Submission concerning the planned acquisition of Vodafone Hungary by the Hungarian telecom company 4iG and the Hungarian state

As third parties, within the meaning of point 25 of the Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases,[1] we hereby inform the Commission of the planned acquisition of Vodafone Hungary by 4iG and the Hungarian State that in our opinion is capable of being a candidate for referral under Article 22 of the EU Merger Regulation 139/2004.

At the time of writing, this acquisition and the underlying transaction is still subject to completion of confirmatory due diligence and the Parties entering into binding transaction documentation. The Parties announced that they are targeting completion of the transaction by the end of 2022. Normally, the transaction would likely be required to be notified only to the Hungarian Competition Authority (GVH). However, it is likely that once the deal is final, the Hungarian government will declare the acquisition of national strategic importance in a few days, and in that case the merger can be cleared right away without any competition law approval.

In this submission we provide information that should enable the Commission to make a preliminary assessment as to whether the criteria of referral are met and also why this transaction might Significantly Impede Effective Competition in several telecommunication markets of European dimension.

Therefore, it is urgent and decisive that the Commission obtains detailed information about the planned acquisition and starts a preliminary assessment. We believe that this assessment should start even before the transaction is signed, because as we demonstrate below, the Hungarian government will likely exempt this transaction from competition law review and the transaction can be effectively cleared in a few days. So, we would like to ask the Commission to write an invitation letter to the Hungarian Competition Authority (GVH) and potentially to other national authorities for referral.

First, we introduce the planned acquisition and explain why the planned acquisition is expected to be exempted by the Hungarian government and thus will fall outside of the Hungarian Competition Act and merger review by the Hungarian Competition Authority (GVH).

Second, we set out the legal (procedural) framework that, despite the lack of EU dimension of the merger, enables the European Commission to review this merger. The legal basis for such re-attribution of a merger case is Article 22 of Regulation 139/2004 as interpreted by the General Court in the recent case T-227/21 *Illumina/Grail*.[2] In sum, we argue that as the four cumulative criteria for referrals as laid down in Article 22 of Regulation 139/2004 and interpreted by the General Court in T-227/21 *Illumina/Grail* are clearly fulfilled in this case the Commission should review the planned merger.

Third, we provide an in-depth assessment of the likely effects of the planned acquisition on several telecommunications markets in Hungary and how it will significantly harm competition. This assessment shows that due to the fact that the Hungarian government have declared a number of telecom mergers including 4iG of "national strategic importance", this company could effortlessly have acquired

[1] Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases C (2021) 1959 final, Brussels, 26.3.2021
[2] Case T-227/21 *Illumina/Grail*, ECLI:EU:T:2022:447

two big telecommunication companies in 2021-2022 without fearing any competition law review. These completed mergers already resulted in very concentrated markets. Should 4iG now acquire Vodafone Hungary, that is not only the second largest mobile telecommunication operator but is also the second largest competitor in wholesale and fixed retail markets, most Hungarian telecommunication markets will effectively become duopolies with a small fringe. Therefore, there are horizontal concerns both because of loss of infrastructure competition and increased chance of tacit collusion. Moreover, vertical concerns arise as after the merger the ability and incentive to foreclose access to basic infrastructure needed to entry and expansion will be heavily increased.

Article 22 constitutes an effective corrective mechanism in the light of the principle of subsidiarity by protecting the interests of the Member States and in the light of that principle, the Commission as the most appropriate authority must deal with the case. Should the Commission decline to review the planned acquisition and it is implemented, then it will not be subject to any examination while it will significantly affect competition in Hungary. **It is thus is essential to act at EU level.**

The telecommunications sector is of major importance to the European economies, to citizens' daily lives and for the integration project, in particular. The quality of telecommunications services affects the well-functioning of the internal market and hence the standard of living of EU citizens. The well-functioning of telecommunications markets as a network industry is key for EU growth and competitiveness. Therefore, regulatory oversight is needed to both promote competition in the provision of services, regulate access to infrastructure and create an integrated EU market and safeguard consumers' access rights to services with a public nature.

Moreover, telecommunications are closely related to media and the economic activities in these sectors are all interconnected in a complex supply chain. In Hungary, this relationship is especially crucial, as a very large concentration was already created in the media market by similar mergers of national strategic importance in the course of 2018 that were exempted from competition law review and resulted in significant harm.[3]

1. The planned acquisition of Vodafone Hungary

The information provided in this document concerns the planned acquisition of Vodafone Hungary by the Hungarian telecom company 4iG and the Hungarian state.[4] On 22nd August, 2022, Vodafone Group Plc ("Vodafone") announced that it had entered into heads of terms with 4iG Public Limited Company ("4iG") and Corvinus Zrt ("Corvinus", a Hungarian state holding company) in relation to the potential sale of 100% of Vodafone Magyarország Távközlési Zrt ("Vodafone Hungary") for a total cash consideration equivalent to an enterprise value of HUF 715bn (€1.8bn). The deal is expected to create Hungary's second largest telecoms operator. 4iG will hold a majority 51% stake while the Hungarian state will hold 49%.

