

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Suspensory Effects of Merger Notifications and Gun Jumping - Note by Hungary

27 November 2018

This document reproduces a written contribution from Hungary submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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JT03438715

Hungary

1. This contribution discusses the recent Hungarian practice relating to the violation of the standstill obligation. The focal point of the contribution is the introduction of the Hungarian jurisdictional background and the Gazdasági Versenyhivatal's (Hungarian Competition Authority, "GVH") policy regarding fining in gun jumping cases. The submission also discusses recent merger cases where the GVH established that the concerned parties had infringed the prohibition of the implementation of a concentration prior to its clearance.

1. Legal background

2. The standstill obligation, which is enshrined in the Hungarian Competition Act, came into effect on 1 July 2014. As a result of this amendment of the law, a notifiable merger cannot be implemented until the prior approval of the GVH has been attained.

3. The purpose of the merger control rules is to ensure that all mergers and acquisitions which meet the notification thresholds are monitored for possible anti-competitive effects. As compliance with competition law requirements is a priority of the GVH, mergers which do not raise competition concerns are also subject to the investigation of the gun-jumping prohibition.

4. The standstill obligation is set out in the Hungarian Competition Act. According to Article 29:

(1) The concentration of companies under Subsection (1) of Section 24 cannot be carried out before the expiry of the deadline prescribed in Subsection (1) of Section 43/N for processing the notification of a concentration, or - if competition control proceedings are opened for the examination of the concentration within that time limit upon receipt of the notification - before a decision is adopted in conclusion of such proceedings, not exceeding the administrative time limit for the proceedings, specifically, voting rights and the right for the appointment or delegation of executive officers acquired as a result of the concentration cannot be exercised; as regards the decision-making process of the merging or the acquired company, and the previously independent company or business unit, and as regards the business relations of concentrating companies the status quo before the concentration shall apply.

(2) The restriction set out in Subsection (1) shall not apply to the conclusion of the merger agreement or to the public takeover bid, nor to the underlying acts and legal statements required for the execution of the merger, through which control rights are not conferred upon the company acquiring control.

5. The Competition Act provides for derogation from the standstill obligation, pursuant to which the GVH may grant the merging parties permission to implement the concentration before its clearance. According to Article 29/A:

(1) Upon receipt of a reasoned request submitted by a company provided for in Subsection (1) of Section 28, the Gazdasági Versenyhivatal (Hungarian Competition Authority) may - upon weighing all applicable circumstances of the

case, such as the impact the prohibition under Section 29 may have on the companies affected and on other companies, and the potentially harmful impact the concentration of companies may have on competition - permit the company acquiring control to exercise its right to do so by way of derogation from Section 29 before the decision is adopted in conclusion of the competition control proceedings opened for the examination of the concentration, in particular if it is deemed necessary to protect the investment of the company.

(1a) The request referred to in Subsection (1) shall be submitted within five days following delivery of the ruling on the opening of competition control proceedings for the examination of the concentration, or - with justification - within eight days upon gaining knowledge of the need to exercise the right of control before the decision is adopted in conclusion of the competition control proceedings opened for the examination of the concentration, with no justification permissible after this deadline. A justification related to a delay in gaining knowledge will not be accepted, and no individual remedy may be sought against the decision rejecting such justification.

(1b) In the application referred to in Subsection (1) the applicant shall justify the circumstances cited as the reasons for having to exercise the right of control before the decision is adopted in conclusion of the procedure for the examination of the concentration, and shall, furthermore, demonstrate the method and the extent of exercising the right of control before the decision is adopted in conclusion of the procedure for the authorisation of the merger, and, in that context,

- a) the means of the right of control, and the suitability of those means for achieving the objective sought,
- b) the impact of the right of control on the companies affected, and also on other companies,
- c) recoverability as regards the conditions of competition that might have been altered in consequence of exercising the right of control, and whether any adverse effect the merger may have on competition can be eliminated.

