

AN OVERVIEW OF THE MERGER CONTROL REGIME IN HUNGARY

Act LVII of 1996 - on the Prohibition of Unfair Trading Practices and Unfair Competition ("Competition Act") contains the main rules for merger control, augmented by sectoral legislation applicable to pharmacies and media. Broadly, the Hungarian merger control regime is similar to that of the EU, with a few differences. The Hungarian Competition Authority ("HCA", in Hungarian: *Gazdasági Versenyhivatal*) regularly issues jurisdictional notices on merger control, the latest version available to date is notice 2/2023 last amended on 9 June 2023.

What transactions qualify as concentration?

The following transactions are caught as concentrations under the Competition Act:

1. acquisition of sole or joint control over the whole or a part of previously independent undertakings; i.e.
 - a) the acquisition of the majority of voting rights in the target;
 - b) the power to appoint, elect or dismiss the majority of the board members or executive officers of the target;
 - c) the ability to exert decisive influence over the market behaviour of the target (either by virtue of contractual arrangements or as a result of specific factual circumstances)
2. merger of two or more previously independent undertakings; and
3. creation of a full-function joint venture.

Insights: Different from the EUMR, in the case of **joint ventures** the change in the number of direct or indirect joint controllers qualifies as a concentration. Also, if direct control is acquired by a full-function joint venture, its joint controllers are considered to be undertakings concerned. Acquisitions of **part of an undertaking (outsourcing)**: different from the EUMR as well, since it is irrelevant whether the acquiring undertaking of a share will actually carry out a market activity through it, or whether it will only carry out this activity for the selling undertaking or for itself. It is sufficient to consider that the assets or rights to be transferred may be capable of carrying out the market activity and providing services to third parties. Another significant difference is in terms of business units that **rights related to the production and distribution of products** (trademarks, industrial designs, know-how, etc.) may also be considered as business unit (even in themselves, i.e. without the transfer of the means of production) if, as a result of their transfer, the receiving undertaking may in the future replace the transferor undertaking on the market for the products which can be produced using them. This is conditional on the undertaking having the necessary equipment to produce the products in question.

What are the notification thresholds?

Two sets of thresholds apply across all industries. A mandatory notification requirement is triggered if Threshold A is met; Threshold B is entirely voluntary:

Threshold A (mandatory):	Threshold B (voluntary):
The combined turnover from Hungary of the company groups involved exceeds HUF 20 billion (approx. <u>€52.49 million / \$56.49 million</u>) in the preceding business year;	The combined turnover from Hungary of the company groups involved exceeds HUF 5 billion (approx. <u>€13.12 million / \$14.12 million</u>) in the preceding business year, and threshold A is not met;
AND	AND
At least two of the groups of companies involved have a turnover of HUF 1.5 billion (approx. <u>€3.937 million / \$4.2 million</u>) from Hungary;	It is not evident that the concentration will not significantly lessen competition on the relevant market. The criteria for such assessment are set out in HCA Notice 3/2023 and are the same as those for the opening Phase II proceedings, referenced below.



Eszter Ritter
Partner
eszter.ritter@lakatoskoves.hu



Iván Sólyom
Partner
ivan.solyom@lakatoskoves.hu



B. Dávid Nagy
Trainee Lawyer
david.nagyb@lakatoskoves.hu

The HCA has no jurisdiction for ex-ante merger review where a **venture capital fund under direct or indirect State control acquires joint control** in a company through an equity investment carried out with State aid under a scheme approved by the European Commission. These are subject to post-completion information obligation only, if the target's net turnover for the previous year did not reach HUF 1.5 billion (approx. €3.937 million / \$4.2 million). The HCA may launch an ex-officio merger review if there are competition concerns.

The Hungarian Government is authorized by the Competition Act to classify individual **concentrations as "strategically important for the national economy"**, resulting that the HCA has no jurisdiction for any merger review.

Insights: The Hungarian Government has frequently utilized such powers, for example in the case of the 100% transfer of the three major shareholders' shares (MKB Bank Nyrt., Magyar Takarékszövetkezeti Bank Zrt. and Budapest Bank Zrt.) to the joint holding company called Magyar Bank Holding Zrt. in the banking sector (they have decided on the transfer on 30 October 2020 and it was implemented in separate phases until its completion in 2023), the acquisition of 100 % of the shares in the universal electricity provider E.ON Áramszolgáltató by the state-owned MVM Zrt. in the energy sector in 2022, the acquisition of 100 % of the shares in Antenna Hungária Zrt. in the media/telecommunications sector in 2014, the acquisition of Vodafone Magyarország Zrt. (the State acquired 49% of the shares through Corvinus Nemzetközi Befektetési Zrt. and 4iG Nyrt. acquired indirect ownership of 51% of the shares through Antenna Hungária Zrt.) in the telecommunications sector in 2023.

