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Serial Acquisitions and Industry Roll-ups – Note by Hungary

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More documents related to this discussion can be found at
www.oecd.org/competition/serial-acquisitions-and-industry-roll-ups.htm.

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1. Introduction

1. Competition agencies are facing increasing levels of concentration in certain industries, and the driving force behind this phenomenon can usually be attributed to one or only a few companies' acquisitions in a certain sector, resulting in monopolies or oligopolistic market structures. However, the Hungarian Competition Authority (GVH) can only analyze mergers – and, consequently, industries characterized by high levels of concentration – that must be notified to it, because they reach the notification thresholds laid down in the Hungarian Competition Act (HCA).

2. Within this mandatory notification regime, a so-called 'calculation rule' is in force, which can also help the competition agency to reduce the number of smaller but, at the same time, potentially harmful mergers happening within a two-year-long time period (Section 2 of Article 24¹). However, this rule is used slightly differently to that of the European Commission.²

3. The GVH also added a secondary threshold to the HCA in 2017 in order to catch potentially harmful mergers that could be otherwise implemented under the radar (Section 4 of Article 24).³ This instrument may be considered as a safety net that helps avoid letting through killer acquisitions. It is different from the 'calculation rule' in the sense that this can also be applied if the undertakings involved in the mergers belonged to different groups of undertakings beforehand, and also if these mergers happen more than two years apart. We also have to emphasize that this secondary threshold means a voluntary notification as the second part of the condition set out in the text of the law, i.e. the significant lessening of competition in the relevant market, is absolutely at the discretion of the parties' preliminary assessment. These types of mergers – if not notified by the parties, but the GVH becomes aware of them in some other way – can be investigated *ex officio* up until the end of the 6th month after the implementation of the transaction (thus this can serve as a call-in option as well).

4. Finally, as financial investors have also become regular acquirers in recent years, the HCA was amended with a new article recently, which targets the financial investments of state-controlled venture capital funds that have been provided with some kind of state

¹ The one billion five hundred million forint threshold shall cover all concentrations that took place during the two-year period preceding the concentration between companies that used to be part of the group of undertakings that lost control due to the concentration along with those belonging to the group that acquired control, where no competition control proceedings had been opened, except if the concentration was notified and acknowledged in accordance with Paragraph b) of Subsection (1) of Section 43/N.

² Subsection 2 of Section 2 of Article 5 of Council Regulation No. 139/2004

³ Where the notification requirement provided for in Subsections (1)-(3) does not apply to a specific concentration, it may be reported to the Gazdasági Versenyhivatal nonetheless, if it is not immediately apparent that the concentration does not significantly reduce competition in the relevant market (Section 14), particularly as a consequence of creating or strengthening a dominant position in that market, and if the combined net turnover of all groups of undertakings involved, together with the net turnover of undertakings controlled by members of the same group jointly with other companies, exceeded five billion forints in the previous financial year (hereinafter referred to as "concentration control threshold").

aid, and imposes an obligation on such financial investors to provide information on their acquisitions which fall into this category to the GVH.

2. ‘Calculation rule’

5. The function of the HUF 1.5 billion rule in accordance with the second phrase of Section 1 of Article 24 of the HCA aims to ensure that smaller acquisitions – which are assumed to have no substantial impact on competition, or only to a negligible extent – are not unnecessarily subject to competition inspection prior to their implementation. At the same time, even these small acquisitions have the potential to endanger competition if they become a continuous practice of the given group of undertakings in such a way that within a relatively short period of time it acquires step-by-step, each step constituting a separate merger, businesses or parts of businesses with a net sales revenue of less than HUF 1.5 billion from the same group of undertakings. This way it would even be possible to avoid the merger notification obligation by splitting a single transaction into several parts that each involve undertakings having a net sales revenue of less than HUF 1.5 billion. Therefore, in the case of the HUF 1.5 billion rule, according to Section 2 of Article 24 of the HCA – as an exception to the exception – it must be notified if the group of undertakings implements a merger with an enterprise of less than HUF 1.5 billion of turnover, but within a two-year period it had already carried out a merger with the same group of undertakings, and the net turnover of the targets, when considered together, is eventually more than HUF 1.5 billion. It is important, however, that pursuant to Section 2 of Article 24 of the HCA, only those mergers happening within two years must be taken into account, for which no competition supervision proceeding has been conducted, and mergers that the GVH has approved in accordance with point b) of Section 1 of Article 43/N of the HCA shall be ignored as well.⁴

6. The basic purpose of the provision laid down in Section 2 of Article 24 of the HCA is the same as the regulation of the EU merger law with similar content. There is, however, a significant difference. In fact, the EU regulation considers all transactions carried out by the same persons or groups of undertakings within two years to constitute a single merger, which shall be deemed to have been created on the day of the last transaction. In other words, transactions that have been implemented within two years and have been below the threshold value even if considered together, can also be examined. In contrast to this, according to Section 2 of Article 24 of the HCA, only the transaction which happened last within a two-year period and by which the HUF 1.5 billion threshold was exceeded may be investigated. Otherwise, mergers that could have been implemented previously – due to not fulfilling the conditions set out in Section 1 of Article 24 of the HCA – could subsequently be subject to gun jumping. However, in the investigation of the (last) transaction by which the HUF 1.5 billion threshold was exceeded, the enterprises and parts of enterprises legally acquired during the two-year period (collectively still under HUF 1.5 billion in net sales) need to be considered as belonging to the acquiring group of undertakings as indirect participants to the merger.⁵

