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The International Comparative Legal Guide to:

Merger Control 2018

14th Edition

A practical cross-border insight into merger control issues

Published by Global Legal Group, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George Print Group
December 2017

ISBN 978-1-911367-85-7
ISSN 1745-347X

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the fourteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 44 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Nigel Parr of Ashurst LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The relevant merger authority is the Hungarian Competition Office (*Gazdasági Versenyhivatal* "GVH", website: www.gvh.hu) and its decision-making body, the Competition Council. The GVH is a state administrative authority that is independent from the Government and only reports to the Hungarian Parliament.

1.2 What is the merger legislation?

The relevant merger legislation is the Hungarian Competition Act (Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, "Competition Act"); in particular, part I chapter 6. The Competition Act sets out both substantive and procedural rules of merger proceedings. As the GVH is part of the public administration, Act CXL of 2004 on the General Rules of Administrative Proceedings and Services is applicable (which will be replaced by Act CL of 2016 on the General Administrative Procedural Code as of 01.01.2018) to the GVH's procedure when the Competition Act does not contain special provisions regarding the issue in question.

In addition, there are relevant guidelines, so-called "position statements" and notices of the GVH, such as the notice on "differentiating between concentrations subject to authorisation in simplified or full procedure", the notice on "conditions and obligations in merger clearance decisions", or the notice on "preliminary consultation in connection with merger proceedings". The GVH has also issued general merger guidelines, similar in its structure and content to the European Commission's jurisdictional notice; however, in certain cases their position differs from that of the European Commission.

1.3 Is there any other relevant legislation for foreign mergers?

The Competition Act applies to any transaction that meets the stipulated turnover thresholds. There is no other relevant legislation for foreign mergers.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Sectors regulated by specific legislation include the financial, media and telecommunication, energy (electricity and gas industries), pharmaceutical and railroad transport sectors.

Merger rules for these particular sectors are partly contained in the Competition Act and also sector-specific regulatory acts (e.g. Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises, Act LXXXVI of 2007 on Electric Energy, Act C of 2003 on Electronic Communications, Act XL of 2008 on Natural Gas). In the case of a merger of financial institutions, a special approval from the Hungarian Central Bank as the financial supervisory authority ("MNB") is required, in addition to obtaining authorisation from the GVH. Also, in other sectors (e.g. energy, railroad-transportation) the approval by the respective authorities (e.g. the Hungarian Energy Office, Hungarian Railway Office) is required in addition to the GVH's authorisation. For specific media mergers, the preliminary opinion of the Media Council is required, which is binding on the GVH in the sense that it may not approve a concentration which has not been approved by the Media Council.

The Competition Act contains special provisions for the concepts of "key business entities for the national economy" and "mergers of strategic importance at national level".

The Hungarian legislature has empowered the Hungarian government to issue decrees in order to qualify specific mergers as strategically important at national level (i.e. in order to preserve jobs or to secure supplies). These transactions do not require a merger control proceeding or authorisation from the GVH. The government has used this tool to exempt direct or indirect state acquisitions in various sectors (e.g. acquisition of the MKB Bank and of Budapest Bank Zrt., the merger of Takarékszövetkezeti Bank Zrt. and Magyar Takarék Zrt. in the bank sector, acquisition of FŐGÁZ in the energy sector, acquisition of Antenna Hungária in the media sector, and acquisition of majority ownership in Bombardier MÁV Hungary Kft. in the transportation sector).

The acquisition in a liquidation proceeding over a key business entity for the national economy (in the following: "key business entity") is entitled to preferential treatment, whereby the GVH's prior approval for the derogation from the suspension clause is not required, i.e. the acquirer may exercise control prior to the GVH's final decision. However, the GVH may restrict these rights in a separate decision, or prohibit the concentration in its final decision.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

According to the Competition Act and the GVH's jurisdictional notice, a concentration occurs when a change in the controlling entities of the undertaking takes place. This results in a shift of interests on the controlling side which affects the behaviour of the undertaking. The Competition Act respectively lists the following cases:

- two or more previously independent undertakings merge or part of an undertaking is acquired by another independent undertaking;
- one or more persons already controlling at least one undertaking or one or more undertakings acquire, whether by purchase of shares/securities or assets, by contract or by any other means, direct or indirect control right(s) of one or more other undertakings (which were previously independent but not from each other); or
- two or more undertakings create a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

Control shall be constituted by rights, contracts or any other means which, either separately or in combination, confer the possibility of exercising decisive influence over an undertaking; in particular, by way of:

a) holding over 50% of the shares, stocks or voting rights in the controlled company;

b) having the power to designate, appoint or dismiss the majority of the executive officers of the other company;

c) having the power, by contract, to assert major influence over the decisions of the other company; and

d) acquiring the ability to assert major influence over the decisions of the other company (*de facto* control).

Regarding joint ventures a change in controlling entities (i.e. a concentration) occurs in case of a shift from joint to sole control by one of the formerly jointly controlling entities and also in case there is a decrease in the number of jointly controlling entities. In the latter case, the GVH considers that a concentration occurs and assesses whether such change affects the market behaviour of the undertaking only within the framework of the merger control proceeding. The HCA takes this position in order to avoid legal uncertainty.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

The acquisition of a minority shareholding amounts to a merger only if it confers (sole or joint) control over the target undertaking.

2.3 Are joint ventures subject to merger control?

A joint venture which is capable of performing all the functions of an autonomous business entity on a permanent basis (full function joint venture) is subject to merger control, except if the joint venture has as its object or effect the coordination of the activities of the joint venture partners. Such coordinative joint ventures must be assessed against cartel provisions.

2.4 What are the jurisdictional thresholds for application of merger control?

A merger must be notified to GVH if:

- the total net group turnover of the undertakings concerned exceeded HUF 15 billion (approximately EUR 48 million) in the previous business year; and
- there are at least two undertakings concerned whose total group turnover in the preceding business exceeded HUF 1 billion (approximately EUR 3.2 million) each.

Please note that for the purpose of calculating the turnover thresholds:

- Intra-group revenues must be disregarded. The notion of "intra-group" refers to revenues from sales within the same group of one undertaking concerned.
- For both foreign and Hungarian undertakings, only the net sales revenues generated from the goods sold or services rendered in Hungary are to be taken into account.
- Special rules apply for the calculation of turnover for financial institutions and insurance companies.
- For the purposes of calculating the HUF 1 billion threshold, turnovers of undertakings that were acquired from the same group within two years preceding the acquisition of control by the acquirer group must also be considered, if such acquisitions were, at that time, not subject to authorisation.

A secondary "merger investigation threshold" has been introduced to the Hungarian Competition Act with the (end of) 2016 amendment. The concept entails a notification in case the total net turnover of the undertakings concerned has exceeded HUF 5 billion (approx. EUR 16 million) in the previous business year, and if the concentration might significantly restrict competition, particularly as a result of the creation or strengthening of a dominant position in the relevant market. The GVH has issued a notice to help assess this second criteria, as a result of which a "voluntary notification" is to take place when the market share thresholds are above a certain level, which is essentially the same as the criteria for initiating a Phase II proceeding.

In the case of this "voluntary" notification, closing may take place without a clearance decision, i.e. the transaction may be implemented. There are no fines for implementing the transaction. Accordingly, even though the notification is voluntary, in case a concentration is not notified, the Hungarian Competition Authority may initiate a proceeding on its own motion within six months following the closing of the transaction (which does not entail suspension of the implementation). Such proceedings involve the risk that the GVH orders – in the worst case – *restitutio in integrum*. In case of high-profile transactions or if the dynamics of competition are potentially affected, filing may be recommended.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes, all concentrations must be notified to the GVH if the relevant thresholds are met. However, in case only the merger investigation threshold of HUF 5 billion is met, the notification is in fact voluntary and the parties must assess the risks of not filing.

