



# ICLG

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## **Mergers & Acquisitions 2018**

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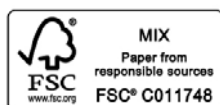
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# Hungary

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## 1 Relevant Authorities and Legislation

### 1.1 What regulates M&A?

The main source of legislation governing M&A activity and corporate governance in Hungary is Act V of 2013 of the Civil Code (Civil Code), which contains the general legal provisions on contracts and all forms of companies, including high-level rules on the transformation, merger and demerger of companies. Detailed provisions on transformations, mergers and demergers may be found in Act CLXXVI of 2013 on the Transformation, Merger and Demerger of Certain Legal Persons (Transformation Act). The procedural provisions applicable to the registration of corporate changes are set out in Act V of 2006 on the Company Procedure and Voluntary Winding Up (Company Procedure Act). Act CXX of 2001 on the Capital Market (Capital Market Act) governs acquisitions by means of public takeover and contains provisions on securities. Additional provisions applicable to companies active in regulated industries may be found in sector-specific legislation.

### 1.2 Are there different rules for different types of company?

Generally, the provisions of the Civil Code apply to all types of Hungarian companies. Additional provisions apply to acquisitions of public companies limited by shares (in Hungarian: *nyilvánosan működő részvénytársaság* or *nyrt*) by means of public takeovers. Further, sector-specific legislation may apply to companies active in certain regulated industries.

### 1.3 Are there special rules for foreign buyers?

As a general rule, the same substantial and procedural rules apply to foreign buyers. Foreign buyers may be required to fulfil additional administrative requirements if they are not resident in Hungary.

### 1.4 Are there any special sector-related rules?

Sector-specific legislation applies to companies engaged in regulated industries such as the energy, media and financial sectors. The acquisition and transformation of such companies may require the prior approval of the competent regulatory authorities, setting further preconditions and documentation requirements.

### 1.5 What are the principal sources of liability?

In general, civil law liability under Hungarian law may be contractual and extra-contractual. Both forms of liability are governed by the Civil Code. The liability of a company's director *vis-à-vis* the company is adjudged according to the rules of contractual liability.

## 2 Mechanics of Acquisition

### 2.1 What alternative means of acquisition are there?

Acquisitions may take various legal forms ranging from simple share sale and purchases through share swaps, acquisitions by contribution of the target company's shares into the acquirers capital to mergers and other forms of corporate transformations.

### 2.2 What advisers do the parties need?

Depending on the complexity of the deal, the parties may need a variety of advisers. Since most acquisitions necessitate the registration of certain corporate changes in the company register, the parties need a legal adviser in most of the cases. In case of mergers and other forms of corporate transformations, the law prescribes the preparation and audit of a large amount of financial documentation requiring the parties to avail themselves of accounting experts and auditors. In case of an acquisition by means of a public takeover bid, a financial adviser needs to be involved as well.

### 2.3 How long does it take?

Depending on the structure and the complexity of the deal, the length of the deal may vary considerably. While a simple share sale and purchase without the need for regulatory approvals may be completed within days (excluding the court procedure for having changes registered), a merger or other corporate transformation usually takes up to three to four months and an acquisition by means of public takeover may take up to one year due to the documentation requirements, as well as statutory deadlines which need to be observed.

### 2.4 What are the main hurdles?

Hurdles to acquisitions may be civil as well as regulatory hurdles. Civil hurdles may be statutory pre-emption rights of the target

company's shareholders or pre-emption rights set out in the target company's articles of association, as well as consent rights of other shareholders set out in the target company's articles. Usually, the most important regulatory hurdle to acquisitions in Hungary is the necessity of obtaining merger clearance from the Hungarian Competition Office (in Hungarian: *gazdasági versenyhivatal* or *GVH*) or other competent competition authorities. Further, additional regulatory approvals may be required in case of target companies active in certain regulated industries, such as energy, public utility, media or finance.

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## **2.5 How much flexibility is there over deal terms and price?**

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In general, rather few restrictions apply to deal terms and price arrangements in case of the acquisition of privately held companies. However, the acquisition of publicly traded companies by means of public takeover bids is regulated by the provisions of the Capital Market Act.