[3] In November 2018 the Hungarian government declared the creation of a media conglomerate with Government Decree 229/2018 of "national strategic importance in the public interest." This meant that the merger was exempted from competition law review affecting hundreds of broadcast, online and print publications. The merger comprised a foundation to which 10 companies donated their media outlets, resulting in the control and operation of nearly 480 publications by a publisher known for his loyalty to the Hungarian prime minister. The exemption of the merger of the media companies from competition rules resulted in a largescale concentration of political power by the government aggravating the already shrinking space for media pluralism in the country

[4] https://www.vodafone.com/news/corporate-and-financial/vodafone-agrees-non-binding-terms-sale-vodafone-hungary-4ig-corvinus

Hungarian Minister for Economic Development, Márton Nagy in a statement noted that he will be asking the Government to declare the transaction of 'national strategic importance' in the public interest.[5] On the basis of Article 24/A in the Hungarian Competition Act, the Hungarian Government "may, in the public interest, in particular to preserve jobs and to assure the security of supply, declare a concentration of undertakings to be of strategic importance at the national level."

For concentrations of national strategic importance, no authorization of the Hungarian Competition Authority (GVH) is required. The decision can be taken in a government decree, which is not subject to judicial review by the Hungarian courts.

At the time of writing, this acquisition and the underlying transaction is still subject to completion of confirmatory due diligence and the Parties entering into binding transaction documentation. However, the Parties announced that they are targeting completion of the transaction by the end of 2022. It is likely that once the deal is final, the Hungarian government will declare the acquisition of national strategic importance in a few days. In that case, the planned acquisition falls outside of the Hungarian Competition Act and the review of the Hungarian competition authority, GVH and the Hungarian courts.

Therefore, it is **urgent** and **decisive** that the Commission obtains detailed information about the planned acquisition and starts a preliminary assessment.

2. Re-attribution of the planned acquisition to the European Commission under Article 22 Regulation 139/2004

On the basis of Article 22 (1) of Regulation 139/2004 one or more Member States may request the Commission to examine any concentration as defined in Article 3 of Regulation 139/2004 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Regulation 139/2004 is aimed at making the referral system more flexible and effective in order to ensure that a concentration would be dealt with by the authority best placed to analyse its competitive effects and, where appropriate, to restore effective competition, whilst taking account of the principles of subsidiarity and the "one stop shop" as well as maintaining legal certainty to the utmost extent possible.[6]

As the General Court in T-227/21 *Illumina/Grail* recently confirmed,[7] it is clear from the wording, the legislative history and the purpose of Article 22 of the Merger Regulation, as well as from the Commission's enforcement practice, that Article 22 is applicable to all concentrations.[8]

This means, according to the Court, that referral may be made for a concentration which does not fall within the scope of the merger control rules of the Member State which requested its referral.[9]

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[5] This reference is available only in Hungarian, for example https://24.hu/fn/gazdasag/2022/08/22/4ig-vodafone-vasarlas-magyar-allam-vezetekes-piaci-mobilpiac-piacszerzes/

[6] Principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation available at : https://ec.europa.eu/competition/ecn/eca_referral_principles_en.pdf, Commission Notice on Case Referral in respect of concentrations (2005/C 56/02)

[7] Case T-227/21 *Illumina/Grail*, ECLI:EU:T:2022:447, paras 89-151.

[8] Commission Notice on Case Referral in respect of concentrations (2005/C 56/02) point 6.

[9] T-227/21 *Illumina/Grail* para 109

As mentioned above, the planned acquisition will likely be declared to be of 'national strategic importance' in Hungary and as such, on the basis of Article 24/A in the Hungarian Competition Act it falls outside of the Hungarian competition legislation and review of the GVH.