The latest amendments of the Competition Act established a new merger control mechanism. The GVH has to assess within eight days from notification (or the payment of filing fee) whether it intends to conduct a detailed investigation of the transaction. If such investigation is not necessary, it may issue a clearance certificate within the eight-day period, without a formal merger control

proceeding. Even though merger control applies also in lack of a substantive overlap, a complete filing, which shows that the absence of anticompetitive effects is evident, may lead to the issuance of a clearance certificate within this rather swift timeline.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

All foreign-to-foreign transactions that meet the turnover thresholds must be notified. In order to avoid having to notify too many transactions without actual relevance for the Hungarian market, the Competition Act establishes that only Hungarian turnover of the undertakings relevant for the concentration have to be considered; please see question 2.4 above.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

Temporary acquisitions of control for a period of up to one year by insurance undertakings, financial institutions, investment companies or property managing organisations, do not have to be notified, if the purpose of the acquisition was resale and if the exercise of control is limited to the extent to what is absolutely indispensable. The period of one year may be extended by one more year upon request, if the undertaking can prove that it was not possible to divest within one year.

Moreover, the GVH generally has no competence to assess transactions that have a Community Dimension, pursuant to the European Merger Regulation ("EUMR").

In the case of concentrations which are considered as being of strategic importance at national level by way of a government decree, the GVH's authorisation is not required. For details, please see question 1.4.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The basic principles are similar to the ones under the EUMR: if the steps together constitute an economically linked (single) transaction, only one "joint" filing is necessary.

The HCA's general merger guidelines provide for two basic scenarios where the HCA assesses more transactions in a single proceeding. The first scenario involves those cases where even though separate mergers take place, they are interlinked; hence qualify as one concentration within the framework of the Competition Act (one concentration scenario). In the second scenario, separate mergers qualify individually as concentrations under the Competition Act; however, one "unified" proceeding is necessary for the assessment (more concentrations scenario).

The "one concentration scenario" covers (i) those mergers which are linked by a single economic purpose, the attainment of which requires all individual mergers/stages to take place, and (ii) those acquisition sequences where one group acquires control over several undertakings of another group. These transactions qualify as one concentration and are handled by the GVH in a single proceeding irrespective of the timeline or when they take place.

Within the "more concentrations scenario", the GVH conducts a single proceeding in case the individual concentrations are (i) interlinked, (ii) concluded on the same day, and (iii) the notification has been done in one filing form, or the filing forms were submitted on the same day. The GVH considers the issue whether the assessment may be done in a single proceeding a substantive one. Therefore, the decision primarily depends on considerations pertaining to the identification of relevant market effect and data.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

If the thresholds and other requirements of the Competition Act are met, a filing for an authorisation from the GVH is compulsory (for exceptions, see question 2.7 above).

The deadline for the notification was abolished with the introduction of the suspension clause. However, the Hungarian Competition Act clarifies that the notification may only be submitted following the time of publication of the public bid, the conclusion of the contract, or the acquisition of the right of control, whichever occurs the earliest. For further details please see questions 3.3 and 3.7.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Please see the answer to question 2.7.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

The introduction of the suspension clause resulted in the introduction of a specific fine for breach of the suspension clause. Accordingly, the competition council may impose a *daily* fine of a minimum of HUF 50,000 (approximately EUR 160) and a maximum of HUF 200,000 (approximately EUR 640), up to 10% of the net turnover of the group of undertakings in the business year preceding the violation, from the day of the occurrence of the first of the following events: the publication of the invitation tender; the conclusion of the binding contract; or the acquisition of the control rights by any other means, provided no authorisation of the GVH was requested and the concentration was implemented, regardless of whether the GVH has later approved the concentration.

The Hungarian system also sanctions undertakings for acquiring control despite the GVH's prohibition decision, or for not fulfilling the imposed commitments.

In these cases the GVH may impose a fine of up to 10% of the net turnover of the group of undertakings in the business year preceding the violation. The authority indicated that it would also apply the general fining rule (of up to 10% of the group turnover of the undertaking concerned in the previous financial year) if a concentration has been notified to the authority, but has been implemented prior to the clearance decision (for which the daily fines would not apply, as the undertaking complied with the notification obligation but breached the non-implementation obligation). Moreover, when the transaction is closed prior to the authorising decision and the authority finally prohibits the concentration, the authority may impose all measures necessary to restore effective competition (including divestments).