The Capital Market Act governs the minimum requirements a public takeover bid shall contain, for example: the bidder's name; the bidder's participation in the target (whether direct or indirect); the monetary value of the consideration offered for the target's shares and the composition of such consideration (ratio of cash and securities and the description of securities if any); the expiry of the acceptance period, etc. Further, the Capital Market Act contains detailed provisions on the minimum consideration payable for listed shares.

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## **2.6 What differences are there between offering cash and other consideration?**

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Both cash and other consideration may be offered under Hungarian law. However, cash is the most common consideration in acquisitions. In case of acquisitions by a public takeover bid, if the consideration is entirely offered in cash, the shareholder accepting the bid may request the bidder to pay the consideration in cash only.

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## **2.7 Do the same terms have to be offered to all shareholders?**

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In case of the acquisition of privately held companies, the offer does not have to be made to all shareholders. However, if the other shareholders have a pre-emption right, the shareholders to whom the offer is made shall forward the offer to the shareholders having pre-emption rights. Also, if the acquiring party acquires at least 75% of the target company's shares, the remaining shareholders have a statutory put option right based on which they may sell their shares to the acquiring party on the same terms.

In case of acquisitions by means of a public takeover bid, the principle of the shareholders' equal treatment needs to be observed, i.e. the same terms shall be offered to all shareholders. Furthermore, the bidder shall purchase all shares offered, unless the participating interest to be acquired by the bidder would be less than 50% and the bid contains a cancellation clause for this case. The principle of equal treatment shall also apply among shareholders when exercising their right of acceptance of the takeover bid.

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## **2.8 Are there obligations to purchase other classes of target securities?**

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As a general rule, if the acquirer acquires at least 75% of the target company's shares, the remaining shareholders of the target company

shall have a statutory put option right towards the acquirer which may be exercised by the remaining shareholders regardless of the class of their shares. Also, in case of an acquisition by means of a public takeover bid, the bidder is required to purchase all shares offered regardless of their class.

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## **2.9 Are there any limits on agreeing terms with employees?**

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The Capital Market Act contains provisions on dealing with employees in public takeover situations. The bidder shall submit an operating plan which covers its future plans regarding the future of the target company which also covers its intentions regarding the target company's employees and management, including any material change in the conditions of employment. So the bidder may enter into preliminary negotiations with the target's management in respect of the employees but it shall in all cases comply with the confidentiality requirements on business and securities secrets and insider trading.

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## **2.10 What role do employees, pension trustees and other stakeholders play?**

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According to the provisions governing public takeovers, the management body of the target company shall forward the takeover bid upon its receipt without delay to the representatives of the employees. The employees may state their opinion which shall be attached to the opinion of the management body of the target company, so the employees may express their opinion regarding the proposed transaction, which may in theory support or hinder the deal. Also, there is an obligation to consult with employee representatives in case of mergers and other corporate transformations. However, in our experience, employees, just as pension trustees, play a rather formal role. In case of mergers and other corporate transformations, the merging companies' creditors may ask for security in case the debtor company's financial situation deteriorates as a result of the merger. Failure to provide security may result in non-completion of the transaction.

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## **2.11 What documentation is needed?**

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Documentation requirements vary significantly depending on the type of transaction. A simple share purchase can be effected by means of an ordinary sale and purchase agreement and some supporting corporate documentation. Mergers and other corporate transformations, as well as acquisitions by means of public takeover bids, require complex legal and supporting accounting as well as financial documentation, the preparation of which requires the involvement of advisers from various fields.

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## **2.12 Are there any special disclosure requirements?**

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General *ex post* registration and disclosure requirements apply in case of almost all types of transactions. Special disclosure requirements apply to mergers and other types of corporate transformations where the decision on the transformation needs to be announced to the concerned companies' creditors. In case of a public takeover bid, the bidder shall announce the bid to the Hungarian National Bank, provide the bid documentation to the target company's board or management body and submit the bid offer for publication.



