Merger Control

The international regulation of mergers and joint ventures in 74 jurisdictions worldwide

Consulting editor
John Davies

2016

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Merger Control 2016

Consulting editor

John Davies

Freshfields Bruckhaus Deringer

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@lbresearch.com

Adam Sargent
adam.sargent@lbresearch.com

Dan White
dan.white@lbresearch.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 1996
Twentieth edition
ISSN 1365-7976

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

CONTENTS

Hungary

Gábor Fejes and Zoltán Marosi
Oppenheim

Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The most significant sources of law regarding merger control are Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (the Competition Act), Act CXX of 2001 on Capital Markets (the Capital Markets Act), and Act IV of 2006 (the Companies Act). Other important legislative acts that are not strictly part of competition law include the General Rules of Public Administrative Procedures and Services (Act CXL of 2004). There are also numerous laws regulating specific sectors where natural monopolies or restricted competition currently exist (in particular Act C of 2003 on Communications and Act LXXXVI of 2007 on Electric Energy). For utilities and other sectors subject to specific rules (eg, media, pharmacies), see question 8. The Competition Act is administered by the Hungarian Competition Authority (GVH) (www.gvh.hu; includes some text in English) and its decision-making body, the Competition Council. The GVH is an independent body, operating under the control of Parliament. The president of Hungary, following nomination by the prime minister, appoints the president and two vice-presidents of the GVH. Vice-presidents are proposed by the president of the GVH to the prime minister, and if the latter agrees, the prime minister makes a nomination to the president of Hungary, who then appoints the vice-presidents. They are appointed for a six-year term, which is renewable. In addition, the secretary-general of the GVH heads the GVH's administration under the control of the president.

2 What kinds of mergers are caught?

The Competition Act regulates concentrations of all types of undertakings (including legal entities and private persons if they fall under the scope of the Competition Act, that is, if they engage in economic activity).

The GVH will examine the following types of transactions:

- the merger of two or more previously independent undertakings;
- the acquisition of direct or indirect, sole or joint control over the whole or a part of a previously independent undertaking or undertakings; and
- the formation of a full-function joint venture.

3 What types of joint ventures are caught?

Joint ventures are subject to merger control under the Competition Act. The authorisation of the GVH is required if independent undertakings jointly set up a new undertaking that can permanently fulfil all functions of an independent undertaking (full-function joint venture). The establishment of non-full-function joint ventures therefore falls outside the merger control provisions of the Competition Act, but may be assessed under the rules prohibiting anti-competitive agreements.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The Competition Act makes a distinction between direct and indirect control. Under the merger control rules both direct and indirect control are caught.

Direct control is to be interpreted as:

- the acquisition of over 50 per cent of voting rights;
- the power to designate, appoint or dismiss a majority of the executive officers;
- a contractual right to exert decisive influence over the decisions of the other undertaking; or
- the de facto ability to exert decisive influence over the decisions of the other undertaking.

Under the Competition Act, indirect control is also defined in order to capture the entire group of undertakings to which the given company belongs.

The merger regime of the Competition Act does not extend to the control of minority and other interests less than control.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A merger must be notified to the GVH if:

- the net sales revenue of all groups of undertakings concerned and the net sales revenue of the undertakings controlled jointly by the groups of undertakings concerned and other undertakings exceeded 15 billion forints in the previous business year; and
- there are at least two groups of undertakings concerned whose total net sales revenue in the year preceding the merger, together with the net sales revenue of undertakings controlled jointly by undertakings concerned and other undertakings exceeded 500 million forints each.

For the purposes of calculating the 500 million forint threshold, turnovers of undertakings that were acquired by the same group within two years preceding the acquisition of control must also be considered, if such acquisitions were at that time not subject to notification.

In the course of calculating the net sales revenues the turnover between undertakings that are members of the same group of undertakings or parts of such undertakings shall be disregarded. In addition, the turnover of the seller or the seller's group is also not taken into account.

For calculating the threshold of merging credit institutions, the aggregate of the following revenue items must be taken into account: interests and interest-like revenues, revenues from securities including shares and other securities with varying returns, revenues from shareholdings and shareholdings in connected undertakings, commissions, the net profit of financial transactions and revenue from other business activities. For merging insurance companies, the threshold is calculated on the value of the secured gross insurance premiums. For investment firms and funds, the threshold is calculated on the revenue from investment services or membership fees respectively.