It is important to note that in case only the "merger investigation threshold" is met, the suspension clause does not apply; however, the HCA may order *in integrum* restitution in case of competition concerns.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

In the past, there was no express requirement for a "hold separate" solution in the absence of a suspension clause; and case law is still not available on this issue. For possible risks of closing before clearance, please see question 3.7.

3.5 At what stage in the transaction timetable can the notification be filed?

A notification may be filed as soon as (but not earlier than) the transaction agreements have been signed, the public bid is announced or the controlling interest has been acquired. Unlike under European competition law, prior notification (e.g. on the basis of a good faith intention to conclude an agreement) is not permitted under Hungarian law. No formal procedure is available during which an unsigned contract could be pre-reviewed and evaluated by the GVH. However, the concept of pre-notification contacts is also not implemented in the Hungarian Competition Act. An amended notice on pre-notification talks was also issued, which emphasises that the concentration must already be decided (i.e. not hypothetical) before pre-notification talks are requested.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Following the submission of a notification, the GVH has a deadline of eight days in which to decide whether it intends to conduct a detailed assessment of the concentration. In unproblematic cases where no competition issues arise and all documents the GVH needs to establish this are available, the HCA may simply issue a clearance certificate ("certificate proceeding").

In cases where the concentration may raise competition issues or the filing is uncomplete, the GVH initiates a formal merger control proceeding within eight days and notifies the parties accordingly and continues the Phase I assessment. It may return the filing within 15 calendar days and request that the parties provide further information within a time period specified by the case handler, usually around one month (which may be extended once at the request of the parties). Issuing such data requests stops the clock for the GVH until receipt of the applicant's response. The GVH may issue such data requests more than once during the proceeding.

Once the GVH has received the filing, it has 30 calendar days (in which the time for answering the data request, and other facts which stop the clock, are not included) to assess the impact of the transaction (Phase I).

Within Phase I – which may be extended by 20 calendar days – the Competition Council (on the basis of a report prepared by a case handler) decides whether to clear the transaction or open Phase II proceedings in order to assess the transaction in more detail. A final decision in Phase II has to be adopted within four months. Phase II may be extended by another two months.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

The Hungarian Competition Act includes a suspension clause which explicitly prohibits completion of a transaction (especially the exercising voting rights or appointing the management), prior to its clearance, by the competition authority. However, the prohibition to complete the transaction does not prevent the signing of the underlying agreement or any necessary action under the agreement, provided the control rights of the acquirer are not exercised.

The Hungarian system has also introduced derogation from this prohibition similar to that under the European Merger Control Regulation. Upon its request, the GVH may permit the acquirer to exercise its control right prior to the GVH's final decision on the concentration, particularly if it is necessary to protect the value of its investment. In the request, the applicant has to provide justification, including the circumstances resulting in the necessity to exercise the control rights prior to the authorisation. The applicant must also demonstrate the form, extent and detailed framework in which he or she intends to exercise such rights.

The GVH may impose an obligation of a limitation of control rights in the context of the derogation. Such a request must be submitted at the same time as the filing of the application for the authorisation of the concentration, or at the latest within eight days from acquiring knowledge of the fact that the control rights need to be exercised prior to the authorisation of the transaction (in the latter case, justification for the delay must also be provided). The GVH issues its decision within 15 days from the submission of the request.

The fines which may be imposed for breach of the suspension clause range from HUF 50,000 to HUF 200,000 per day (from the signing of the contract, issuance of the public bid until the start of the competition supervisory proceeding against the company). This special fining basis is applicable if an undertaking has failed to request the authority's authorisation for the concentration and has implemented the concentration. The authority has indicated that it would apply the general fining rule (of up to 10% of the group turnover of the undertaking concerned in the previous financial year) if a concentration has been notified to the authority, but has been implemented prior to the clearance decision. In 2017, the GVH imposed a fine for the violation of the suspension in one case, where the buyer already acquired certain assets prior to the clearance decision of the GVH. The GVH took the view that such action qualifies as partial implementation prior to clearance and imposed a fine of HUF 1.8 million (EUR 6,000).