6. The competent competition council decides whether the party's request for derogation from the standstill obligation is justifiable or not. According to Article 72:

(1) The competent competition council shall decide, within fifteen days of the date of receipt of the application, based on the investigator's report, relating to the application under Section 29/A for exercising control rights before the decision is adopted on the merits, with the imposition of control restriction provisions where deemed necessary. No separate decision is required in relation to the application under Section 29/A if the competent competition council brings a decision before that deadline concerning the concentration, or terminates the proceedings.

7. It should be mentioned that the acquisition of non-controlling minority shareholdings does not fall within the scope of the Hungarian Competition Act. However, due to the introduction of a secondary 'merger investigation threshold' as a result of the 2016 amendment of the Hungarian Competition Act, a concentration must also be notified

if it does not meet the jurisdictional notification thresholds,¹ if the total net turnover of the undertakings concerned exceeded HUF 5 billion in the previous business year, and if the concentration might significantly reduce competition in the relevant market, particularly as the result of the creation or strengthening of a dominant market position in the market. In such cases the implementation of the transaction without prior notification does not qualify as a violation of the standstill obligation. Consequently, the GVH considers this kind of threshold as a voluntary threshold.

2. Legal Test of gun jumping

8. In cases where it is suspected that the parties have violated the standstill obligation the GVH investigates whether the change in control, or the buyer's influence on the operation of the target company took place before clearance was obtained. The GVH has determined that the exercise of de facto control by the buyer over the target company constitutes a violation of the standstill obligation.

9. Moreover, in the Hungarian practice if a buyer has the ability to control a target company, this in itself constitutes a violation of the standstill obligation. It does not have to be proven that the control rights have been exercised for a violation of the law to be established.

10. In order to prove that this ability exists, the GVH considers, for example, if the buyer possesses veto rights,² has taken possession³, or if formal procedural steps have been taken, such as the removal of the seller from the business register and from the founding document.⁴ After these procedural and legal steps have been taken the seller will not be able, or will only be partially able to influence the operation of the target company, thereby the pre-merger decision making process will have changed.

3. Investigation of gun jumping

11. Since the amendment came into force in 2014 the GVH has investigated 6 transactions involving the implementation of a concentration before clearance has been granted. 170 mergers were notified between 2014 and 2017, and in only 4 per cent of these cases the parties were found to have violated the standstill obligation. In all of these cases the transactions were notified to the GVH.

12. It should be noted, that until 2017 the GVH investigated a violation of the standstill obligation in the same proceeding in which it decided to authorise a concentration, whether

¹ A concentration must be notified to the GVH if the net sales revenue of all the groups of undertakings concerned and the net sales revenue of the undertakings controlled jointly by the groups of undertakings concerned and other undertakings exceeded HUF 15 billion (approx. EUR 50 million) in the preceding business year; and there are at least two groups of undertakings concerned whose total net sales revenue in the year preceding the merger, together with the net sales revenue of the undertakings controlled jointly by the undertakings concerned and other undertakings exceeded HUF 1 billion [approx. EUR 3.2 million] each.

² GVH decision, case BLT Group/Balatontourist (VJ/44/2017)

³ GVH decision, case Tranzit/Poultry Business Merger (VJ/13/2017.)

⁴ GVH decisions, Naboulsi Group mergers (VJ/10/2016., VJ/13/2016., VJ/14/2016.)

or not the transaction had been notified. Since January 2017 if a transaction is notified and cleared by the GVH, a separate proceeding is initiated in relation to a suspected violation of the standstill obligation.

13. So far, in only two cases the parties have requested derogation from the standstill obligation. In both cases the GVH did not assess the justification for the request, as it was concluded within 15 days that the concentration would not lead to a significant lessening of competition; consequently, no separate decision had to be made in relation to the request to exercise control rights before the end of the merger review process.

14. Customers or competitors may submit a formal or informal complaint if they are aware of – an already implemented – concentration that has not been notified. Additionally, the GVH monitors the news to identify transactions that parties may have failed to notify.