For the acquisition of business units (parts of undertakings), the net revenue attributed to the operation of such assets and rights will be considered.

In the case of foreign undertakings, only the net sales revenues generated from the goods sold or services rendered in Hungary are taken into account.

Under the Competition Act, mergers failing to reach the above turnover thresholds are not subject to merger control by the GVH and thus cannot be investigated under the merger control rules.

In addition, if a transaction meets the thresholds of the EU Merger Regulation (EUMR), the European Commission has jurisdiction to assess it.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is mandatory. An exception to the mandatory filing requirement is that the temporary (less than one year) acquisition of control or assets by a financial institution does not qualify as a merger if this acquisition is made with a view to resale, and if the exercise of control is limited to what is absolutely necessary. In such a case, no notification of the acquisition needs to be filed. The GVH can authorise the extension of the aforementioned term.

In addition, as of November 2013, a special public interest exemption has been introduced into Hungarian law. Namely, the Hungarian government is entitled to exempt a notifiable concentration from the competence of the GVH if such merger has been declared – by way of a government decree – as having a 'strategic significance' (including the need to protect workplaces, the strengthening of international competitiveness of a given sector of the economy and in the interests of security of supply). It means that the exempted concentration need not be notified to the GVH and thus it will not be reviewed at all by the GVH. There were altogether 10 concentrations thus exempted from review in 2014.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Foreign mergers are subject to Hungarian merger control if they may have an effect within the territory of Hungary. Consequently, meeting the turnover thresholds in Hungary is sufficient even in the absence of any structural links to Hungary. In practice, there are two main situations in which foreign-to-foreign mergers are caught: where there are Hungarian subsidiaries of the parties; or there are no subsidiaries, but the parties themselves have turnover in Hungary, that is, their goods and services are present on the Hungarian market.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

In addition to authorisation from the GVH, special approval from the Hungarian Financial Supervisory Authority is needed for the merger of financial institutions.

To guarantee the plurality of the media, special provisions apply to the mergers of media enterprises (eg, media enterprises over a certain audience share may not acquire even minority shareholdings in other media enterprises and national radio stations may not acquire a controlling interest in any other media enterprises). In addition, in mergers between media enterprises, the GVH is obliged to consult the the Media Council and request a position statement from it on the effects of the merger on the plurality of the media. If the Media Council refuses to give its consent to the merger based on its expected negative effects on the plurality of the media, the GVH must also prohibit the merger (regardless of any competitive effects) as the position statement of the Media Council is binding on the GVH. If, however, the Media Council provides a positive statement, the GVH remains free to decide on the merger in light of its effects on competition.

Other special sectors are the energy and gas industries. Here, the most important cooperating authority is the Hungarian Energy and Public Utility Regulatory Authority (HEPUR), which has to give its approval to certain concentrations within this sector. For such concentrations, the approval of both the HEPUR and the GVH may be required. The approving resolution of the HEPUR is not based on competition issues but rather on sectoral considerations, in particular ensuring security of supply.

Special rules also apply to undertakings operating pharmacies in Hungary, both in relation to the shareholding structure (over 50 per cent must be held by qualified pharmacists) and their mergers (prohibition of mergers whereby an undertaking or a group of undertakings would control at least four, or – in certain cases – at least three pharmacies; prohibition of acquisition of shares in pharmacies by pharmaceutical companies and wholesalers of pharmaceutical products, by undertakings having shareholdings in at least four pharmacies and by certain offshore companies).

A special regime exists for the bankruptcy and liquidation proceedings of those companies that the Hungarian government designates as having special importance for the Hungarian economy. If these companies come under bankruptcy or liquidation proceedings, then a quicker and more effective merger control regime will be applicable for the acquisition of control over them. Under this special regime the acquirer is expressly provided the right to exercise control over the target already prior to the final decision of the GVH, to the extent that is absolutely necessary in order to continue with the ordinary course of business.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

As of July 2014, there is no deadline for filing to the GVH as – similarly to the EU regime – an explicit suspension obligation was introduced (see question 11). For concentrations created prior to that date, the applicant had to notify the GVH within 30 calendar days from the date of the 'triggering event' (typically the conclusion of the binding contract between the parties). Under a recent amendment of the Competition Act it is specified that the application for authorisation shall be submitted after the public invitation to tender, the conclusion of the contract, or the acquisition of the right of control, whichever occurs earlier; as a result, it will be clear that the notification of planned mergers is not possible. In the case of mergers between credit institutions and insurance companies, the merger clearance application must be made at the same time as the application for permission from the Hungarian Financial Supervisory Authority (see question 8).