Furthermore, any contract resulting from the exercising of control rights in violation of the suspension clause is null and void and the undertaking exercising such rights is responsible for the damages. However, the undertaking in breach of the prohibition may not rely on the nullity.

The Hungarian Competition Act contains a special immunity from fines for small and medium-sized enterprises (SMEs). In the case of first-instance infringement of SMEs, the competition council may refrain from imposing a fine on the undertaking, and shall issue a warning instead.

3.8 Where notification is required, is there a prescribed format?

Yes, the notification must be submitted on a filing form which can be downloaded from the website of the GVH (www.gvh.hu). The filing form is available in Hungarian and English, but may only be

submitted in Hungarian. A new filing form – in fact, an amendment of the previous filing form – was issued by the GVH and is to be applied to concentration arising as of 15 January 2017.

Original documents in English, German or French may be submitted as annexes to the filing form without a Hungarian translation. However, the GVH may order the parties – *ex officio* or at the request of the parties – to submit a Hungarian translation or summary of such documents. If the documents are in any other language, the parties must submit Hungarian translations, as well.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

The new Hungarian filing form (introduced in the beginning of 2017) is designed so that not all questions have to be answered in lack of any overlaps/competition issues. As a result, less data has to be provided for non-problematic cases, which accounts for most cases before the Authority.

There is a possibility for the GVH to issue – under certain circumstances – a so-called '*simplified decision*' which does not contain the reasoning of the decision. Even if the requirements for a simplified decision are met, it is at the authority's discretion to decide whether to resort to a simplified decision or to conduct a regular proceeding. A simplified decision may speed up the proceeding by saving time for the Authority from having to provide a detailed reasoning of its clearance decision.

Moreover, practice shows that *preliminary consultation (pre-notification talks)* can speed up the proceeding, as the parties can incorporate the GVH's recommendations and requests into the formal filing form, and thereby reduce the chances or scope of an additional data request.

Under certain circumstances two concentrations can be assessed in the same proceeding. The respective rules are included in the general merger guidelines of the GVH (for more details please see the answer to question 2.8).

3.10 Who is responsible for making the notification?

The responsibility for submitting the filing rests with the direct acquirer or an undertaking controlling the direct acquirer. In case of a merger or a joint venture (as opposed to other types of control, such as acquisition of control), both undertakings concerned are obliged to file the notification. Recent amendments provide that the indirect acquirer (the undertaking owning the acquiring subsidiary/SPV) may also take the position of the notifying party, since in several cases international undertakings only establish subsidiaries for the purposes of the acquisition. In these cases, the mother company may submit the notification instead of the directly acquiring entity.

Regardless of who is responsible for submitting the notification, a Power of Attorney has to be provided both from the acquirer(s) and from the target.

3.11 Are there any fees in relation to merger control?

A filing fee of HUF 1 million (EUR 3,200) is payable upon filing the notification. In case the GVH decides not to issue a clearance certificate in a certificate proceeding within eight days, a further HUF 3 million (approximately EUR 9,600) must be paid for the Phase I proceeding. An *additional* fee of HUF 12 million (approximately EUR 38,000) is payable if Phase II proceedings have been opened, i.e. the total Phase I + Phase II proceeding costs HUF 16 million (approximately EUR 51,000). The Phase II fee has to be paid within eight days of the Authority's decision to open Phase II proceedings.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

The rules governing a public offer applicable to the public offer at hand are relevant in a merger control clearance process from the perspective of determining the date of the publication of a public bid (from which date the notification may be submitted). If the public bid is published outside Hungary, the national (takeover) laws of the country where the public bid is published will be applicable.

3.13 Will the notification be published?

The Hungarian Competition Act contains a statutory obligation for the GVH to publish a short summary of facts (without revealing business secrets) on the website of the GVH, based on the summary which the parties provide in the notification. However, the parties may prevent such publication by indicating that the fact of the transaction as such also constitutes a business secret.