⁴ Point 189 of Notice 2/2023 of the President of the GVH and the Chair of the Competition Council of the GVH on certain law application issues related to the proceedings on investigating concentrations

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7. This ‘calculation rule’ has only been used twice in the practice of the GVH so far. One of them was in case VJ/8/2013., where the buyer acquired retail shops selling daily consumer goods from the same seller group of undertakings (two shops in the first, and one more shop in the second transaction), the two transactions being approximately one month apart. The parties’ turnover threshold was reached by the second transaction (by the acquisition of the third shop), therefore the parties had to notify the merger. However, only the second transaction was considered in terms of competitive effects, the two shops acquired in the first transaction were regarded as part of the acquirer’s group of undertakings as indirect participants to the transaction.

8. The other example to the use of the ‘calculation rule’ was in case VJ/52/2014., where Magyar Telekom Zrt. acquired the fixed communication networks located in District 18 of Budapest and its related customer base as former parts of ViDaNet Kábeltelevíziós Zrt. This was a notifiable merger as Magyar Telekom Zrt. concluded a separate transaction with ViDaNet Kábeltelevíziós Zrt. a year before that was not notifiable to the GVH, but the turnovers of the two targets of these transactions together exceeded the notification threshold of the HCA.

3. Call-in option

9. The GVH has quite extensive experience in handling voluntary notifications, because the parties prefer (pre-)notifying their transactions, even if there would be no explicit need to do so, as the transaction in question obviously does not have the possibility to lessen competition in the relevant market. Since its introduction to the HCA, the GVH has held 50 pre-notifications in these types of cases and has handled 13 formal merger notifications. Slightly more than half of these formal notifications (8) ended with issuing an official certificate permitting the implementation of the concentration within 8 days after the notification was submitted, which means that the conditions for initiating a competition supervision proceeding were not met. In 5 out of the 13 notifications that came to the GVH’s attention due to this voluntary notification regime, however, the GVH had to initiate a formal competition proceeding. Notably, all were unconditionally cleared.

10. The last clearance decision of this type was issued in November 2023 in case VJ/33/2022., in which the parties were Fluidra Magyarország Kft., Kerex Uszoda- és Szabadidőtechnikai Kft. and Kerex Szerelő Kft., after more than a one-year-long analysis of the merger in a phase II proceeding. After a thorough examination of the case and the pool equipment market in Hungary, however, the Competition Council found no evidence of harmful competitive effects emerging as a result of the merger.

4. Financial investors

11. The GVH experienced in its practice that financial investors have also become regular acquirers in recent years. On the one hand, they tend to invest in smaller and even in nascent markets – this is when the question of killer acquisitions may arise; on the other hand, these companies tend to gain (joint) control over smaller firms active in neighboring fields or that have complementary goods and services to the acquirers. Because these target companies are usually smaller on one concerned market, and they are often active in quite different fields than the acquirer, competition issues rarely arise as a result of these transactions. This was one of the reasons – besides intentions to decrease bureaucracy – why the HCA was modified and Article 25/B was introduced on 30 September 2021, which declares that concentration of companies where a venture capital fund under direct or

indirect State control acquires joint control rights in a company – whose net turnover for the previous year did not reach HUF 1.5 billion – through an equity investment carried out with State aid that has been declared by the European Commission to be compatible with the internal market shall not be notified to the GVH.

12. Nonetheless, the GVH still would like to become aware of these mergers, and this is the reason why the venture capital fund acquiring joint control shall inform the GVH of the implementation of such a concentration within thirty days of the date of implementation. The GVH also issued a new informative form for such transactions which is available (only in Hungarian) on its website.⁶ However, since its introduction, there have only been 3 cases in which the parties submitted this kind of informative form. The GVH did not initiate a competition proceeding in any of these cases, albeit it has the powers to do so – like in the case of the call-in option – based on Section 5a of Article 67 of the HCA.

5. Concluding remarks

13. In summary, the aforementioned provisions laid down in the HCA give powers to the GVH to watch over the Hungarian economy, more specifically those sectors that may be prone to serial acquisitions and perhaps to processes leading to intense concentration; however, so far the GVH has quite limited experience in cases that can potentially end up in industry roll-ups. This is the reason why we think that the legal basis in Hungary is quite firm and suitable for catching mergers that can result in problematic outcomes in certain markets, we must however admit that so far the GVH has not had to deal with mergers falling under the normal threshold that had the potential of causing harm to competition in the markets concerned.

14. Besides market concentration, we consider the ‘calculation rule’ and the call-in option, as well as Article 25/B of the HCA to be useful tools that complement the ordinary merger threshold of the HCA. Moreover, they also give us the opportunity to intervene when necessary. Theories of harm, especially those that emerge in relation to digital markets, however, can raise some unexpected and more difficult questions, but the GVH aims to be ready for handling these issues as well by monitoring the Hungarian economy thoroughly, especially sectors that are more likely to be exposed to serial acquisitions.

⁶ https://gvh.hu/pfile/file?path=/szakmai_felhasznaloknak/urlapok/Tpvt25B-urlap_211221.pdf1&inline=true