The interpretation of Article 22 by the General Court in in *Illumina/Grail* ensures that a concentration which threatens significantly to affect competition within the territory of a Member State and affects trade between Member States, would not be subject to any examination, either by the national authorities or by the Commission, may be examined by the Commission. It thus concerns an action which cannot be achieved by the Member States. On the contrary, in that situation, it is essential to act at EU level.[10]

In particular, as is stated in recital 11 of Regulation 139/2004, Article 22 constitutes an effective corrective mechanism in the light of the principle of subsidiarity by protecting the interests of the Member States. In accordance with recital 14 of that regulation, a case will be dealt with by the most appropriate authority, in the light of that principle.[11]

As stated in the 2005 Commission Notice on referral and demanded by the principle of susbsidiarity, re-attribution of jurisdiction should only take place to another competition authority in circumstances where the latter is the more appropriate for dealing with a merger, having regard to the specific characteristics of the case as well as the tools and expertise available to the authority. Particular regard should be had to the likely locus of any impact on competition resulting from the merger. [12]

Decisions regarding the referral of cases must take due account of all aspects of the application of the principle of subsidiarity, including the benefits inherent in a 'one-stop-shop' system, and the importance of legal certainty with regard to jurisdiction. When considering whether or not to exercise their discretion to make or accede to a referral, the Commission and Member States should bear in mind the need to ensure effective protection of competition in all markets affected by the transaction.

It is therefore, in the interest of Hungary and the Hungarian economy, that the planned merger is subject to review by the Commission, who is in the current case the more appropriate authority for dealing with the merger.

The General Court in *Illumina/Grail* also confirmed that situations in which concentrations are not notified but merely made known to the Member State concerned, either because they do not fall within the scope of that system, or because no such system exists also fall within Article 22 (1).[13]

According to the General Court, Article 22(1) of Regulation 139/2004 enables a Member State, irrespective of the scope of its national merger control rules, to refer to the Commission concentrations which do not meet the turnover thresholds in Article 1 of that Regulation, but which may have significant cross-border effects.[14]

The General Court in T-227/21 *Illumina/Grail* explained that referral mechanisms are an instrument intended to remedy control deficiencies inherent in a system based principally on turnover thresholds which, because of its rigid nature, is not capable of covering all concentrations which merit examination at European level. Those mechanisms therefore create, as emphasised by the expression 'corrective mechanism' used in recital 11 of Regulation No 139/2004, a subsidiary power of the Commission which

[10] T-227/21 *Illumina/Grail* para 163.
[11] T-227/21 *Illumina/Grail* para 165.
[12] Commission Notice on Case Referral in respect of concentrations, point 9.
[13] T-227/21 *Illumina/Grail* para 130.
[14] T-227/21 *Illumina/Grail* para 116.

confers on it the flexibility necessary to achieve the objective of that regulation, which is to permit the control of concentrations likely significantly to impede effective competition in the internal market.[15]

2.1. The legal requirements of referrals from Member States to the Commission pursuant to Article 22

According to the 2005 Commission Notice on Referral, a referral can be made by one or more Member States to the Commission pursuant to Article 22, when two legal requirements are fulfilled: (i) the concentration must affect trade between Member States; and (ii) it must threaten to significantly affect competition within the territory of the Member State or States making the request.[16]

As to the first criterion, a concentration fulfils this requirement to the extent that it is liable to have some discernible influence on the pattern of trade between Member States.

As to the second criterion of the Commission 2005 Notice, a referring Member State or States is/are required in essence to demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny. Such preliminary indications may be in the nature of prima facie evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

2.2. Four cumulative conditions

In T-227/21 *Illumina/Grail*, the General Court confirmed that the first subparagraph of Article 22(1) of Regulation No 139/2004 sets out four cumulative conditions for authorising referral of a concentration to the Commission. First, the referral request must be made by one or more Member States; second, the transaction which is the subject of that request must satisfy the definition of concentration set out in Article 3 of that regulation without meeting the thresholds for a European dimension laid down in Article 1 of that regulation; third, the concentration must affect trade between Member States; and, fourth, the concentration must threaten to significantly affect competition within the territory of the Member State or States which made the referral request.

As to the first condition, the Commission can invite Hungary to refer the planned acquisition to the Commission as the most appropriate authority to review the merger. This was also the case in T-227/21 *Illumina/Grail* where first the Commission received a complaint relating to the concentration at issue,[17] and later the Commission informed the Member States of the concentration at issue, by sending them a letter in accordance with Article 22(5) of Regulation No 139/2004 ('the invitation letter').[18]

As to the second condition, the planned transaction qualifies as a concentration within the meaning of Article 3 (b)of Regulation 139/2004. As mentioned above, 4iG will together with the Hungarian state buy 100% of Vodafone Hungary. 4iG will acquire a majority 51% stake while the Hungarian state will hold 49%.