10 Who is responsible for filing and are filing fees required?

In the case of a merger or joint venture, the parties or, in all other cases (eg, acquisition of control), the party directly acquiring the business unit or the controlling rights or the undertaking that directly controls the party acquiring the business unit or the controlling rights is responsible for applying for authorisation.

A procedural fee of 4 million forints applies to cases, the assessment of which does not raise serious concerns (Phase I investigation). The fee is payable upon submission of the application. An additional fee of 12 million forints applies in more complicated cases if a Phase II investigation is launched.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

After 1 July 2014, there is a waiting period of 30 calendar days following notification in simple cases (Phase I investigations) and four months in more complicated cases (Phase II investigations). Where there is good reason, the GVH can extend the waiting period by a maximum of 20 calendar days in Phase I investigations and two months in Phase II investigations. It is important that the applicable waiting period begins when the notification is submitted to the GVH, however, a request for additional information does not count towards the waiting period. If the GVH does not bring a decision at the end of these periods, clearance is deemed to be granted by the force of law for the given transaction.

As of 1 July 2014, it is now expressly prohibited to execute a notifiable concentration in the absence of the approval of the GVH. Implementation is construed in a wide manner, thus encompassing, the exercise of voting rights in the target company, the exercise of rights related to the appointment of management and in general the obligation to act in accordance with the situation prevailing before the concentration. Non-compliance with this prohibition may result in fines (see question 12) and if a concentration is not cleared by the GVH, then any act or measure that violates this provision shall be considered as null and void under Hungarian civil law.

However, it is certainly permitted to conclude an agreement or to make other steps forming the basis of the given transaction (eg, a share sale and purchase agreement or a public purchase offer).

As an exception, the GVH may permit the acquirer to exercise its control rights before clearance: in such a case, the acquirer has to submit a reasoned request to this effect. Under a recent amendment to the Competition Act it is further specified that the acquirer should explain the reasons for the necessity to exercise the rights, the way those rights would be exercised and the likely effect of such an exception. In general, the request would have to be submitted together with the notification. The GVH may grant permission, in particular, if this would be necessary to maintain the value of the acquirer's investment in the target. Specific conditions and obligations may also be imposed on the acquirer in the permit and – in order to make such conditions and obligations effective – the GVH may request specific market or business information from the acquirer in question.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

For concentrations created after 1 July 2014, the following types of penalties apply:

- for implementing a transaction that is prohibited by the GVH: fines with a maximum of 10 per cent of last year's net sales revenue;
- if the concentration is implemented or closed before clearance and there is a failure to file: a daily fine of maximum 200,000 forints for each day from the triggering event (eg, the conclusion of the contract) until the initiation of proceedings by the GVH; and
- for failure to respect a decision of the GVH (such as a decision ordering remedies): fines with a maximum of 10 per cent of last year's net sales revenue.

Furthermore:

- if a transaction was implemented and the GVH subsequently prohibits the transaction; or
- if the transaction is implemented despite the GVH's prohibition decision or without the fulfilment of the preconditions set by the GVH's decision the GVH may apply, under article 31 of the Competition Act, restorative measures – such as divestiture or any other means necessary and proportionate – in order to restore effective competition.

These powers have not yet been exercised.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The merger rules apply also to foreign-to-foreign mergers, consequently, the sanctions discussed in question 12 would apply.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

See question 11, which also applies to foreign-to-foreign mergers (in particular the possibility to ask for the permission of the GVH to exercise control rights).

15 Are there any special merger control rules applicable to public takeover bids?

No.

16 What is the level of detail required in the preparation of a filing?

The merger notification form is divided into two parts. In non-problematic merger cases it is sufficient to submit only the first part of the notification form, which can be regarded as being similar to the short CO form under the EUMR. The questions here are limited to the description of the transaction, the parties' ownership structure and their activities in Hungary. In contrast to the former notification form, there is no need to provide, eg, a customer and supplier list, a detailed description of the market and the expected changes as a result of the merger or to estimate competitors' market shares.

