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The Use of Structural Presumptions in Antitrust – Note by Hungary

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1. Introduction

1. In Hungarian competition law terminology there is no precise equivalent for the legal instrument that Anglo-Saxon legal literature calls "structural presumption". The reasons for this can be traced back to the differences between the Hungarian legal system and those of the European Union and the United States. Nevertheless, both the courts in Hungary and the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH) are aware of and apply presumptions in competition cases, including antitrust and merger control proceedings.

2. In the Hungarian competition regime, several types of presumptions are recognized, including procedural presumptions (e.g. presumption of innocence), evidentiary presumptions (e.g. absence of other reasonable explanation in the case of non-competition agreements), and presumptions of substantive law (e.g. de minimis rule).

3. As regards the presumptions applied in the Hungarian competition regime, it can generally be stated at the outset that most of them are rebuttable presumptions.[1] In practice, these tools help the case handlers involved in the proceedings and the Competition Council of the Hungarian Competition Authority in their work, as they provide a starting point and a crutch for the investigation. Consequently, in Hungarian competition law practice, these presumptions do not imply a reversal of the burden of proof and its shifting to the undertakings involved in the proceedings. Rather, their purpose is to identify market practices and concentrations with potentially distortive effects on competition.

4. In this contribution, and in accordance with the description of the subject matter, only presumptions concerning the definition of the relevant market, the existence of a dominant position and market power are discussed; other presumptions in the field of competition law are not addressed. The contribution will focus more on merger-specific presumptions, mainly because the soft law documents developed by the GVH in this area may provide useful information for interested parties on this topic.

2. Definition of the relevant market and market power

5. For defining the relevant market, the GVH considers the SSNIP test as the theoretical basis, in line with international literature. The SSNIP test by itself is not a structural presumption, but it is essential for the use of the presumptions presented later. Indeed, market definition is indispensable to determine market shares and market power. Accordingly, market definition is a multi-step process based on the hypothesis of the narrowest market, whereby the possibility of a small but significant and non-transitory increase in price is initially examined only with regard to this narrow product/geographic area. If it is indeed deemed to be possible, the market is not wider than the initial product scope/geography; if not, the product scope/geography under consideration should be extended and the test should be repeated by gradually including products/geographies that could be considered as potential substitutes.

[1] An example of an irrebuttable presumption, however, is the presumption of distortion of competition by object infringements.

6. However, in addition to this theoretical framework, the established case-law holds particular importance. Especially in merger cases, the starting point for the market share presumptions – which are to be discussed in the subsequent paragraphs – are the previous decisions, since if competition concerns can be dismissed under any realistic market definition, then the definition of the relevant market is not necessary.

7. In cases involving abuse of dominance, past practice may also form the basis for the definition of relevant market, i.e. the SSNIP test cannot be considered as the only means of defining it in these cases either. In particular, the definition of the relevant market may be a key issue in cases concluding with a finding of infringement. However, given that the majority of the GVH's decisions have resulted in the acceptance of commitments, in most of them the precise definition of the relevant market was not necessary or not contested by the parties as it was not relevant for the purposes of the commitments offered.

8. For abuse of dominance cases, the GVH has not issued a specific notice or other guidance in soft law documents in situations where a dominant position is likely to exist. However, the GVH Competition Council has made it clear in several decisions that it relies on the European Commission's practice[2] which implies that the existence of a dominant position is unlikely if the market share of the undertaking is below 40 percent in the relevant market, and that above 50 percent a dominant position can be presumed. According to established case law, market share is the basis for the assessment of dominance, but the assessment of dominance also requires an examination of other aspects, such as possible barriers to entry or expansion in the relevant market. For instance, an undertaking that is otherwise the only one present in the relevant market may not necessarily be dominant, provided that the barriers to entry are not high.

3. The use of structural presumptions in merger control

9. For the purposes of the definition of the relevant market, the presumptions discussed in the context of antitrust cases are also applicable to mergers, while the merger-specific presumptions are outlined below.