The planned concentration will very likely not meet the thresholds for a European dimension as laid down in Article 1 of Regulation 139/204. 4iG business activity in the European Member States concentrates to Hungary only (although it made a recent acquisition to become Albania's largest telecommunications operator as well). Hence, it is almost certain that 4iG achieves more than two-third

[15] T-227/21 *Illumina/Grail* para 142.
[16] Commission Notice on Case Referral in respect of concentrations (2005/C 56/02) point 42-44.
[17] T-227/21 *Illumina/Grail* para 11
[18] T-227/21 *Illumina/Grail* para 12.

of its its aggregate Community-wide turnover within one and the same Member State within the meaning of Article 1 (2) of the Regulation. This situation is similar to the situation in the Illumina/Grail merger where "the turnover of the undertakings concerned did not exceed the relevant thresholds, in particular given the fact that Grail did not generate any revenue in any EU Member State or elsewhere in the world, the concentration at issue did not have a European dimension for the purpose of Article 1 of Regulation No 139/2004 and was not therefore notified to the European Commission pursuant to Article 4(1) of that regulation."[19]

As to the third condition, the concentration must affect trade between Member States. As stated in paragraph 43 of the Referral Notice, a concentration fulfils the criterion of effect on trade between Member States laid down in Article 22 of the Merger Regulation if it is liable to have some discernible influence on the pattern of trade between Member States. The proposed transaction is capable of affecting trade between Member States due to its vertical foreclosing effect of other telecommunications service providers in the other EU Member States to the Hungarian telecommunications market.

As for the fourth condition, in the following we set out how the planned acquisition will significantly affect competition within the territory of Hungary. Below, we first set out the main competition concerns related to this acquisition and how the relevant markets can be defined and show the major developments that have taken place in the Hungarian telecommunications market in the period 2014-2022.

3. Affected markets

Both 4iG and Vodafone are active at various vertical levels and segments of the Hungarian telecommunications market. In a number of preceding mergers, the European Commission and the Hungarian Competition Authority (GVH) defined several relevant markets in Hungary and in other EU Member States.[20] In order to simplify our analysis, we cluster these markets into the following three categories.

1. Wholesale markets: various services to access basic infrastructure supplied to other telecommunication operators who need this infrastructure to be able to effectively provide their own services. The product markets analysed here are especially leased lines (which can be further separated into backbone and trunk segments), passive infrastructure, call origination, call transit, call termination and wholesale broadband internet access. The geographic scope for these product markets is national.
2. Retail fixed markets: various telecommunication services that are supplied to customers through a fixed network. The product markets that are analysed here are usually business connectivity services (which can be further segmented into broadband access and leased lines), fixed internet access (both to residential and non-residential customers), fixed voice services and television services. The geographic scope for business services is national, but for residential services a local geographic scope is usually applied, at a municipality level.
3. Retail mobile markets: various telecommunication services that are supplied to customers through a mobile network. The product markets analysed here are usually mobile voice services and mobile broadband access (both to residential and non-residential customers). The geographic scope for these product markets is national.

[19] T-227/21 *Illumina/Grail* para 9.

[20] See especially Chapter 4 and the references therein of the European Commission's decision in 2014 in the Deutsche Telekom/GTS merger (M.7109), which also heavily affected Hungary.

4. The development of the Hungarian telecommunication markets in the period 2014-2022

In this section, we provide an overview of the changes that have taken place in the ownership of the main competitors in the Hungarian telecommunication markets between 2014 and 2022. The following table summarizes the main developments. The sequence of the firms in each cell illustrates the relative position of each firm based on publicly available data.

Table 1. Main competitors on the Hungarian telecom markets, 2014-2022

	Beginning of 2014	Beginning of 2021	End of 2022 (provisional)
Wholesale markets (infrastructure, excluding termination)	1. Magyar Telekom 2. UPC 3. Invitel 4. GTS 5. Antenna Hungária (AH) 6. MVMNet (state-owned)	1. Magyar Telekom (acquired GTS) 2. Vodafone (acquired UPC) 3. Invitech (divested from Invitel) 4. Antenna Hungária (became state-owned) 5. MVMNet	1. Magyar Telekom 2. 4iG (acquired Invitech + AH & acquires Vodafone) 3. MVMNet (almost acquired by 4iG, remains state-owned)
Retail fixed markets (voice, broadband, TV)	1. Magyar Telekom 2. UPC 3. Digi 4. Invitel 5. Antenna Hungária (mainly TV)	1. Magyar Telekom 2. Vodafone (acquired UPC) 3. Digi (acquired most parts of Invitel) 4. Invitech (remaining parts of Invitel) 5. Antenna Hungária	1. 4iG (acquired Digi + Invitech + AH & acquires Vodafone) 2. Magyar Telekom
Retail mobile markets (voice, broadband)	1. Magyar Telekom 2. Telenor 3. Vodafone	1. Magyar Telekom 2. Telenor (AH acquired 25% share) 3. Vodafone +1. Digi acquired some frequencies & started to enter	1. Magyar Telekom 2. 4iG (acquired Digi & acquires Vodafone) 3. Telenor (renamed to Yettel, 4iG acquired 25% share via AH)