The above – more detailed – issues are only dealt with in the second part of the notification form (Chapters VI–VII), which shall only be answered in more complicated cases (ie, if there is a horizontal overlap between the parties' activities and the combined market share of the companies reaches 15 per cent on this market; or if there are vertically related markets where one of the parties' combined market share reaches 25 per cent on either of the markets).

The complete notification form is similar to the Form CO under the EUMR. It is nearly 30 pages long and is a highly complex instrument; it can be downloaded from the GVH's website (www.gvh.hu) in Hungarian. An English version of the form is available at the GVH's website. It could take between one week and one month to collect the required information depending on whether only the first part or also the second part of the notification form shall be completed and on the complexity of the case. The applicant is also obliged to submit additional documents with the notification, such as the agreement on the acquisition or merger and the annual financial reports of the undertakings concerned. In any event, it is advisable to include as much information as possible on the products and markets concerned in order to present convincing arguments that the merger does not significantly impede competition.

A certificate of payment of the procedural fee must accompany the notification in order to be valid. The notification itself is to be submitted in Hungarian but from 1 July 2014 originals of English, French and German language documents may also be submitted, without official Hungarian translations. Official translation in merger procedures may only be requested if the correctness of the translated document is questioned. The GVH then inspects the documents and information supplied, and will request further information or documents if it deems it necessary.

17 What is the statutory timetable for clearance? Can it be speeded up?

The deadline for a Phase I investigation is 30 calendar days from the complete notification (as of 1 July 2014) and four months for a Phase II investigation. Where justified, this deadline may be extended in a Phase I investigation by up to 20 calendar days and in a Phase II investigation by up to two months. The parties concerned shall be notified of any such extension before the expiry of the original deadline. The applicable waiting period begins on the day when the notification is submitted to the GVH. In practice, the GVH may request additional information from the notifying party on the basis of the initial notification and as a result, the period for responding to such a request does not count towards the waiting period. In addition, on the basis of the general rules of administrative procedure, there is a further possibility to 'stop the clock'; namely, the waiting period may also be extended by the GVH's further requests for information by the time necessary for the parties and third parties to respond to such requests.

To speed up the timetable for authorisation, the parties may request for informal consultations with the GVH prior to the merger control procedure. The scope or aim of the consultation procedure may include, inter alia, questions as to the necessity of the notification, the content of the notification form (in order to exclude certain questions from the notification form which are irrelevant for the purposes of the given notification), or, at a later stage, following notification, the additional questions posed by the GVH, the competition concerns raised by the GVH, the possible remedies, etc. The informal consultation procedure is treated as highly confidential and the parties may at any time decide to stop the informal consultation without entailing any negative consequence. The possibility of pre-notification consultations is included in the Competition Act and the GVH issued a notice on pre-notification informal consultations (under No. 4/2014).

A further possibility to speed up the process is to refer to the GVH's option to bring a 'simplified decision' (ie, a decision without a detailed reasoning). The GVH may issue such decisions in Phase I cases, unless there are additional factors that would make the publication of the full reasoning of the decision necessary (eg, when the GVH sets conditions or applies remedies for the transaction, when the correct classification of the transaction as a concentration is not obvious or when there is a higher public interest attached to the transaction).

In practice, according to the relevant statistics, the average time spent on Phase II merger reviews is approximately 100 days, while on average a Phase I merger procedure lasts around 30 days.

18 What are the typical steps and different phases of the investigation?

The notifying party may start an informal consultation with the GVH prior to the filing of the notification form (see question 17).

Once an application is filed, the GVH's case handlers in the Merger Unit examine the notification form and the supporting evidence. The application shall contain all the facts and data necessary for the assessment of the case. If the GVH requires more information it may return the application within 15 calendar days of receipt with the request that additional information be supplied within a certain period of time. The deadline for providing the requested information may be extended once, where justified, at the request of the applicant prior to the expiry of the deadline.

In the case of both Phase I and Phase II investigations, the procedure in the GVH is divided into two stages: the investigation procedure, ending with completion of the case handler's report; and the procedure of the Competition Council.

Phase I investigation

Following the receipt of the complete application, the case handler prepares a report with a proposal relating to the future course of the proceeding and interim measures if appropriate. Thereafter the Competition Council, which has the sole power to decide on the merits of the case, will make its decision on the basis of the case handler's report. The GVH has to decide at the end of Phase I whether the transaction is cleared during this phase (ie, during Phase I) or whether a second phase (Phase II) will be opened.