3.1. Thresholds

10. The rules of the merger control system in force in Hungary are set out in Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (Hungarian Competition Act, HCA). Similarly to most countries that have a merger regime, the Hungarian legislator has established thresholds – in line with Regulation (EC) No 139/2004 – at which a concentration is deemed to be notifiable and thus the GVH has the power to investigate it.

11. Even thresholds themselves constitute a presumption. Indeed, the legislator has made the assumption that concentrations below the thresholds are presumed to have little impact on competition and therefore do not require any action of the competition authority. The thresholds may of course change as a result of different economic events (e.g. high inflation), and developments in competition policy. In Hungary, the notification thresholds were most recently raised in 2023. The relevant

[2] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

paragraphs of the Hungarian Competition Act in force are set out in the Annex, so only the rationale behind the definition of the notification thresholds is presented here.

12. In Hungary, uniform thresholds have been set for all sectors, so the Hungarian legislator did not intend to create a sector-specific system. The traditional thresholds, as structural presumptions, take two components into account for the determination of the notification obligation. On the one hand, the overall economic significance of the transaction, i.e. the combined turnover of the parties, and on the other hand, the incremental value, which typically represents the turnover of the target.

13. The HCA also contributes to the possibility to examine certain concentrations below the traditional thresholds. Voluntary notification under Article 24(4) is essentially based on the likelihood of a substantial lessening of competition (SLC), but in the interests of legal certainty the Hungarian legislator has limited the possibility of bringing concentrations under control by setting a combined turnover threshold. This threshold is, however, much lower than the aggregate turnover threshold used for the mandatory notification thresholds, which is only a quarter of the traditional threshold. Thus, the threshold used in Hungary is not the one applied in the German and Austrian merger regimes, which is based on the value of the transaction.

3.2. Notice

14. Pursuant to Article 24 (1) of the HCA, as described above, undertakings that reach the turnover thresholds set out therein are subject to a notification obligation vis-à-vis the GVH. However, the GVH does not always initiate competition supervision proceedings for a detailed examination of the concentration. The Hungarian Competition Act does not contain a provision on the cases in which it may be established that it is not obvious that the concentration will not lead to a significant lessening of competition in the relevant market. This is a matter of the discretion of the GVH.

15. The conditions for initiating proceedings are therefore set out in the Notice issued by the President of the Hungarian Competition Authority and the Chairman of the Competition Council.[3] The notices are based on the experience gained so far in the application of the Competition Act and are not binding. Their main function is to elaborate on the content of the GVH's practice as an enforcer in giving substance to legal provisions, summarising the practice of past and future enforcement.

16. The conditions set out in the Notice can be described as structural presumptions, because in the absence of such conditions, the GVH will rely on the presumption that the concentration will not give rise to negative competitive effects. Following the notification of a concentration, the case handlers will examine whether these conditions are fulfilled in the case of the notified concentration in an 8-day procedure. If they are not, the GVH will acknowledge the concentration by issuing an official certificate.

17. Prior to discussing the presumptions in detail, it is worth outlining the main logic behind the definition of structural presumptions. The Notice contains presumptions both for mergers between undertakings with an actual market presence and for cases where only one of the parties is an actual market player and the other is only a potential entrant.

[3] Notice 3/2023. of the President of the Hungarian Competition Authority and the Chair of the Competition Council regarding the obligation of notification of concentrations, initiation of competition control proceedings and the interpretation of the term “not obvious” in the initiation of Phase II proceedings.

18. In cases where both undertakings have an effective market presence, the Notice sets a combined market share threshold of 20 percent for horizontal mergers and 30 percent for non-horizontal mergers, as well as a merger-specific increment of 5 percent. However, the increment is determined not only on the basis of market share but also on the basis of the Herfindahl-Hirschman Index (HHI).

19. In the case of a potential entrant, given the higher degree of uncertainty, the Notice sets a higher threshold for the actual entrant's share, whereas there is no quantitative threshold for a potential entrant. In the case of a potential entrant, the Notice only requires verifiable arguments in favour of its future growth potential, i.e. that it can move from being a potential entrant to an actual market presence. Such a verifiable argument could be, for example, the size of the customer base or perhaps specific development plans.