It is important to note that a large part of the Hungarian population has a choice between at least two separate fixed networks, and the ratio of the legacy xDSL technology is very low compared to other EU countries. Due to the vigorous infrastructure-based competition on the fixed market, Hungary evolved into a comparatively good performer in the network coverage and service take up of the fixed broadband services in the EU. This is reflected in the Digital Economy and Society Index (DESI) broadband connectivity indicators.[21] Additionally, Hungary is among the best European performers in Purchasing

[21] Digital Economy and Society Index (DESI) 2022, European Analysis, downloadable at https://ec.europa.eu/newsroom/dae/redirection/document/88764. Hungary was above the EU average in fast broadband availability in 2021: it was the 8th in the NGA broadband coverage and 12th in the very high capacity networks (VHCN) rankings. This above EU average position was also true for the fixed broadband service take-

Power Parity comparison, according to the most recent Retail Broadband price study prepared for the European Commission.[22]

Until the beginning of 2014, the Hungarian telecommunication market was highly competitive, with 6 large competitors in wholesale markets, 4 major competitors with national presence and also smaller local operators with their own (mostly cable) infrastructure in retail fix markets. Furthermore, there are 3 major international (Magyar Telekom, Telenor, Vodafone) competitors in retail mobile markets. There was only one telecommunication company, Magyar Telekom (subsidiary of Deutsche Telekom), which was fully vertically integrated and present on the wholesale markets as well as in the fixed and mobile retail markets.

Between 2014 and 2020, a process of consolidation took place, which can also be observed in other Member States' telecom markets. However, in Hungary these changes were closely monitored by the European Commission and the GVH. These investigations assessed various theories of harm in-depth (we discuss these in the next section), and collected the opinions of the competitors and customers of the undertakings concerned. Some of these mergers were cleared only with remedies.

1. In 2014, Magyar Telekom (subsidiary of Deutsche Telekom), the only company active in all Hungarian telecom markets acquired GTS, which was a firm mostly active on wholesale markets serving business customers in the retail fixed markets in Hungary. DG Competition investigated this merger and cleared it without commitments.[23]
2. In 2019, the international mobile network operator Vodafone acquired several European assets of Liberty Group, which was active through its subsidiary UPC on the Hungarian wholesale and retail fixed markets. DG Competition assessed this merger in a long Phase 2 investigation and cleared it only with commitments.[24] However, even though DG Comp investigated the Hungarian markets in detail it has found no anticompetitive concerns in Hungary, and therefore remedies were required only in another country (Germany).
3. In 2018, Digi, a very competitive and innovative ("maverick") player in the retail fixed markets, acquired the retail business of Invitel, a former incumbent in several Hungarian regions and therefore an active player in the wholesale and retail fixed markets. The GVH investigated this merger for almost a year and cleared it only with far-reaching structural remedies.[25] Invitel's wholesale services continued to be supplied by Invitech, and after the merger, Invitech also acquired Invitel's retail business in local cities where Digi was required to sell its retail business. However, later in 2018 the GVH observed that Digi had submitted incorrect information to the merger investigation and therefore reopened the investigation, which lasted another year. The anticompetitive concerns established by the GVH remained the same but these were established

up performance: Hungary was the 8th in fixed broadband household penetration and the 5th ranking of the ratio of the households with a fixed broadband subscription of at least 100 Mbps.

[22] See Mobile and Fixed Broadband Prices in Europe 2021, A study prepared for the European Commission DG Communications Networks, Content & Technology by Empirica and TÜVRheinland, 2022, downloadable at https://digital-strategy.ec.europa.eu/en/library/mobile-and-fixed-broadband-prices-europe-2021. Hungary is tendentiously in the cluster of inexpensive national markets, and more importantly, it is one of the most inexpensive countries in the fixed high-speed, above 100 Mbps standalone and triple play service packages.

[23] See European Commission's decision M.7109.

[24] See European Commission's decision M8864.

[25] See the GVH's decision in case Vj-43/2017.

in more cities, and therefore, due to the commitment decision of early 2020, Digi was required to divest more assets to Invitech in order to get the final clearance.[26]

Two other transactions took place in the relevant time-period involving the Hungarian state that did not require an assessment by the GVH.[27]

4. In 2014, the Hungarian Infocommunication Service Provider (NISZ) owned by the Hungarian state acquired Antenna Hungária, which was mostly active in the wholesale markets and in retail fixed markets (mostly terrestrial television broadcasting).
5. In 2019, the very same Antenna Hungária acquired a 25% non-controlling share in Telenor, the second largest mobile telecom service provider at the time.[28]

Therefore, by the beginning of 2020, the number of main competitors decreased from 6 to 5 in wholesale markets and from 4 to 3 in fixed retail markets, compared to the situation in 2014. However, the GVH and the European Commission's merger investigations revealed that there remained enough safeguards on these markets so that there was no Significant Impediment to Effective Competition (SIEC).