What are the threshold calculation rules?

In general

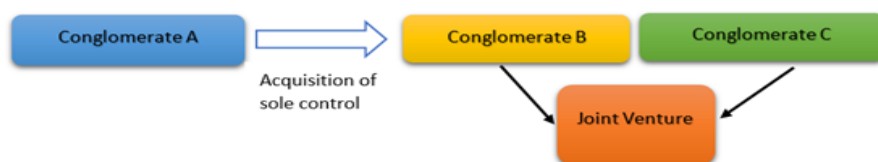
- a. The seller's group turnover is not taken into account.
- b. Only net sales revenues from Hungary (i.e. sales to customers in Hungary) must be taken into account, irrespective of place of registration of the entity generating the revenue. Special rules apply for calculating the thresholds of merging financial institutions, insurance companies, investment firms and funds, commodities exchange service providers, payment institutions, electronic money institutions, intermediaries of financial services, funds and stock exchanges.
- c. The net turnover shall be determined based on the last audited financial year before the earliest of the dates of publication of the public bid, conclusion of the contract, acquisition of control or the merger filing.
- d. Intra-group sales are excluded.
- e. Turnover denominated in currencies other than HUF, must be converted on the basis of the exchange rate of the Hungarian National Bank effective on the last day of the most recent audited financial year.
- f. In the case of a business unit as target, the net turnover generated by the use of the assets and rights to be transferred must be taken into account.
- g. Contrary to the European Commission's practice, the turnover between the JV (which is controlled by the undertaking group concerned and other undertakings) and the undertaking concerned does not reduce the net turnover to be taken into account.
- h. For the purposes of calculating the HUF 1.5 billion (approx. €3.937 million / \$4.2 million) threshold in Threshold A, turnovers of undertakings that were acquired from the same group within two years preceding the acquisition of control must be added, provided there at those acquisitions had not been notified to the HCA.

Insight: The two-year rule deviates from the EUMR, since only the last transaction would be subject to merger review, and the activity of the previously acquired targets would be assessed as part of the acquirer's group under the Hungarian regime.

Joint ventures

In case of JV-s, each parent company group is taken into account separately. Accordingly, in transactions involving a change in direct or indirect joint control over the JV target, the undertaking groups concerned are (i) each of the jointly controlling shareholder(s), existing or new, and (ii) the target. **"No-nexus JVs"** (i.e. where the target itself has no turnover from or any connection to Hungary) are therefore caught by merger filing if the notification thresholds are met by two or more parent groups.

Insight: HCA in its 2022 decision **Vj-43/2020 (Gi International and others)** explained that, if a (foreign-to-foreign) transaction involves a target company group (Conglomerate B), which has a joint venture (JV) with a third party (Conglomerate C), then also the indirect acquisition of joint control over the JV is part of the merger assessment. It follows that such third party also qualifies as an "undertaking concerned" by the concentration (whether or not it plays a passive role), resulting that the turnover from each four undertaking groups (including the independent third party unrelated to the acquisition at parent company level) must be taken into account for both the jurisdictional and material assessment. This is a deviation from EU merger control rules.

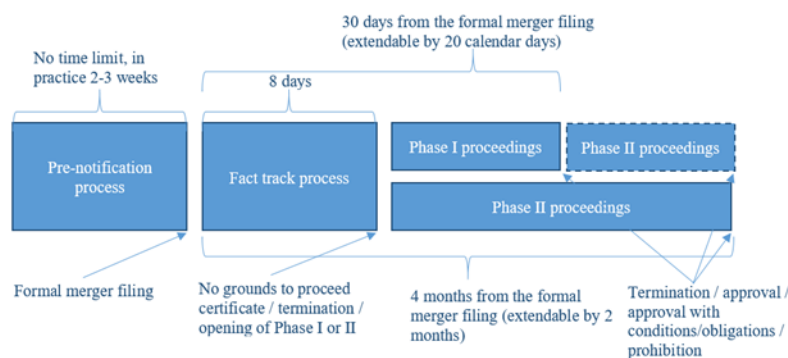


Special merger assessment rules in media and pharmacy sectors

In the case of mergers with the participation of **media companies**, where at least two of the participant groups are responsible for editorial content, and who are primarily active in providing media content to the public via electronic telecommunication means or printed media. In such cases, the HCA must seek the opinion of the Media Council, which is subject to special provisions of the Media Act (Act 185 of 2010). A negative opinion (prohibition or approval with conditions) is binding on the HCA. With regard to **acquisition of pharmacies**, no concentration may be implemented which would result in more than four pharmacies coming under the direct or indirect control of the same undertaking or undertaking group or the same natural person, nor may a concentration be implemented which would result in three or more pharmacies in a municipality with a population of less than 20 000 coming under the direct or indirect control of the same undertaking or undertaking group or the same natural person. Such limitation is set out in Act 98 of 2006 on the secure supply of pharmaceuticals.