20. However, as in dominance cases, these thresholds are only a pre-screening test and, if they are met, additional circumstances need to be taken into account to establish the likelihood of SLC.

21. As regards the detailed presentation the presumptions set out in the Notice take into account, in part, market shares in the relevant market or markets, market concentration and other circumstances. Exceeding the market share thresholds does not in itself mean that the GVH will initiate competition supervision proceedings to investigate the concentration. If the merger leads to a small increase in market concentration in the relevant market or if other qualitative circumstances of significant competitive importance can be identified, the GVH will continue to apply the presumption that the merger will not lead to adverse effects on competition.

22. As a general rule, the GVH will not initiate proceedings in the case of horizontal effects if there is no relevant market in which the combined market share of the groups of undertakings concerned, either as buyers or sellers, exceeds 20 percent, and in the case of vertical effects if there is no relevant market in which one of the groups of undertakings concerned by the concentration is exclusively a seller, and the other is exclusively active as a buyer, and where the combined market share of either the seller or the buyer group exceeds 30 percent, and in the case of portfolio effects, where there is no affected market with portfolio effects in which the combined market share of either group exceeds 30 percent. The share ratios set out in the Notice are in line with the Commission's Notice on Simplified Procedure[4] and the Horizontal and Non-Horizontal Merger Guidelines.

23. In the case of horizontal effects, where the parties' combined market share exceeds 20 percent, the GVH will not initiate competition proceedings if the combined market share of the other merged groups in the relevant market does not exceed 5 percent, excluding the group of undertakings concerned with the largest market share in the relevant market. In addition, there must be a competing undertaking with a market share comparable to the market share of the largest merging group in the relevant market, or the HHI must remain below 1 000 after the merger or fall between 1 000 and 2 000 but increase by less than 250 or be above 2 000 but increase by less than 150.

24. In addition, competition proceedings are not initiated to investigate a merger in vertical or portfolio affected markets if the relevant market shares described above are met, but the share of the other group of undertakings concerned in the relevant market does not exceed 5 percent; and there is a competitor with a similar share to the group of undertakings with a sole market share above 30 percent.

[4] Commission Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings 2023/C 160/01

25. In comparison, in the case of vertical effects, an additional, alternative condition is that the group of undertakings with a sole market share of more than 30 percent is already present on both the seller side and the buyer side of the vertically affected market prior to the concentration, provided that the concentration does not exceed the 20 percent threshold on the side of the vertically affected market where both groups of undertakings are present, the combined horizontal market share of the parties is below the 20 per cent threshold or there is no possibility of coordination based on personal or economic links; in the latter case, such that the combined market share of the two groups of undertakings does not exceed 30 percent.

26. For portfolio effects, the same alternative rule applies.

27. However, an exception is made for vertical and portfolio effects where a group of undertakings with a market share above 30 percent has a market share below 5 percent on the other side of the market affected by the vertical effect or on the other market affected by the portfolio effect and the other group of undertakings has a market share above 5 percent. The importance of this exception rule lies in the fact that in this case it cannot be excluded that it is actually the merger in question that creates the opportunity and the incentive to engage in restrictive practices.

28. In the case of mergers where at least one of the parties is vertically integrated or is a player in both markets affected by the portfolio effect, if the relevant market share of the two groups of undertakings, jointly but not individually, exceeds 30 percent on at least one side of the market affected by the vertical effect or at least one of the markets affected by the portfolio effect, and 5 percent on the other side of the affected market, the GVH will initiate competition proceedings. In this context a competition supervision proceeding may be initiated even if, in the affected market in which the parties have a combined market share above 30 percent, the merger does not lead to an increase in concentration from a horizontal point of view as described in the presumption of incremental effect for mergers with horizontal effects.

29. There is of course an exception to this rule, as well. Indeed, the GVH presumes that a concentration does not give rise to adverse competitive effects if, in the market where the parties' combined share exceeds 30 percent, the group of undertakings having a higher market share on the one market also has the higher share in the other relevant market; and the share of the other group of undertakings is not higher than 5 percent in the other relevant market. This is simply because, in this case, the merger is unlikely to significantly increase the possibility and incentive to engage in restrictive conduct.