### 2.13 What are the key costs?

Key cost elements include the advisers' fees as well as official fees for publications, announcements and registrations, in addition to the official fees for governmental approvals such as merger clearance or the approval of the takeover bid.

### 2.14 What consents are needed?

Any acquisition may be subject to civil and regulatory consents. The articles of association of privately held companies may prescribe that the transfer of shares is subject to the consent of target companies. Such consent may be granted by the shareholders' meeting or by the management board (in case of companies limited by shares). A public takeover bid is subject to the Hungarian National Bank's approval. Further regulatory consents include the merger clearance to be issued by the competent competition authority and other governmental approvals in case the target company is active in certain regulated industries.

### 2.15 What levels of approval or acceptance are needed?

There is no minimum level of approval or acceptance, but, in case of a public takeover, the bidder must purchase all shares offered, unless the participating interest to be acquired by the bidder in the target company would be less than 50% pursuant to the declarations of acceptance, and the takeover bid contains a cancellation clause for this instance.

### 2.16 When does cash consideration need to be committed and available?

The minimum amount of consideration to be paid against the securities purchased in the framework of a public takeover is governed by the Capital Market Act. The bidder shall effect payment within five working days following the expiry of the period for the submission of the declaration of acceptance, or on the day when the GVH's clearance is granted.

## 3 Friendly or Hostile

### 3.1 Is there a choice?

In case of a public company, the acquirer may acquire the target company even if the target company's management does not want the deal to go through and the response of the management board to the takeover bid is against the selling of the participation to the bidder. In case of privately held companies, the target company's management plays an even less important role in the transaction.

### 3.2 Are there rules about an approach to the target?

There are no specific restrictions on approaching the target. The Capital Market Act does not prohibit approaching the target before the public announcement of the public takeover bid either. The bidder and its investment service provider shall announce the bid to the Hungarian National Bank, provide the target company's board or management body with the bid documentation and submit the bid offer for publication.

### 3.3 How relevant is the target board?

The strategic importance of the target company's management board shall be assessed in light of the target's articles of association as, in certain cases, the board may be authorised to use defence instruments. Under the Capital Market Act, the management body may, as a general rule, not adopt any decision aiming to prevent the bidder in carrying on its activities for the acquisition of the participation (for example, by increasing the target's share capital, buy up its own shares, etc.).

### 3.4 Does the choice affect process?

In case of a public takeover, the board of the target plays an important role because it may convey any information to the bidder before the announcement of the takeover bid, which may be useful for bidders. Under the Capital Market Act, the management body of the target company shall respond to the takeover bid submitted by the bidder and communicate such response to the shareholders before the commencement of the period within which the declarations of acceptance may be submitted by the shareholders. Therefore, the response and overall conduct of the management may substantially affect the transaction.

## 4 Information

### 4.1 What information is available to a buyer?

In Hungary, buyers can avail themselves of a variety of public registries for the purpose of reviewing a target company's state of affairs. Detailed company information, the status of the company's real estate and the status of credit collaterals provided by the target can be reviewed in publicly available registers. Annual financial statements are also publicly available. The Capital Market Act requires public companies to publish annual and special reports. Such reports may provide buyers with information regarding the target company's financial status and general information about its operations.

### 4.2 Is negotiation confidential and is access restricted?

Generally, negotiations with shareholders are subject to confidentiality in case of privately held companies. However, offers need to be made available to shareholders having pre-emption rights. In case of public takeovers, as a general rule, in case of more than one potential bidder, these bidders shall be treated equally; therefore, the target may not restrict access, even if a bidder is deemed unfriendly by it.

### 4.3 When is an announcement required and what will become public?

As a general rule, acquisitions are publicly announced when being registered in the company register, i.e. *ex post*. Usually, only the identity of the acquiring party is registered and, thus announced. In case of mergers and other corporate transformations, a public announcement on the terms of the merger shall be made after the resolution on the merger making this process rather transparent. In certain cases, the acquisition of a participating interest in a target company shall be subject to a public takeover bid that is to be approved by the Hungarian National Bank. In these cases, the target company shall be notified as well and the bid shall be published.