Phase II investigation

In more complex cases, as defined in the applicable notice of the GVH on the differentiation between Phase I and Phase II cases, the GVH requires more time to investigate the relevant markets and the possible effects of the transaction, involving the assessment of various units within the GVH (such as the chief economist's team, other offices, etc). The final decision of the GVH is then issued within a longer waiting period.

Substantive assessment

19 What is the substantive test for clearance?

The substantive test applicable for Hungarian merger clearances is the significant impediment to effective competition (SIEC) test. Thus, according to the Competition Act the GVH may only prohibit the implementation of a concentration, if such concentration results in a significant impediment to effective competition, in particular by the creation or strengthening of a dominant position.

When examining an application for authorisation, the advantages and disadvantages resulting from the merger are assessed. The Competition Act provides guidelines on how the GVH should review the application. The following aspects should generally be considered:

- the structure of the relevant markets;
- existing or potential competition in the relevant markets, purchase and sales opportunities, the costs and risks, as well as technical, economic and legal conditions to market entry;
- the market situation and strategy, economic and financial capability, business conduct, domestic and international competitiveness of the undertakings concerned; and
- the effect of the concentration on suppliers and consumers.

20 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures that can permanently fulfil all functions of an independent undertaking (full-function joint venture). For them the SIEC test applies (see question 19).

In the case of a concentration that is a joint venture with the purpose or effect of concerting market practices of the participants, the concentration is examined under the rules prohibiting anti-competitive agreements (and their exemption), and thus such a concentration must be permitted if:

- it rationalises production or distribution, or adds to technical or economic development, or helps environmental conditions or competitiveness;
- consumers will be granted a fair share of the benefits;
- the limitation or elimination of competition does not exceed that which is necessary to attain the set goals; and
- the merger does not enable the elimination of competition regarding a significant proportion of the relevant products.

21 What are the 'theories of harm' that the authorities will investigate?

The GVH will assess the advantages and disadvantages resulting from the merger (see question 19). In the course of the GVH's investigation the market position of the parties before and after the transaction and the possible horizontal, vertical and portfolio effects of the transaction are examined. Horizontal effects may occur when the parties to the merger are direct competitors. Vertical effects concern situations when the undertakings concerned operate on different levels of the supply chain. In these cases, the market power held by one of the undertakings may be transferred to another market. In respect of portfolio effects, the GVH examines whether the product range of the companies will be widened as a result of the transaction.

22 To what extent are non-competition issues relevant in the review process?

When assessing a notification, the advantages and disadvantages resulting from the concentration must be assessed. In the course of this assessment, the aspects listed in the Competition Act (see question 19) are followed. These aspects generally do not refer to any non-competition factors, and in practice the GVH does not consider non-competition issues in the review process. Consumer benefits resulting from economic efficiencies generally receive considerable attention in the course of the GVH's procedure, and the advantages of the merger are judged from the consumer's point of view.

In cases of mergers between media enterprises the GVH is obliged to consult the Media Council and request a position statement from it on the effects of the merger on the plurality of the media. If the Media Council refuses to give its consent to the merger based on the expected negative effects on the plurality of the media, the GVH must also prohibit the merger (regardless of any competitive effects), as the position statement of the Media Council is binding on the GVH (see also question 8).

23 To what extent does the authority take into account economic efficiencies in the review process?

As described in question 19, economic efficiencies are taken into account to the extent that they bring about benefits to consumers.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The GVH may block the transaction or attach conditions to its approval (see question 25). If a concentration is implemented without authorisation and the transaction could not have been authorised, the GVH may order the parties to sell their interest or separate parts of the undertakings (see question 12).

In the past, only very few cases have been blocked by the GVH. In 2009, for example, the GVH prohibited one merger: the proposed acquisition of Vidanet (a local electronic communications service provider) by Magyar Telekom (the Hungarian telecommunications incumbent) as the GVH found that Magyar Telekom would become the monopoly owner of certain essential telecommunications network infrastructure in the affected region in Hungary and thus competition would be significantly impeded. Following the judicial review, the court requested a new procedure to be undertaken by the GVH. However, as the parties withdrew their application, the GVH terminated the repeated procedure.