30. In line with the Commission's recent simplification project, the GVH's Notice also contains a specific presumption for certain cases of concentrations involving full-function joint ventures. It is also not necessary to initiate competition proceedings in the case of the creation of a full-function joint venture which is not likely to have any significant market activity in Hungary within a foreseeable period (in principle three years), or in the case of the acquisition of control over such an undertaking if its net turnover does not exceed HUF 150 million [EUR 375,000] and there is no likelihood of coordination between the founders or acquirers of control which would be detrimental to competition. As can be seen, the threshold applied here is one-tenth of the threshold that triggers a notification obligation for the specific increment resulting from the merger. Therefore, in this case, the Notice presumes that the level of potential harm associated with such joint ventures is lower, the focus will be more on the likelihood of coordination between parent companies.

31. The structural presumptions described above provide the GVH's case handlers with a basis for assessing the need to initiate proceedings, and the merging parties are also in a

position to know whether they can expect the initiation of proceedings and assess whether they need to notify the concentration under Article 24(4) of the HCA.

32. However, the above assumptions may be refuted. Therefore, if the GVH has grounds to assume that the merger will lead to a significant lessening of competition, it will initiate proceedings even if the above conditions are fulfilled.

33. As regards the presumptions concerning the scope of the potential entrant, the GVH will initiate a competition proceeding if a group of undertakings with significant market power in the relevant market (which is likely to be the case, in principle, where its market share is above 40 percent) would merge with a group of undertakings with no or only a minimal market share in the relevant market, where there are justifiable circumstances (e.g. innovation, size of future customer base) to suppose that significant future development (entry or expansion) in the relevant market is realistic. This rule may be of particular relevance for the control of killer acquisitions and other mergers that are harmful to the future market.

34. Competition proceedings are also initiated if the relevant market shares calculated on a turnover basis would not justify the initiation of proceedings, but the shares calculated on a capacity basis exceed the thresholds for initiating competition proceedings as described above. This is particularly realistic in relevant markets where capacity is of decisive importance and the merging parties have significant spare capacity.

35. In the case of the possibility of coordination based on relationships, the initiation of competition proceedings may also be justified. Where there is a possibility of coordination based on links between the undertakings concerned, the GVH will decide whether to initiate competition proceedings based on a case-by-case assessment of the circumstances, including an assessment of the strength of the possibility of coordination and the interest to establish such coordination. In the absence of circumstances that reinforce the likelihood and importance of coordination, the GVH will not initiate merger proceedings, as the possibility of ex-post competition intervention (action against conduct that infringes the prohibition of restrictive agreements) may be a sufficient safeguard against the possible occurrence of restrictive coordination.

36. The last of these exceptions is where other circumstances are likely to arise which, irrespective of the market shares of the merging parties concerned, risk significantly lessening competition. Such circumstances may include indications that the merged entity may have the ability to impede the market expansion of competitors, that the merger would bring together two groups of firms that are dominant in innovation, or that one of the merging parties has a promising product that is about to be launched.

3.3. Court practice

37. The presumptions mentioned above are therefore based on the GVH's experience from previous proceedings, generally accepted literature and the European Commission's guidelines and notices. As mentioned before, these notices are not legally binding in the Hungarian legal system and the GVH may deviate from them in its decisions, but the consistent practice of the courts has been that the absence of binding force of a fining notice does not exempt the GVH from deciding in accordance with it in its individual decisions. The absence of such an obligation would deprive this legal instrument of its fundamental purpose and importance, namely the predictability of the application of the law. It may, however, be possible for an individual decision to depart from the Notice in view of specific

relevant circumstances in an individual case, but the GVH must give detailed reasons for doing so, stating the circumstances justifying the individualisation.[5]

38. In recent years, most cases initiated on the grounds of abuse of dominance have concluded with the imposition of commitments, in which case the competition authority cannot take a position on whether the conduct in question constitutes an infringement or not. Additionally, based on the GVH's past practice, it can be observed that in merger cases, the national competition authority rarely applies the strictest form of intervention, namely prohibition.