#### 4.4 What if the information is wrong or changes?

As a general rule, the party making the announcement or providing information shall bear both civil and, to some extent, criminal liability for the accuracy of the information at the time to which the information relates. More detailed rules apply in the case of public takeovers. Under the Capital Market Act, the bidder and its investment service provider shall issue a declaration stipulating that all data and information contained in the business report is true and correct and that it contains all of the information necessary to make an informed judgment of the bidder and the takeover bid to which it pertains. The bidder and its investment service provider shall be subject to joint and several liability for any and all damages resulting from supplying any misleading information.

## 5 Stakebuilding

#### 5.1 Can shares be bought outside the offer process?

Yes, shares of a public limited company may be bought outside of the public offer process for the acquisition of less than 25% of the voting rights if there is shareholder in the company, other than the buyer, holding more than 10% of the voting rights; or for the acquisition of less than 33% of the voting rights. The shares of a private company limited by share may also be bought outside of the public offer process.

#### 5.2 Can derivatives be bought outside the offer process?

Yes, derivatives may be bought outside of the offer process.

#### 5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Shareholders in a public limited company shall notify the issuer and the Hungarian National Bank at the time of reaching or exceeding the following thresholds, held directly or indirectly: 5%; 10%; 15%; 20%; 25%; 30%; 35%; 40%; 45%; 50%; 75%; 80%; 85%; 90%; 91%; 92%; 93%; 94%; 95%; 96%; 97%; 98%; and 99%.

#### 5.4 What are the limitations and consequences?

Any shareholder who fails to comply with the notification requirements under question 5.3 above may not exercise its voting right until the fulfilment of its notification obligations.

## 6 Deal Protection

#### 6.1 Are break fees available?

The Capital Market Act stipulates the code of conduct to be followed by the target company's board in case of public takeover offers. As a general rule, the management body of the target shall remain neutral, therefore, it may not offer break fees to the shareholders or to the bidders to terminate the pending deal.

#### 6.2 Can the target agree not to shop the company or its assets?

The management body of a public target company shall publish the public takeover offer to the shareholders, and the shareholders may accept such offer without the permission of the target company. Therefore, the target company may not refuse to shop the company's shares. However, the management board of the target may refuse to sell the target company's assets, but in this case the shareholders meeting may resolve on selling such assets even if the management board is against the respective deal.

#### 6.3 Can the target agree to issue shares or sell assets?

The management body, as of the date of receipt of a public takeover bid or – if the management body already had information concerning the takeover bid – as of the date of receipt of this information up to the time limit allowed for the acceptance of the bid may not adopt any decision aiming to hinder the target company in carrying on its activities for the acquisition of a participating interest (such as to increase the share capital, buy up its own shares, sell crown jewels, etc.), if so prescribed in the articles of association of the target company.

#### 6.4 What commitments are available to tie up a deal?

As a general rule, the parties may stipulate a deposit (in Hungarian: *foglaló*) or penalty to tie up a deal in case of share sale and purchase agreements under the Hungarian Civil Code.

## 7 Bidder Protection

#### 7.1 What deal conditions are permitted and is their invocation restricted?

The substantial and procedural rules of the public takeover offer are governed by the Capital Market Act. For other deals not falling under the scope of the Capital Market Act, the general rules of Hungarian law are applicable.

#### 7.2 What control does the bidder have over the target during the process?

Control is transferred to the bidder as described in question 7.3 below; therefore, the bidder has no control of the target during the public takeover process.

#### 7.3 When does control pass to the bidder?

Generally, control passes to the bidder according to the provisions of the parties' share transfer agreement. Since Hungarian competition law prohibits consummation of the transaction prior to merger clearance, the transfer agreement should provide that control may not transfer prior to the issuance of merger clearance. In case of a public takeover, a share transfer agreement between the bidder and the shareholder who has accepted the bid shall become effective, and control shall pass, on the last day of the period open for acceptance unless there is a merger clearance proceeding pending on this day, in which case the agreement shall become effective, and control shall pass on the day when merger clearance is granted.

#### 7.4 How can the bidder get 100% control?

The bidder may get 100% control if, in case of a privately held company, it has concluded a transfer agreement with every shareholder or, in case of a public takeover, every shareholder of the target has accepted the public offer.