As of 1 July 2014, if a specific measure ordered by a merger decision of the GVH has not been complied with, a fine may be imposed, which may amount to 10 per cent of the last year's net turnover.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Competition Act expressly provides for the possibility of attaching conditions to any authorisation by setting a specific deadline for the parties concerned to carry out the divestiture of certain parts of their undertakings or assets or to divest some areas of control over an indirect participant. In addition to structural conditions, behavioural conditions may be imposed. The GVH's notice on remedies (under No. 2/2014) details the main principles for the acceptance of remedies by the GVH and there is also an opportunity for negotiations in this regard.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

According to the GVH's remedies notice, the remedies shall be suitable to remove competition concerns, they have to be based on the proposal of the parties and they must be capable of being monitored and implemented effectively. To ensure that an approval decision with remedies can be passed within the statutory deadline, the parties are required to duly cooperate with the GVH as regards the timely proposal of remedies. To this effect, the parties shall provide the GVH with sufficient time to evaluate their proposal, including the carrying out of a market test, whereby the GVH gains stakeholders' (competitors', potential customers' and suppliers') views on the capability of the proposed remedies to remove competition concerns.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There is no specific practice of the GVH in this respect.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

If the parties stipulate ancillary restrictions on competition in their agreement on the acquisition of control, these restrictive provisions are covered by the authorisation decision by the GVH. However, the GVH made it clear in a number of its decisions that – similarly to the European Commission – the GVH does not make its own assessment of such restrictive provisions in its authorisation decision: it is up to the parties to assess, for example, whether their non-competition clause is indeed directly related and necessary for the concentration. If and insofar as such clauses fail to fulfil these requirements, they will fall under the provisions of the Competition Act relating to anti-competitive agreements.

In terms of the assessment of such restrictions, Hungarian competition law generally follows the principles set out in the Ancillary Restraints Notice of the European Commission, that is, they will be covered by the merger control authorisation if the scope of restriction affects the market concerned by the concentration, the restriction does not exceed the scope of activities of the participants in the territory of Hungary before the acquisition, and the duration of such restriction is limited in time.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

In the course of a merger control process, it is typical for the case handlers to communicate with (and send written requests for information to) competitors, customers and other third parties in order to check market information provided by the applicants. Third parties may also act upon their own initiative and submit their own views on a proposed merger, though such intervention is rather rare in the GVH's practice.

As stated in question 30, the hearing held by the Competition Council, during which the decision on the merits of the case will be adopted, is public and the GVH publishes all resolutions on its website. This may trigger third parties to intervene into the proceedings or to challenge the GVH's resolution in court (although such challenges are very much limited by the applicable procedural rules on standing and are in any case rare in practice).

In addition, any person detecting a violation of the Competition Act – for example, a failure to submit a merger notification – can submit a complaint to the GVH. The formal complaint must specify the activity or conduct, which forms the basis of the suspected violation. Persons submitting formal complaints are not parties to a merger notification procedure, and they are not entitled to the same rights and do not bear the same obligations as the parties to the transaction. A person submitting a formal complaint may request that its identity be kept confidential in the course of the investigation. The GVH has two months following the receipt of the formal complaint to decide whether to open proceedings (may be extended for a further two months in complicated matters). If the formal complaint is rejected, the person submitting it may appeal to the court (and may inspect the files of the GVH insofar as such inspection is necessary for the exercise of the right to appeal).

If the complaint does not qualify as a formal complaint, it will be treated by the GVH as an informal complaint. In these cases the GVH is not obliged to decide formally about opening an investigation, but can act at its own discretion. Such a resolution of the GVH cannot be challenged, and accordingly the person submitting an informal complaint has no right to review the files of the case.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The files in the GVH may be seen by the applicants, their representatives, the GVH officials and persons entitled by law (including official experts, public prosecutors and investigative authorities). Other persons cannot have access to the files. Internal documents of the GVH and correspondence between the GVH and other competition authorities cannot be accessed, provided that such documents will not be used as evidence in the course of the proceedings. The applicants and other parties to the proceedings may request that documents or information provided by them be treated wholly or partly as documents that include business secrets. Any foreign competition authority supplying information or data to the GVH may also request that documents or information provided by them be treated wholly or partly as confidential. If the case handler rejects a request by the party to classify such a document or information as confidential, then such decision of the case handler is subject to review by the Competition Council. If the GVH decides on such classification, it may oblige the applicant and other parties to prepare a non-confidential version of the documentation.