39. Consequently, judicial review of the above presumptions has been rare. The effectiveness of applying these presumptions is significantly influenced by the burden of proof that the court imposes on the competition authority in the event of an appeal following an intervention decision.

40. In Hungarian case law, the judgments in merger cases (e. g. VJ/152/2008 Magyar Telekom/Vidanet) are noteworthy. It should be highlited that in none of these judgments did the courts explicitly address and comment on the issue of structural presumptions. What makes worth mentioning the Magyar Telekom/Vidanet case is that in the judgment the Court made it clear that the GVH has a duty to investigate the facts to the extent necessary for reaching a well-founded decision and to draw reasonable conclusions from them. However, there has been no court judgment challenging the structural presumptions and their application.

4. Summary and future challenges

41. The GVH regularly reviews its merger notices, in the course of which it has the possibility to add structural presumptions where necessary. The most recent revision took place in 2022, with the revised notices entering into force on 1 July 2023. As a result of this revision, market share thresholds were not deemed necessary to be amended, but, also as a result of the Commission's parallel simplification project, the Notice was extended to include presumptions relating to joint ventures, and also new presumptions (e.g. the possibility of coordination based on links) were introduced, where the scope of cases where the absence of competition concerns is not obvious was widened.

42. Nevertheless, the presumption related to killer acquisitions, introduced in 2017 into the Notice, illustrates the challenge of reconciling predictability in structural presumptions with the possibility that a concentration raising competition concerns could be subject to proceedings, particularly in examining concentrations that fall below the threshold set out in Article 24(1), where it is not obvious that they do not significantly reduce competition in the market, thus allowing for the emergence of harmful competitive effects.

43. This authorisation is particularly important in an era when mergers and acquisitions in the digital markets and in the pharmaceutical industry show that mergers below the thresholds can also cause serious harm to competition in the markets. Start-ups and other such innovative businesses, while not necessarily generating revenues yet, can stimulate the economy and thus contribute to consumer welfare. Thus, monitoring acquisitions involving such businesses is also of paramount importance to protect the Hungarian economy.

[5] VJ/60-513/2012, Order of the Supreme Court Kfv.II.37.497/2010/14, Judgment of the Curia Kfv.II.38.134/2019/10, point 36

44. However, in order for the GVH to be able to fully exercise its powers, the GVH must always be alert to new market practices. New market practices show that the elimination of potential competitors, killer acquisitions and the expansion of ecosystems may occur not only horizontally, but also vertically and at the portfolio level. The practice of the GVH is, of course, sensitive to this, but consideration may be given to clarifying the wording of paragraph 33 as described above to better reflect the evolution of the GVH's practice, which is in line with current international trends and reviews.

ANNEX

The HCA currently in force stipulates in Article 24 (1) that: "A *concentration of undertakings shall be notified to the Hungarian Competition Authority in cases where the aggregate net turnover of all the groups of undertakings concerned and the undertakings jointly controlled by undertakings that are members of the groups of undertakings concerned and by other undertakings exceeded twenty billion forints [50 million euros] in the preceding business year, and the net turnover of each of at least two of the groups of undertakings concerned in the preceding business year combined with the net turnover of the undertakings jointly controlled by undertakings that are members of the respective group of undertakings and other undertakings in the preceding year was more than one billion five hundred million forints [3,75 million euros]*".

The HCA also allows the GVH to investigate concentrations that do not meet the above thresholds, but meet the voluntary notification threshold, if it is not clear that such mergers do not significantly lessen competition in the market, consequently, adverse competitive effects cannot be excluded. In other words, pursuant to Article 24 (4) of the HCA: "*A concentration of undertakings not subject to notification pursuant to paragraphs (1) to (3) shall also be notified to the Hungarian Competition Authority in cases where it is not obvious that such concentration would not significantly reduce competition on the relevant market, in particular as a result of the creation or strengthening of a dominant position, or where the aggregate net turnover of all the groups of undertakings concerned and the undertakings jointly controlled by undertakings that are members of the groups of undertakings concerned and by other undertakings exceeded five billion forints [12,5 million euros] in the preceding business year*".