In case of a public company, the bidder may exercise a call option regarding the remaining shares of the target company if i) it has declared its intention to exercise its call option in the application for approval of the takeover bid, and ii) it controls 90% or more of the voting rights of the target company within three months from the date of closure of the successful bid in the target company.

Finally, a bidder may acquire 100% control if it has acquired at least 75% in the target company and the remaining shareholders exercise their statutory put option right.

### 8 Target Defences

#### 8.1 Does the board of the target have to publicise discussions?

The target board may provide the bidder with information about the target before the public takeover bid is announced; however, the parties shall keep this information strictly confidential to comply with the confidentiality provisions of the Civil Code and the Capital Market Act, therefore, there is no obligation to publicise preliminary discussions.

#### 8.2 What can the target do to resist change of control?

The target may apply pre-bid and post-bid defence tactics. Within the scope of preventive defence, the target may apply – for example – change of control clauses in the key contracts of the company or establish a staggered board, where the directors may not be removed at the same time.

The Capital Market Act also stipulates the code of conduct to be followed by the target company's board in case of public takeover offers. As a general rule, the management body of the target shall remain neutral. Despite the neutrality rule, the management body of the target company may undertake actions to encourage the launch of a counter-offer (the “white knight” defence tactic); or adopt a decision for the implementation of a resolution the general meeting has passed before the announcement of the bid (or being informed about it), provided that it is a part of the ordinary course of the target company's business.

#### 8.3 Is it a fair fight?

Given that many publicly listed company apply “poison pill” defence tactics in their bylaws against takeover bids, by limiting the maximum level of voting rights or applying other restrictions and change of control clauses in key contracts hostile bids are not common in the Hungarian market.

### 9 Other Useful Facts

#### 9.1 What are the major influences on the success of an acquisition?

The quality of the valuation and assessment thorough due diligence may have a major influence on the deal. Due diligence provides the bidder with in-depth information of the history, values, culture and financial reports of the target. Poor valuation may result in an increased price, which will make the deal look less successful. Besides due diligence, a high-quality management team and trustworthy and experienced advisers play an important role.

#### 9.2 What happens if it fails?

Failure of a deal is an important market event that may lead to change in the share price, and other market operators may also try to take advantage of any uncertainty.

### 10 Updates

#### 10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

In 2017, the Hungarian National Assembly adopted a bill on the enhancement of the legal competitiveness of the Hungarian business environment. The bill aims to cut back unnecessary administrative burdens and to establish a forward-looking legal framework that recognises and satisfies economic needs. The bill provides for companies having their registered seat in the European Union to transfer their registered seat to Hungary by means of a simplified, accelerated process by merging with a Hungarian entity established solely for the merger. The rules previously in force allowed companies established in other EU Member States to transfer their registered seat to Hungary, but the foreign company had to merge with a fully operational and existing company registered under Hungarian law.



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Dr. Fenyvesi graduated from the Janus Pannonius University of Pécs in 1998 and pursued postgraduate studies in EU Law at the University of Pécs. He obtained an LL.M. in International Economic Law from the University of Warwick in 2004, and attended the University of Oxford as a Chevening scholar, receiving a *Magister Juris* degree in 2006. Dr. Fenyvesi joined the Budapest office of Freshfields Bruckhaus Deringer in 2005. He became an associate of Oppenheim in 2007, and has been a partner at the firm since 2010. Dr. Fenyvesi has been the head of the corporate practice of Oppenheim since 2014.

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The Budapest office of the international law firm Freshfields Bruckhaus Deringer re-established itself as an independent law firm under the brand name "Oppenheim" as of 1 November 2007. Nevertheless, Oppenheim has been providing legal services for more than two decades now. Oppenheim currently consists of more than 40 lawyers and legal experts who provide advice on all areas of Hungarian business law. The attorneys of Oppenheim provide their legal expertise through a combination of specialised practice groups and sector experience, such as manufacturing, construction, energy, utilities, automotive, healthcare, media, IP/IT, capital markets, banking and financial services, and the services industry.

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