However, from 2021 we can observe a significant qualitative change. Through a series of acquisitions just over the course of one year, a relatively unknown Hungarian info-communication firm, named 4iG became the second largest telecom operator in Hungary. It has, moreover, acquired this position while continuously escaping competition law assessment due to the exception laid down in Article 24 of the Hungarian Competition Act, that enables the Hungarian government to declare mergers to be in the "national strategic importance" (see above under Section 2).[29]

1. In September 2021, 4iG acquired Invitech (comprising the divested parts from the Digi/Invitel merger) a firm, which was especially active in wholesale markets and also on some retail fixed markets. The GVH cleared the merger in a simplified procedure in 3 days, without publishing any details on the affected markets.[30]
2. In November 2021, 4iG announced the acquisition of MVMNet, which was active on wholesale markets. However, after almost a year of preparation, this deal was abandoned in September 2022.
3. In December 2021, 4iG acquired the whole Hungarian business of Digi, which was the third largest competitor and most vigorous competitor ("maverick" firm) on retail fixed markets that time, and which had also been planning its entry into retail mobile markets for several years. The parties did not need to notify the merger to the GVH due to the fact that the Hungarian government declared the merger to be of "national strategic importance"[31] and as such the deal was closed before the end of the year. It is crucial to note that this merger, in fact, effectuated the previously announced Digi/Invitel merger of 2017, which was seriously challenged by the GVH both in 2018 and 2020.[32]

[26] See the GVH's decision case Vj-42/2018.
[27] These mergers did not have to be notified as the Hungarian state was the buyer.
[28] AH also acquired 25% share in CETIN Hungary, which is the Telenor group's infrastructure service provider.
[29] In addition to these mergers, 4iG also announced in 2019 the acquisition of T-Systems Magyarország from Deutsche Telekom, active both on wholesale and retail markets servicing business customers. However, this deal was abandoned before signing after a few months of preparation.
[30] See the GVH's decision in case ÖB-48/2021.
[31] See Decree 751/2021 of the Hungarian Government.
[32] See footnotes 15 and 16 above.

4. In February 2022, 4iG acquired the entire business of Antenna Hungária, which was mostly active on the wholesale markets, and also had a 25% share in mobile network operator Telenor.[33] Again, the parties did not need to notify the merger to the GVH due to the fact that the merger was declared to be of "national strategic importance",[34] and the deal was quickly closed.
5. At the end of August 2022, 4iG and the Hungarian State announced that they are jointly acquiring the whole Hungarian business of Vodafone. According to the announcement, 4iG will acquire 51% of the shares. By the time of the announcement, Vodafone had become the second largest (or very close third) competitor on the retail mobile markets, as well as the second or third largest competitor on the fixed retail markets because of the integration of UPC. Through the series of the above-mentioned acquisitions that were all excluded from a rigorous merger investigation by the GVH, 4iG became the second largest supplier on the wholesale markets and also the second or third largest competitor on the retail fixed markets. The deal has not been signed yet, however, the parties are planning to close the deal within a few months.

The above overview clearly shows, that in comparison with the situation of the Hungarian telecom market in the beginning of 2021, the competitive landscape has become highly concentrated by September 2022 due to the exclusion of any competition law assessment or intervention by the Hungarian competition authority. The wholesale market has become especially concentrated and a highly competitive "maverick" player (Digi) has disappeared from both retail fixed and mobile markets. Moreover, should the 4iG/Vodafone merger be concluded, the wholesale market and the retail fixed markets would become duopolistic with a small fringe of small local competitors and significant cross-shareholdings would emerge in the mobile market dominated by three-players. Ultimately, two both horizontally, and vertically integrated companies (4iG and Magyar Telekom) would dominate the entire Hungarian telecommunication market.

5. Summary of the relevant decisions of DG Comp and the GVH

In this section we summarize the findings of the three merger investigations on the Hungarian telecom markets that provide key insights for the assessment of the 4iG/Vodafone merger.

In the *Deutsche Telekom/GTS* merger investigated by DG Competition in 2014, competition concerns were assessed both on the horizontal and vertical levels of the affected markets in Hungary.

