restricted because it does not control the formulation of MFB's business plan. As such MFB constitutes a different decision-making centre from Magyar Posta and MVM. As a consequence, the Competition Council concluded that the transaction qualifies as a concentration within the meaning of the Competition Act. The operation was ultimately cleared because it did not raise competition problems<sup>12</sup>.

This approach was later upheld by the Competition Council in Vj/23/2012 and Vj/51/2012. In the former case, the aforementioned companies MVM and MFB (party to Vj/17/2012) aimed to acquire joint control over Magyar Gáz Tranzit. The situation described in Vj/17/2012 has not changed as far as the decision-making centres is concerned (in the sense of Article 15(2) of the Competition Act). As a result, the Competition Council established that MVM and MFB are independent from each other and that their transaction is subject to approval. By contrast, the Competition Council pointed out in the Vj/51/2012 case that the buyer (Hungarian National Asset Management Inc – 'MNV', Tiszavíz Vízierőmű Energetikai Kft.) cannot be regarded as independent from the vendors (MALÉV)<sup>13</sup> and thus the transaction was not subject to pre-emptive control. There were also other transactions which were conducted with the participation of the State. These operations generally concerned public utilities such as sewage disposal and treatment (Vj/3/2012).

### 3. Repeated procedures

Merger decisions of the GVH are generally not challenged by the parties because their majority approves the notified transactions without imposing

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<sup>12</sup> The newly created (MPVI Mobil) company could have become the fourth significant market player on the market of mobile telecommunications services (next to Magyar Telekom, Telenor and Vodafone). However, it is interesting to note that the decision closing the frequency auction issued by the NMHH was repealed by the court, which means that despite the authorisation of the Transaction, currently there is no fourth market player on the market concerned.

<sup>13</sup> Since both vendors were 100% controlled by MALÉV (MALÉV Hungarian Airlines), the Competition Council evaluated whether MALÉV can be regarded as independent from MNV or not.

any remedies. It is very likely, however, for the parties to appeal a merger prohibition. Such was the case in Vj/158/2008 where the GVH rejected the application of Telekom (telecoms incumbent; hereafter: 'MT') to acquire control over ViDaNeT (local electronic communication service provider; hereafter, 'Vidanet').

The authority assessed the case in Phase II proceedings because of MT's and Vidanet's high market shares on the local markets for Internet access, cable television and voice services. Relevant here was also the nature of the concentration (the operation would have resulted in a 3-to-2 situation). After closing the investigation, the authority delivered its preliminary position to MT stating that the concentration would likely result in competition problems on the investigated markets (residential broadband cable Internet services, voice services, broadcasting) where the operation was likely to create a dominant position. Of most concern was the fact that together, the two parties would end up operating the only broadband network infrastructure available on the territory of the horizontally affected region in western Hungary. Commitments offered by the parties did not seem adequate to outweigh the identified competition concerns.

Generally, if parties presume that their concentration will be prohibited by the authority, in most of the cases they withdraw their application. This practice also appeared in the preceding case of the merger concerned, as it was not the first time when Telekom intended to acquire control over Vidanet (see Vj/110/2003), however in that case the parties decided to withdraw their application. In contrast to that, in Vj/158/2008 the latter scenario was not repeated as parties did not withdraw their application.

Having regard to all the above-mentioned competition concerns, the GVH prohibited the transaction. The ban was challenged by the parties resulting in a long judicial procedure. The Court of Appeal of Budapest ruled in April 2012 that the decision of the GVH was not sufficiently grounded and thus upheld the ruling of the Court of First Instance which repealed the merger prohibition and ordered the GVH to initiate new proceedings relating to the notified transaction.

Many questions could arise relating to this procedure including the length of the review process. Merger procedures are originally pre-emptive procedures, but this case was initiated in 2008 and reopened in 2012 making it very difficult to define the period of time under investigation, especially taking into consideration the developments that took place on the relevant markets in the meantime. It will thus be very interesting to see how the GVH will deal with these procedural/theoretical questions in its renewed assessment.

#### **IV. Conclusions**

The year 2012 brought with it many welcomed procedural shifts in Hungary from the perspective of competition law practitioners. These changes were triggered by the introduction of a new notification form, which is being dealt with by a specified unit within the GVH (Merger Section). Noteworthy are also some other procedural modifications, such as the formal introduction of pre-notification contacts that are meant to shorten the merger review process and increase its efficiency.

An evaluation of Hungarian merger decisions clearly shows that the Competition Council faced a lot of new challenges in 2012. As a result, it managed to refine its definition of ‘parts’ of an undertakings, the notion of interdependent transactions and the concept of decision-making centres. These latter improvements are of great importance to future cases. It will be interesting to see how this case-law will develop in 2013.