15. The Hungarian Competition Act also enables the GVH to carry out dawn raids when it is suspected that the buyer has exercised control rights over the target company before obtaining formal approval of the acquisition. According to the Competition Act: *In the case of a suspected infringement of the prohibition provided for in Section 29, the investigator shall be empowered to search any premises, vehicle or data medium with the aim of uncovering any evidence connected to the infringement or concentration investigated, and to enter such premises under probable cause under his/her own authority, without the consent of the owner (tenant) or any other person on the premises, and to open any sealed-off area, building or premises for this purpose.*

16. To date, the GVH has not carried out any dawn raids related to an infringement of the standstill obligation.

4. Legal Consequences

17. As regards to legal consequences, if it is proven that the merging parties have implemented the transaction before it has been notified, the Hungarian Competition Act enables the GVH to impose a fine on the parties for violating the standstill obligation.

18. Before 2017, when setting a fine the Hungarian Competition Act distinguished between a violation of the notification obligation and a violation of the standstill obligation. Before 2017 the GVH was able to impose a maximum fine of up to 10 per cent of the combined net turnover of all groups of companies in case of violation of the standstill obligation. If a company failed to notify a transaction to the GVH, a daily fine of between HUF 50 000 and HUF 200 000⁵ may be imposed from the day of the occurrence of the first of the following events: the announcement of the public bid for the merger, the day of the conclusion of the merger agreement; or the acquisition of the control rights by any other means.

19. In 2017 a number of amendments to the Hungarian Competition Act entered into force, one of which concerned fines in merger proceedings. According to the current version of the Competition Act, a concentration that has not been notified amounts to an infringement of the standstill obligation. Consequently, if a concentration is implemented prior to notification, the GVH may impose a daily fine of between HUF 50 000 and HUF

⁵ When converted to euros by the medium rate of exchange in 2017, the figure is between 165 and 650 euros.

200 000⁶ from the date of the creation of the transaction until the start of the competition control proceeding.

20. Prior to the amendment of the Competition Act companies that implemented transactions before providing notification were exposed to much higher fines than companies that failed to notify transactions at all. Consequently, the purpose behind the amendment of the law was to ensure that notifying companies no longer remained in a more disadvantageous position.

21. In its previous cases, the GVH has imposed fines on companies that have been proven to have infringed the standstill obligation by implementing mergers before obtaining approval. It should be noted that the GVH does not provide guidance on the calculation of fines in cases where the standstill obligation has been infringed; however, it does take into account a number of mitigating and aggravating factors when making its decisions. Previous assessments of the GVH on the level of the fines made in public decisions can be viewed on the website of the GVH, thereby past decisions with respect to the violation of the standstill obligation provide guidance to the business community and to legal consultants.

22. In its previous decisions the GVH has stated that a violation of the standstill obligation is, by its very nature, a serious infringement. When calculating fines, the GVH considers whether the transaction has led to a significant lessening of competition, or whether the parties concerned have previously infringed competition law. The Competition Counsel considers it a mitigating factor if the parties concerned have notified the transaction of their own accord, thereby demonstrating that their intention was not to conceal the transaction from the authority. Consideration is also given to whether the buyers have de facto exercised their control rights before approval has been obtained. The fact of exercising control rights is considered as an aggravating factor.

5. Practical guidance

23. Notice No. 6/2017 of the President of the GVH and President of the Competition Council on certain questions regarding proceedings on investigating concentrations (hereinafter referred to as Notice No. 6/2017), provides guidance on law enforcement issues arising from merger review processes. A section of the guidance deals with enforcement actions relating to the gun jumping prohibition.

24. Notice No. 6/2017 summarises the GVH's previous practice and lists a few examples of behaviour that is considered as constituting a violation of the gun jumping provision. The GVH also emphasises that whether or not a behaviour or agreement infringes the standstill obligation should be considered on a case-by-case basis. In its previous decision the GVH has did not considered it an infringement of the standstill obligation when a buyer failed to notify an acquisition of property rights related to a property it has previously leased on a short-term basis. This is because the investigation of a concentration is related to the transactions establishing the merger. The GVH did not determine implementation the transaction in that case when the condition of the entry into force of the contract the transaction is based on was the consent of the clients who constitute the part of the undertaking which acquired, and the parties initiate to acquire the consent of

⁶ When converted to euros by the medium rate of exchange in 2017, the figure is between 165 and 650 euros.

this client group assuming that these consents do not come into force, until the approval of the acquisition.