- First, the Commission evaluated whether the merger would lead to harmful effects due to a loss of rivalry between Magyar Telekom and GTS (so-called horizontal unilateral effects) on the market for wholesale leased lines.[35] The assessment found no Significant Impediment to Effective Competition (SIEC), mostly because of the presence and strong competitive pressure from national competitors: the Commission specifically named Invitel, MVMNet, Antenna Hungária and UPC as main competitors. A similar assessment emerged of these horizontal unilateral effects on the call transit market, where important countervailing pressure was identified on the side of UPC and Invitel.[36]
- Concerning the retail fixed markets, the Commission assessed horizontal unilateral effects in detail on the business connectivity market, and found unlikely that a Significant Impediment to

[33] In March 2022, Telenor Magyarország was renamed to Yettel.
[34] See Decree 50/2022 of the Hungarian Government.
[35] See points 135-143 of the European Commission's decision in case M.7109.
[36] See points 149-153 of the European Commission's decision in case M.7109.

Effective Competition would take place .[37] One of the main reasons for this assessment was the strong competitive pressure exercised especially by Invitel, but also by Antenna Hungária NISZ and UPC. Another countervailing factor was entry, which was facilitated by the availability of wholesale inputs from various competitors.

- Considering the vertically affected markets, the Commission's investigation focused mostly on the connection between wholesale leased lines and retail business connectivity,[38] and on the connection between wholesale leased lines and retail mobile services. [39] The theory of harm concerning both vertical connections laid in the fact that the acquisition of GTS's wholesale infrastructure could raise the ability and/or incentive of Magyar Telekom to foreclose competitors from the respective downstream market by refusing wholesale access or significantly increase the cost of wholesale access. However, given the presence of strong competitors identified in the assessment of horizontal effects (specifically Antenna Hungária, Invitel, MVMNet and UPC), the European Commission dismissed this concern as well.

In the Vodafone/Liberty merger, which was investigated by DG Competition, the main focus of the assessment was on the vertically affected markets in Hungary, as the horizontal overlaps between Vodafone and UPC were limited.

- First, it was raised whether Vodafone/UPC could/would foreclose other Mobile Virtual Network Operators (MVNOs) from the retail mobile markets by restricting access to call origination, especially since at the time of the merger only Vodafone was hosting MVNOs.[40] However, the Commission's final assessment concluded that other providers of wholesale access, especially the newly merged Digi/Invitel, would have an incentive to host MVNOs as well, which will act as a sufficient countervailing factor.
- Second, the Commission analysed in detail whether Vodafone/UPC could/would foreclose its main competitors on the mobile retail market, the Mobile Network Operators (MNOs) from the wholesale market of leased lines.[41] However, the Commission's investigation found that there were sufficient number of alternatives to this basic infrastructure – more specifically, Antenna Hungária, Invitech and MVMNet – that do not have a presence in retail mobile markets, and as such are more incentivized to offer wholesale access if needed. This would reduce the incentive of Vodafone/UPC to engage in vertical exclusion, and therefore harmful effects were excluded.

Finally, the Digi/Invitel merger investigated by the GVH concentrated mainly on horizontal effects on the retail fixed markets, where the major overlap was present between the parties.[42] We summarize the main findings of the second decision of the GVH, as it is the final decision and was based on updated facts.

- The GVH's main concerns were the horizontal unilateral effects due to loss of rivalry, as Digi and UPC were each others' direct competitors with overlapping networks in 34 municipalities. In 17 of these municipalities their joint market share exceeded 50%.[43] According to the GVH,

[37] See points 159-162 of the European Commission's decision in case M.7109.
[38] See points 188-200 of the European Commission's decision in case M.7109.
[39] See points 216-224 of the European Commission's decision in case M.7109.
[40] See points 1728-1734 of the European Commission's decision in case M.8864.
[41] See points 1738-1747 of the European Commission's decision in case M.8864.
[42] Vertical effects connected to potential foreclosure to wholesale access were also briefly assessed (see points 137-140 of the GVH's decision in case Vj-42/2018), but these were dismissed due to the regulation concerning this activity. Vertical effects connected to potential foreclosure to leased lines were not assessed.
[43] See points 115-122 of the GVH's decision in case Vj-42/2018.

such high levels of market shares on these retail fixed markets could automatically lead to a significant lessening of competition, unless meaningful countervailing factors related to entry or buyer power could be identified. The GVH's concern was primarily a possible price increase after the merger, but it also feared that significant network investments would be delayed or stopped altogether that would have been realized in the absence of the merger. Hence, quality decreases could have been expected to take place as well. After careful consideration of entry, the GVH excluded harmful effects in only 2 local markets with a large concentration, so significant lessening of competition was found to take place in 15 local markets with significant overlaps in the Parties' own networks.