The hearing held by the Competition Council, during which the decision on the merits of the case will be adopted, is public, but the party may request a closed hearing if this is deemed necessary in order to preserve financial, business and other secrets. Upon the respective request of the applicants, however, the vast majority of merger decisions are adopted by the Competition Council without a hearing.

The GVH publishes all resolutions on its website. However, upon the request of the parties any portion of the filed documents and the merger agreement can be kept confidential by the GVH. The GVH may also order the publication of a correction in connection with any prior misleading information.

The GVH may also issue merger decisions without a detailed reasoning in straightforward cases; these are detailed in a separate notice (under No. 3/2014) by the GVH.

As of 1 December 2012, right after the notification is made to the GVH, the GVH publishes on its website the fact and date of the notification, the parties of the case and a short summary of the proposed concentration (in a non-confidential version). By doing so, the GVH provides third parties with the opportunity to share their views on the proposed concentration.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

As the competition authority of an EU member state, the GVH is engaged in intensive international cooperation with the other national competition authorities of the EU and the European Commission within the framework of the European Competition Network. Also, the GVH cooperates with its counterparts within the framework of the European Competition Authorities. In addition, the professional cooperation in the framework of the Organisation for Economic Co-operation and Development (OECD) is also important, while the relations to central and eastern European competition authorities seem to be strengthening as well. The setting up of the OECD–GVH Regional Centre for Competition in Budapest, the objective of which is to develop competition policy, competition law and competition culture and to help the work of the competition authorities of the region, has given new impetus to the cooperation between central and eastern European countries. The GVH is also a member of the International Competition Network (ICN) and it also served as a co-chair of the ICN Cartel Working Group in 2004–2012 together with the DG Competition of the European Commission and from 2011 also with the Japan Fair Trade Commission. The GVH concluded formal agreements with competition authorities outside the EU such as those of Serbia, Albania, Moldova, Ukraine, China, Taiwan and Russia. Finally, the GVH is also engaged in professional cooperation with the competition authorities of the United States. Cooperation in these cases generally means that the relevant authorities exchange their professional experience, share best practices with each other and promote cooperation in the field of competition law and policy. By way of cooperation, the authorities, in particular, make available their annual reports and case descriptions to each other, they inform each other about professional events and provide assistance to each other in establishing relations with the respective legislative, executive and judiciary bodies of their states.

We are, however, not aware of merger control-related case-specific cooperation in the practice of the GVH.

Judicial review

32 What are the opportunities for appeal or judicial review?

The parties may challenge the GVH's decision on the merits of a merger case within 30 days of receipt. Though there is no right of appeal within the framework of the administrative procedure, decisions are subject to full judicial review by the Metropolitan Administrative and Labour Court

Update and trends

There was a recent amendment to the Competition Act, which entailed some fine-tuning of the competition rules, including those relating to merger control.

The GVH also passed a new detailed notice on interconnected mergers (Notice No. 1/2015), where it outlines those instances when formally separate mergers are treated within one proceeding.

of Budapest, and the court may alter the decision of the GVH. An appeal against the judgment of the Metropolitan Administrative and Labour Court of Budapest can be lodged with the Metropolitan Court in Budapest.

In practice, this type of judicial challenge is rare as the GVH clears the overwhelming majority of notified transactions (the last prohibition decision dates back to 2009).

33 What is the usual time frame for appeal or judicial review?

A final and binding judgment may be expected within one to two years from the date of the filing of the statement of claim, but in some cases this may be longer.

Enforcement practice and future developments

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

In 2014 there were 31 merger notifications out of which 25 were closed in a Phase I procedure. Six cases were taken to Phase II. None of the decisions were challenged.

35 Are there current proposals to change the legislation?

The Hungarian parliament adopted an amendment to the Competition Act, which also concerns (to a lesser extent) merger control. The changes mostly include fine-tuning of the latest 2014 reforms, such as the clarification that filing cannot be made solely on the basis of negotiations, but only if any of the relevant triggering events has occurred.

oppenheim

Gábor Fejes **gabor.fejes@oppenheimlegal.com**
Zoltán Marosi **zoltan.marosi@oppenheimlegal.com**

Károlyi u 12
1053 Budapest
Hungary

Tel: +36 1 486 22 00
Fax: +36 1 486 22 01
www.oppenheimlegal.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign Judgments
Environment
Executive Compensation & Employee Benefits
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

iPad app

Available on iTunes

Law Business Research

Merger Control
ISSN 1365-7976

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law