After the final decision, a press release and the non-confidential version of the Authority's (final) decision on the concentrations, are published on the Authority's website.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The GVH may not prohibit a transaction if it does not lead to a substantive impediment of competition in the affected market. The substantive test was introduced with effect from 2009, which replaced the previously applied dominance test. The explanatory notes of the amendment introducing the effective competition test refer to both the SLC tests ("significant lessening of competition", used in the USA) and the SIEC ("significant impediment of effective competition", applied in the European Union). The wording of the Competition Act is not identical to that of the EUMR but reflects more the SLC test: "the GVH authorises the transaction if it does not lead to a substantive impediment of competition [and not the significant impediment of effective competition – remark by the author] on the relevant market, in particular as a result of the creation or strengthening of a dominant position". This test affords the GVH wider possibilities to take economic considerations into account when assessing a transaction.

4.2 To what extent are efficiency considerations taken into account?

The Hungarian Competition Act does not explicitly mention efficiency considerations, but they can be deducted implicitly from the wording of the Competition Act when referring to the "advantages and disadvantages [which] must be taken into account" when assessing a merger. A guideline on the general methods for assessing a merger contains a reference to the efficiency considerations and defines the criteria similarly to those of EU law: "If the concentration reduces the production costs of the undertakings concerned, this may lead to a decrease in price. When assessing these efficiency considerations it is important that

they should be merger-specific, numerically verifiable, and must benefit the consumers to the appropriate extent." It is the task of the undertakings concerned to demonstrate the above criteria, and the notification form contains a related section. The Hungarian Authority is expected to follow European competition law with respect to efficiency considerations.

4.3 Are non-competition issues taken into account in assessing the merger?

Non-competition issues are not taken into account in the GVH's assessment. Such issues are assessed by the respective authorities (e.g. the Central Bank as financial supervisory authority) in separate procedures.

However, certain acts for particular sectors (e.g. media) oblige the GVH to obtain the opinion of the special sectoral/industrial body in a merger related to that specific sector. There is precedent where a special body in the industrial sector denied its consent to the transaction. The GVH signalled that it would also prohibit the transaction, as a result of which the applicant withdrew its application and the GVH terminated the proceedings.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Any third person may submit a (formal) complaint about alleged infringements of the Competition Act – e.g. a failure to submit a merger notification – to the GVH, which has two months from receipt of the complaint to decide whether to open proceedings. A dismissal of the formal complaint may be appealed before the Metropolitan Court of Budapest. If the complaint does not qualify as a formal complaint, it will be treated as an informal complaint, where the GVH does not have to issue a formal decision about opening an investigation, but may do so at its own discretion.

Third parties may submit (informal) comments on a notified transaction to the GVH. Such an informal comment does not confer any rights on the third party; in particular, the third party will not have access to the file prior to the conclusion of the proceeding (except if such a third party is capable of proving that access to the file is necessary for practising its rights or to fulfil legal obligations).

In the course of the proceedings, the officials at the authority may send written requests to competitors, customers, etc. for market information. The GVH may also initiate a public consultation (by publishing the proposed remedies on its website) prior to imposing remedies in a merger control proceeding (market test). Anyone has the right to send comments, opinions and recommendations to this publication within 20 days.

4.5 What information gathering powers does the merger authority enjoy in relation to the scrutiny of a merger?

The GVH has the right to request information from the parties to the transactions and also from third parties (e.g. competitors, trade unions, customers, etc.). Failure to supply the requested information or submission of incorrect/misleading information may entail fines from HUF 200,000 (in the case of legal persons, approximately EUR 640) and from HUF 50,000 (in the case of natural persons, approximately EUR 160) to a maximum of 1% of the turnover in the previous financial year. In the case of a natural person, the fine may not exceed HUF 500,000 (approximately EUR 1,600).

As explained under question 4.4 above, the GVH has the right to request information from the public on the proposed remedies in the context of a merger control proceeding. However, this is a tool, not an obligation on either side; therefore, no sanctions may be imposed on third parties for not complying with the request published on the GVH's website.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The rules on access to file were amended significantly in 2014. Pursuant to the applicable rules, the parties to the proceeding may access the file at any time during the proceeding. Third parties may also access the non-confidential version of the file after the end of the proceeding. Moreover, third parties may also have access to the file prior to the end of the proceeding if they can prove a legal interest (such as an enforcement of their rights or compliance with an obligation).