Procedural aspects – review deadlines and fees

Phase	Duration/deadline
<u>Prenotification process</u> <ul style="list-style-type: none"> Requesting prior consultations (with a draft notification/preparatory note) is voluntary and recommended by the HCA. The process is confidential and the parties may stop it without negative consequence. Documents presented can be used by the HCA for merger clearance purposes only. Practical tool to ensure the formal filing is complete, enabling a smooth “Fast track” process, and avoiding Phase I proceedings. The parties can notify once they have decided in good faith to implement the concentration, even before signing. 	no definite time limit or deadline
<u>“Fast track” process</u> <ul style="list-style-type: none"> All filings are first reviewed in a fast track process. If there are no issues triggering Phase I or II proceedings, the HCA will issue a no grounds to proceed certificate, which attests that the parties are entitled to implement the merger. A procedural fee of HUF 1 million (approx. <u>€2,624 / \$2,835</u>) shall be paid for the processing of the merger notification. There is no deadline to file. The parties can notify once they have decided in good faith to implement the concentration, even before signing. 	within 8 days from formal filing
<u>Phase I proceedings</u> <ul style="list-style-type: none"> The HCA opens Phase I proceedings at the end of the fast track process if (i) the filing is incomplete, (ii) or the HCA must review in more detail if the commitment offer of the parties set out in the filing is appropriate to tackle the potential competition concerns, or (iii) if the opinion of the Media Council must be obtained which is not available upon filing At the end of the review, the HCA may issue a clearance decision with or without conditions, or may terminate the proceedings (due to lack of jurisdiction) or may open Phase II proceedings. A procedural fee of additional HUF 4 million (approx. <u>€10,498 / \$11,299</u>) must be paid. 	30 calendar days from formal filing (extendable by 20 calendar days). clock will stop, inter alia, between the issuing of an information request and the filing of the response, and if the filing fees become overdue, until payment.
<u>Phase II proceedings</u> <ul style="list-style-type: none"> If the HCA finds based after the fast track or Phase I proceedings that it is not obvious that the merger will not substantially lessen competition on any market, the HCA will open Phase II proceedings. At the end of the review, the HCA may issue a clearance decision with or without conditions, or may prohibit the merger. The procedural fee is HUF 19 million (approx. <u>€50,994 / \$54,824</u>) if the Phase II review was opened directly after a fast track process, and HUF 15 million (approx. <u>€40,258 / \$43,282</u>) after a Phase I review. 	4 calendar months from formal filing (extendable by 2 months). clock will stop, inter alia, between the issuing of an information request and the filing of the response, and if the filing fees become overdue, until payment.



Prohibition on implementation

Threshold A: implementation is prohibited before the certificate on “no grounds to proceed” or the merger clearance decision is issued. Any legal act in breach of the suspension provisions will be null and void, and gun jumping may be sanctioned with fine. The notifying party may apply for permission to exercise interim control before clearance.

Threshold B: implementation is permitted in all cases, no nullity and no fines. The HCA may open Phase I proceedings to investigate the concentration within 6 months after closing.

Fine exposure

During a merger review the HCA may impose fines for the violation of the HCA’s decision prohibiting the merger or imposing conditions, for providing misleading information in the filing, gun jumping and failure to notify. The maximum amount of fine can reach 13% of the net worldwide revenues in the preceding business year of the company or company group concerned based on the Competition Act. In practice, the highest merger control fine imposed so far (for misleading the HCA) amounted to 90 million HUF (€236,220 / \$254,237), and fines in this magnitude are rare.

2023 statistics

In 2023, until middle of December, pursuant to publicly available data, the HCA cleared a total of 40 transactions through the fast track process (compared to 64 in 2022) with a “no grounds to proceed” certificate, it opened only 2 ex-officio Phase I proceedings for gun jumping and 1 after notification. These figures are down from 2022 (presumably due to the increase of the notification thresholds) when the HCA cleared 55 filings with a “no grounds to proceed” certificate and opened 8 Phase I proceedings. Phase II proceedings are generally rare. Since 2018 the HCA launched only one ex-officio merger review based on Threshold B, which was closed without a final decision due to lack of information.