- Horizontal unilateral effects were also analysed on the overlapping markets where Invitel was not present with a physical network, but supplied consumers through purchasing wholesale access from Antenna Hungária.[44] The GVH applied the same strict assessment criteria as discussed in the previous points, and identified 67 additional municipalities (all of these with a joint market share exceeding 50%) where a similar significant lessening of competition was expected.
- Horizontal unilateral effects on the overlapping local markets for wholesale access were briefly discussed, but ultimately none were identified.[45] This was due to the fact that Digi proposed commitments to divest one of the parties' physical networks in 82 municipalities and in this way to remedy the concerns discussed above.

6. Theories of harm with regard to the currently planned 4iG/Vodafone merger in the Hungarian telecommunications markets

In this final section, we discuss and explain the main competition concerns arising from the announced 4iG/Vodafone merger in Hungary. These theories of harm are presented according to their relative importance. All of these theories of harm are explained in more details in the European Commission's Horizontal and Non-Horizontal Merger Guidelines. [46]

1. The most serious competition concerns arise on the wholesale markets, both as horizontal and as vertical effects, as they are also connected to retail markets. This concern is due to the fact that in 2021-2022, 4iG has already acquired two main wholesale suppliers (Antenna Hungária and Invitech, the latter owning the former Invitel wholesale infrastructure), and with the acquisition of Vodafone, it would also control the former infrastructure of UPC. It is important to note that the former investigation of the European Commission in the DT/GTS and Vodafone/Liberty merger identified especially these competitors as the main countervailing factors on the Hungarian market that could constrain the market power of the merging parties.[47] **By establishing a duopoly of fully integrated telecom operators on the wholesale markets, 4iG/Vodafone will very likely inhibit increased market power towards its customers in the market of leased lines and business connectivity and increase prices and decrease**

[44] See points 123-132 of the GVH's decision in case Vj-42/2018.
[45] See points 134-136 of the GVH's decision in case Vj-42/2018.
[46] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal of the European Commission 31, 5.2.2004, p. 5–18; and Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal of the European Commission 265, 18.10.2008, p. 6–25.
[47] MVMNet was also named as a competitor, but its competitive pressure should be smaller for multiple reasons: it is state-owned (and the Hungarian State will be a 49% shareholder in the acquired Vodafone) and it specializes mostly on supplying governmental customers (and MVMNet was almost acquired by 4iG as well).

quality through delaying investments. Additionally, it will very likely have both the ability and incentive to foreclose remaining competitors on the retail (especially mobile) markets and further increase prices and decrease quality.

Reduced competition (SIEC) will likely benefit the fully integrated Magyar Telekom on all wholesale and connected retail markets. Hence, Magyar Telekom will have no incentive to act as a countervailing force. This foreclosure not only marginalizes the remaining fringe competitors, but especially increases barriers to entry and expansion on the retail market.

2. The second competition concern arises in retail fixed markets, and its relevance is closely related to the one discussed in point 1. In the absence of the 4iG/Vodafone merger, there would be only three major competitors offering voice, internet and television services and having a national market presence of at least 20-25% each and at least one (but mostly two) of them present in all Hungarian municipalities: Magyar Telekom, Vodafone (former UPC) and 4iG (former Digi and Invitel). **Therefore, as a result of the merger serious horizontal unilateral effects could arise due to loss of rivalry, as two of the three national-level competitors merge. Basically, this structural change (combined with the elimination of Digi and Invitel through previous acquisitions) would shut down or significantly diminish infrastructure-based competition on the Hungarian telecommunication markets, which is generally considered to be one of the most important safeguards by European competition and regulatory authorities.**

   In several cities, they have overlapping networks and Magyar Telekom is not present everywhere with its own infrastructure. If market shares are calculated at the national level, 4iG's market share could get close to 50%, the threshold above which the GVH decided that large structural remedies were needed in the Digi/Invitel merger. However, this 50% market share threshold will definitely be surpassed in many municipalities that were the relevant geographic retail markets analysed in previous decisions. Smaller competitors and possible entrants through wholesale access onto these retail fixed markets could also be marginalized due to the harmful vertical effects connected to wholesale markets, discussed in point 2.
3. The final competition concern emerges on the retail mobile markets. The 4iG/Digi merger, cleared just a few months ago, already granted 4iG the ability to effectively compete on this market. **Therefore, acquiring Vodafone's main mobile business would decrease the number of competitors from 4 to 3 and thus raise horizontal unilateral effects.**

   In addition to this, the acquired 25% shares in Telenor would also make horizontal coordinated effects – that is, increasing the likelihood / effectivity of a potential tacit collusion – more likely. Finally, the vertical effects connected to wholesale markets and the potential foreclosure to the required basic infrastructure (discussed in the first point) could also add to the likelihood of a Significant Impediment to Effective Competition (SIEC) on the various retail mobile markets.