In order to protect commercially sensitive information, the parties to the proceeding must specifically request, with detailed reasoning, for each piece of data or information to be treated as confidential, i.e. that third parties' access to the provided documents or to the making of copies thereof be limited.

Non-confidential versions of the summary of the transactions (provided by the parties in the filing form), as well as of the final decisions of the GVH, are published on its website.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

In case of a certificate proceeding, the GVH issues a clearance certificate within eight days, where it acknowledges the concentration without conducting a detailed (Phase I or Phase II) investigation.

Both Phase I and II proceedings end with a decision of the Competition Council. In this decision, the GVH either clears (with or without conditions and/or obligations) or prohibits the transaction. The GVH's decision may be challenged by the parties within 30 days from receipt of the decision (see question 5.9).

It is also possible that the applicant withdraws the filing or that the GVH establishes that no authorisation was required. In this case, the proceeding ends with a decision of the GVH on the termination of the proceeding.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Although unconditional authorisation is granted in the majority of the cases, the Competition Act expressly provides for the possibility of clearing a transaction subject to conditions or obligations. The Competition Act entrusts the GVH with a wide ranging discretion to determine the conditions/obligations it wishes to impose on the undertakings. The parties must accept the commitments prior to the authority imposing the commitments on them. This practice is in line with the European one, whereby it is usually the parties (and not the Authority) which offer commitments (either already in the submission of the filing or later in the course of the proceeding when the GVH confronts them with an identified competition concern) and these remedies are negotiated before the GVH includes them in its final decision.

As a general rule, the GVH will decide about the remedies during a Phase II proceeding, but it is not impossible for the GVH to decide in a Phase I proceeding when both the competition concern and its solution are easily identifiable, furthermore the notification already includes the proposed commitments.

The Competition Act differentiates between two types of commitments, namely conditions and obligations. The relevant notice (Nr 3/2017) explicitly states that parallel application of these measures is also possible.

Whether the applicants comply with the remedies will be observed by the GVH *ex officio*. In this respect, the GVH initiates review proceedings.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

There is precedent that remedies have been imposed on foreign-to-foreign mergers. In one example, the GVH cleared the acquisition on the cement market of a Slovak company by a Swiss group (the direct acquirer being a German subsidiary) subject to a divesture. The GVH cleared the transaction on the precondition that both the acquirer and the target commit themselves to divest their business shares in a Hungarian subsidiary. However, although the direct acquirer and direct target were foreign companies, both had significant presence (also in the form of subsidiaries) and sales to Hungary. Even if remedies are imposed on foreign-to-foreign mergers, they will most likely relate only to the Hungarian market.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

Remedies may be negotiated at any stage during the proceedings (but before the Competition Council's final decision). Although a separate notice has been issued on remedies, there are no exact deadlines or procedural steps to be taken into account, only a few general "guidelines".

Identifying the competition issue itself is a task of the GVH. In cases where the applicants have not submitted structural or behavioural proposals along with the application itself, the case handler will signal the competition issue to the applicants, providing help to work out the appropriate measures. If the Competition Council identifies the competition issue, then either the Council itself will approach the applicants, or it will decide to give the documentation back to the case handler.

However, in order to avoid a Phase II proceeding, the applicant(s) should submit the proposed remedies as early in the proceeding as possible (preferably already with submitting the application for authorisation).

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The principles for imposing remedies – including divestments – are laid down in the GVH's notice about conditions and obligations in merger clearance decisions (Nr 3/2017). The notice mainly deals with various aspects of defining the object and the buyer in cases of a divestment remedy. The identity of the buyer may be specified in the decision or found later within a time limit – usually not longer than six months – set by the GVH; in which case it has to be approved by the GVH. If the divestment cannot take place within the set time frame, an extension of the time limit may be requested.