25. Notice No. 6/2017 also deals with questions arising related to the restriction of the exercise of the control rights of the seller during the period between the signature and closure of the agreement that the transaction is based on. Limitations on the target company's conducts by the buyer can be imposed. Such rights can only be limited to the extent necessary to secure the transaction or to preserve the value of the buyer's investment. In other words, the seller's rights of control cannot be completely deprived.

26. In the absence of the GVH's approval the obligation of requiring the buyer's consent to certain conduct of the seller is only acceptable, if it does not constitute a veto right for the buyer in the decision-making forums of the target undertaking.

27. Notice No. 6/2017 also provides guidance on the derogation from the standstill obligation, taking into account the previous experiences and cases of the GVH. Furthermore, in order to ensure transparent law enforcement the GVH publishes press releases on public decisions relating to cases where gun jumping has been established. As mentioned above, so far the GVH has not granted a derogation from the standstill obligation. However, in its previous decisions the GVH has set out the factors that will be considered when assessing a request. These are now included in Article 29/A, paragraph 1b.

28. As regards to the sharing of information during pre-merger negotiations, the GVH has held that merging parties should not partake in unreasonable exchanges of information that facilitate coordination between the parties and endanger competition on the market. Notice No. 6/2017 states that if the merging parties coordinate their competitive conduct before clearance is granted, this behaviour falls under the scope of the prohibition of agreements restricting economic competition. Notice No. 6/2017 specifies that exchanging competition sensitive information (e.g. relating to prices, costs, strategic plans), entering into a non-competing agreement, dividing the market, fixing prices and exchanging information relating to bids during pre-merger negotiations, amount to violations of competition law. In addition, the Notice provides guidance on how to prevent the exchange of anticompetitive information.

Annex

In this chapter the GVH provides information with respect to the authority's previous experiences in gun-jumping cases. Up until the present date the GVH has investigated six transactions on the basis of a suspicion of early implementation.

The CEE Holding/ Olympic/Normestone Merger (VJ/145/2015)

In 2016 the GVH assessed a concentration involving the joint acquisition of control by CEE Holding and Olympic over Normeston Group and Normeston Trading. This was the first case in which the GVH assessed whether a transaction had been implemented before its approval. Both CEE Holding and Olympic were active on the field of property management. The target companies operated the Lukoil refuelling station network in Hungary and they were active on the wholesale market of crude oil.

In its decision the GVH cleared the acquisition and fined the parties for gun jumping. It was established that the parties had acquired the shares of the target companies and had been officially registered as majority owners before the merger had been notified.

The decision highlighted the fact that the parties had not only been registered as majority owners but that they had also exercised their control rights before approval had been obtained. During the merger review process the board directors of the target companies made written resolutions proposed by the buyers. The written resolutions stipulated that the members of the companies would not exercise any voting or other rights related to the shares until the merger review process had been concluded; consequently, management rights were limited. The GVH was of the opinion that these written resolutions amounted to CEE Holding and Olympic influencing the directors of the target companies, thus exercising direct control over the boards of the target companies.

Consequently, the GVH held that before obtaining approval CEE Holding and Olympic were not only able to influence the activities of the target companies but they were also able to exercise their control rights.

THE NABOULSI GROUP MERGERS (VJ/10/2016, VJ/13/2016, VJ/14/2016)

In 2016 the GVH investigated three different merger cases where the buyer was the private person Riad Naboulsi and his group of companies (Naboulsi Group). The target companies were Wassim, Dráva and Bábel, all of which were involved in the production and sale of dairy products.

The parties notified the transactions in February of 2016, and as none of the three mergers raised competition concerns they were cleared by the authority. The three merger review proceedings took place at the same time, and in all of the cases the parties were suspected of having implemented the acquisitions before notifying the GVH.

The Naboulsi Group and the owner of Wassim entered into a share purchase agreement (SPA) in April of 2015. The SPA came into force on its date of signature and the founding document of the target was amended on the same day. The Naboulsi Group was then officially registered as the owner of the company. In May 2015 the Naboulsi Group adopted a founding resolution with respect to Wassim. This founding resolution contained only corporate law, taxation decisions. The share purchase agreements concluded with Dráva

and Bábel were signed in November 2015, and the SPAs came into force on their date of signature and the founding documents of the target companies were amended on the same day.