5.6 Can the parties complete the merger before the remedies have been complied with?

If a transaction is cleared subject to a prior condition, the parties may not complete the merger before fulfilling the condition. For subsequent conditions, implementation may occur before the remedies have been complied with but the decision becomes ineffective if the condition is not fulfilled. Failure to comply with an obligation (remedy) may lead to the revocation of the clearance decisions and/or fines on the parties.

5.7 How are any negotiated remedies enforced?

The GVH conducts a follow-up investigation to verify whether remedies have been adhered to. In the case of non-compliance with the imposed remedies, the GVH may impose a fine unless the GVH establishes that, due to a change in the circumstances, compliance with the remedies is no longer reasonable, in which case the decision on the remedies may need to be amended. If the remedy has been complied with, the GVH will terminate the follow-up investigation.

5.8 Will a clearance decision cover ancillary restrictions?

Ancillary restraints are automatically covered by the clearance decision. However, referring to the practice of the European Commission, the GVH has stated several times that, as a general rule, it does not examine whether the provisions on the restraint on competition contained in the transaction agreement(s) do actually constitute ancillary restraints. This has to be assessed by the applicants. Although the Competition Act itself does not contain the requirement of 'direct connection' of the ancillary restraint with the merger transaction, as EU law does, the practice of the Authority requires the above connection. The GVH has put a focus on ancillary restraint recently and is very critical of provisions restricting competition. In several cases is has concluded that certain provisions do not seem to satisfy the criteria of ancillary restraints. It is then in the discretion of the parties whether they amend the restraints accordingly, in order to avoid a separate proceeding initiated by the GVH to assess the restrictive provisions.

5.9 Can a decision on merger clearance be appealed?

Merger decisions may be challenged before the court within 30 days from receipt of the decision.

The court may not only annul the decision and order new proceedings before the GVH, but it may also alter the decision. The initiation of such a procedure does not have any suspending effect on the enforcement of the GVH's decision. The decision of the court may be appealed before the Metropolitan Court of Appeal. There is no further right of ordinary appeal but the parties may initiate an extraordinary review procedure before the Hungarian Supreme Court.

5.10 What is the time limit for any appeal?

The time limit for appeal is 30 days from receipt of the decision.

5.11 Is there a time limit for enforcement of merger control legislation?

The limitation period is five years.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The GVH is a member of the European Competition Network and thus cooperates closely with the competition authorities of other Member States of the European Union.

The GVH is also part of the International Competition Network.

6.2 Are there any proposals for reform of the merger control regime in your jurisdiction?

The last few years have seen various changes to the merger control regime (changes to substantive law in 2009, 2010, 2014 and 2017, furthermore changes to the filing form and updates/issuance of guidelines/notices in 2011, 2012, 2013, 2014, 2015 and 2017).

The amendments of the last few years signal a *ca*. annual update of the merger documents. This is to be welcomed as it is drawn on the stakeholders' and the authority's practical experience and aims at a better functioning of the Hungarian merger control system.

The latest substantial amendments came into force by the beginning of 2017. Both the Hungarian Competition Act and the merger control filing form have been substantially amended, furthermore – as mentioned above – the HCA has issued its own "jurisdictional notice". The amendments of the act have introduced – among others – the voluntary notification option (merger investigation threshold) and the increased (second) merger control threshold. The new filing form applies as of 15 January 2017.

6.3 Please identify the date as at which your answers are up to date.

The information set out in the above sections is up to date as of 13 October 2017.

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She represents clients in several ongoing merger control proceedings (including a Phase II proceeding), cartel proceedings, in a sectoral inquiry before the Hungarian Competition Authority, as well as before courts. Moreover, she runs competition compliance training for several clients. She assists clients in implementing comprehensive new compliance programmes, as well as assisting clients with on-going compliance programmes in several industrial sectors.

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Andras Nagy, an associate at Schoenherr, joined the firm in December 2014. He gained experience as a member of the EU & Competition team not only in Budapest but also in Brussels. He advises clients in various merger control proceedings, cartel investigations and unfair competition proceedings before the GVH as well as in judicial review proceedings before Hungarian courts. Furthermore, Andras has been involved in matters before the European Commission and the European Court of Justice. He has a wide range of publication series and holds regular compliance and dawn raids trainings for national and international clients.

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