The parties claimed that the purpose behind the transactions was to take control over the three target companies as a group in itself. The parties stated that the three transactions had not been implemented because the integration of the target companies into the Naboulsi Group had not occurred. The parties emphasised that the Naboulsi Group did not actually exercise control rights and did not even start synchronising their activities, their business planning and their strategies.

The parties claimed that the official registration of the new owner was only a formal procedural step which, according to the Companies Act, requires the registration of the new owner in the Register of Companies; consequently, it did not mean that the Naboulsi Group had exercised its voting right. Furthermore, the parties stated that the founding resolution with respect to Wassim did not influence the day-to-day operation of the target company.

The GVH found that formal procedural steps, such as the removal of a seller from the business register and from the founding document, changes the ownership structure with the result that the seller is no longer able to influence the operation of the target company. In the decision relating to the acquisition of Wassim, it was also highlighted that the Naboulsi Group had de facto exercised its control by adopting the founding resolution, with it being of no relevance that the founding resolution only concerned formal decisions.

The Tranzit/Poultry Business Merger (VJ/13/2017.)

Although in this case the GVH authorised the acquisition of certain equipment and real estate by two poultry firms, namely TRANZIT-KER and Tranzit-Food, it also imposed a fine on the above-mentioned acquiring undertakings for partly implementing the transaction before obtaining the authorisation of the GVH.

The transaction was cleared in a Phase I procedure, after it was established that it would not raise competition concerns due to the limited market shares of both of the Tranzit companies. However, it was later ascertained that Tanzit-Ker and Tranzit-Food had in fact already partly implemented the merger before the GVH's authorisation had been granted.

Consequently, the GVH imposed a fine on the parties for their partial implementation of the merger before the authorisation of the GVH had been obtained, contrary to the prohibition of implementation contained in the Competition Act. The GVH established that certain equipment related to breeding chickens had already come into the possession of the Tranzit-group before the clearance.

The parties argued that the early takeover was necessary due to significant changes in economic and sanitary conditions. The parties claimed that the early takeover was necessary to avoid major losses due to the rapid spread of bird flu.

When responding to the above-mentioned argument of the parties, the GVH emphasised the fact that the Hungarian Competition Act enables parties to submit a reasoned request to exercise control rights before the final decision in the merger review process.

The BLT Group/Balatontourist Merger (VJ/44/2017)

In 2017 the BLT Group notified a transaction to acquire sole control over Balatontourist, Balatontourist Camping and Balatontourist Füred. The BLT Group operated on the real

estate market, while the target companies provided camping and holiday accommodation services. The GVH cleared the concentration because it was established that no competition concern would arise as a result of the merger.

Based on information obtained from the notification form and from the merger review process, the GVH suspected that the BLT Group might have violated the standstill obligation. After providing clearance the authority opened a new investigation to assess whether the BLT Group had implemented the transaction before obtaining clearance.

The GVH found that the sale purchase agreement (SPA) granted the BLT Group with general veto rights from its date of signature until the date of closure. It was also established that the general veto rights extended to all business decisions regarding the operation of the target companies. It should also be emphasised that the veto rights were not restricted to safeguarding the asset value of the target businesses or to ensuring the regular operation of the companies.

The BLT Group argued that between the signing of the SPA and the clearance, it neither influenced the operation of the companies nor did it participate in the decision making process, moreover the BLT Group did not even communicate with the sellers.

In its decision the GVH rejected the arguments of the BLT Group underlining the fact that - it had the possibility to exercise decisive influence on the target companies based on its veto rights. The pre-merger decision making process had been changed after the signing of the SPA. The GVH emphasised that due to the BLT Group possessing general veto rights, the consent of the BLT Group was required in the decision making process. After the signing of the SPA the sellers were not able to make decisions without the consent of the BLT Group, which enabled the BLT Group to exercise its control over the target companies.