



PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2013/14

PRIVATE ACQUISITIONS

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Private acquisitions in Hungary: overview

Zoltán Forgó and Zsófia Füzi, Forgó
Damjanovic & Partners Law Firm

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CORPORATE ENTITIES AND ACQUISITION METHODS

1. What are the main corporate entities commonly involved in private acquisitions?

The main corporate entities commonly involved in private acquisitions are limited liability companies (*Korlátolt Felelősségű Társaság*) (Kfts) and private companies limited by shares (*Zártkörűen működő részvénytársaság*) (Zrts):

- **Kfts.** These can be established with a minimum registered capital of HUF500,000. They are managed by managing directors and do not issue shares. The members' ownership interest is represented by quotas. Each member has only one quota which can vary in size. The proportion of ownership is represented by the size of the quota (a member with a 50% ownership interest has a 50% quota).
- **Zrts.** These can be established with a minimum registered capital of HUF5 million. They are managed by a board of directors or a single chief executive officer. Zrts can issue either physical shares or electronic shares.

It is also possible to enter into a private acquisition agreement for the acquisition of a public company limited by shares (*Nyilvánosan működő részvénytársaság*) (Nyrt). However, the procedure for a public takeover must be conducted at the same time.

2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

Restrictions on share transfer

Limited liability companies (Kfts). Generally, both members and the company have a pre-emptive right if quotas (*see Question 1*) are being sold to third parties. If there is a breach of the pre-emption right, litigation can be commenced within one year to establish that the transfer is ineffective against the members (or the company) with the pre-emption right.

The articles of association of Kfts can contain further restrictions on the transfer of quotas. The most common restrictions include:

- Transfers require the approval of a members' meeting.
- Transfers are prohibited if they are made other than through sale (for example, inheritance and division of assets on divorce).

Private companies limited by shares (Zrts). Transfer restrictions can be set out either in the articles of association or in a separate shareholders' agreement. The articles of association may provide, for example, that:

- The approval of the company is necessary (this power is normally exercised by the board of directors).
- Certain persons cannot acquire certain classes or type of shares.

If a person acquires shares in violation of the transfer restrictions contained in the articles of association, the shares cannot be registered in the share book, and that person will not be entitled to exercise shareholders' rights.

If restrictions (for example, pre-emption rights or option rights) are set out in the shareholders' agreement, they are only valid against third parties if the following formalities are complied with:

- Printed shares: restrictions are stamped on the shares.
- Electronic shares: restrictions are registered by the financial institutions holding the securities account for the shares.

Foreign ownership restrictions

Generally, there are no restrictions on foreign individuals or companies acquiring ownership interests in Hungarian companies.

3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

Share purchases: advantages/asset purchases: disadvantages

Share purchases are the most common way to acquire a private company and are certainly more common than asset purchases.

The main advantages of a share purchase and disadvantages of an asset purchase are:

- **Simplicity.** The entire business can be transferred with the transfer of ownership title in the acquired company. There is no need to transfer individual contracts, physical assets, IP rights, employees or licences (as is the case in an asset deal).
- **Third party approval to the transfer of commercial contracts not required.** Unless they contain change of control provisions (for example, financing agreements), commercial contracts are normally unaffected in a share deal. In the case of an asset deal, third party approval to the transfer of contracts is required.



- **Licences unaffected.** Except for particular industries, where a change of ownership in excess of certain thresholds requires the approval of the respective regulatory authority (for example, an electricity or gas licence-holder company is subject to approval by the Energy Office), licences are also normally unaffected in a share deal. The acquisition of qualified influence in a financial institution requires approval of the Hungarian Financial Supervisory Authority.
- **No employee consultation process.** Unless there are specific information or consultation requirements under collective agreements, it is not necessary to inform or consult employees or unions on a share purchase. However, employee relations considerations still apply, especially where closing depends on the buyer's satisfaction with arrangements for the retention of key employees. In the case of an asset or business sale, there might be a need to notify employees or the workers' council or workers' representative if the sale leads to the transfer of employees. In addition, a consultation process must also be launched with the workers' council or workers' representative of the target company.

Share purchases: disadvantages/asset purchases: advantages

Asset purchase is a less common way of structuring mergers and acquisition transactions in Hungary and is only used in certain specific scenarios, for example, a distressed sale or spin-off.

The main advantages of an asset purchase are that the buyer can pick and choose the assets it wishes to acquire and generally leave liabilities with the target company. This also protects the purchaser from any hidden liabilities undiscovered by its due diligence. Asset purchase is typical in distressed sale situations where only the valuable part of the target's operations is purchased while the rest of the company will be subject to voluntary liquidation.

4. Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

Auction sales are relatively common and the procedure is typically managed by corporate finance advisory firms.

The seller should make clear in the disclaimer to the information memorandum that it is not obliged to accept the highest bid, or to consider any offer tendered, and should generally reserve its discretion to vary or terminate the auction procedure at any time. The seller normally expressly disclaims liability for, for example, any representations that are made in the information memorandum or otherwise, and should emphasise the conclusiveness of the final sale agreement. There is no specific legal regulation applicable to the procedure at auctions. However, the general rules of fair competition must be carefully observed (*Act 57 of 1996, Competition Act and Civil Code regarding offer and acceptance*). The procedure can be outlined as follows:

- An investment teaser is sent out to potential investors.
- Interested investors can obtain a detailed information memorandum, subject to signing an appropriate confidentiality agreement.
- Indicative offers are submitted by bidders.
- Legal and financial due diligence exercises are performed for selected bidders (typically through virtual data rooms).
- A letter of intent or term sheet can be signed with the bidder making the best bid. This typically contains an exclusivity arrangement for negotiation for a certain limited period and access to wider due diligence materials (*see Question 5, Letters of intent*).
- Negotiation of transaction documents takes place.
- Transaction documents are signed.
- Closing conditions are discharged.
- Closing takes place.

PRELIMINARY AGREEMENTS

5. What preliminary agreements are commonly made between the buyer and the seller before contract?

Letters of intent

Letters of intent (term sheets) are commonly entered into on acquisitions. They record the main commercial points agreed and the basis on which the parties are prepared to proceed with the transaction. Key issues usually covered include:

- The names of the parties.
- A description of the shares or assets.
- A price or price formula (often subject to due diligence).
- Conditions precedent.
- Other major terms, such as:
 - a completion audit;
 - non-compete terms;
 - representations and warranties;
 - employment agreements for key management.
- The proposed timing of the acquisition.
- Details of the costs and expenses which will be incurred.
- Whether the letters of intent are legally binding.
- The law which will govern the contract.

Letters of intent can also address confidentiality and deal protection issues.

In Hungary, simple letters of intent are not normally legally binding in the absence of an express term. Letters of intent usually contain both legally binding and non-legally binding provisions. For example, confidentiality provisions, exclusivity, choice of law and choice of jurisdiction clauses in a complex letter of intent are normally legally binding. A general description of the parties' intent to deal with each other in good faith and a description of the procedure to be followed are usually not.

Exclusivity agreements

Parties often agree on exclusivity periods, especially where significant resources must be invested in legal and financial due diligence exercises. This may not always be available, especially in auction procedures. Exclusivity agreements are part of the letters of intent (term sheets).

The remedy for a breach of an exclusivity agreement is damages for breach of contract. These are likely to be restricted to the costs of negotiations and due diligence exercise (for example, the fees of professional advisers).

Non-disclosure agreements

A non-disclosure agreement (also known as a confidentiality agreement) is commonly entered into at the outset of a transaction. It will provide that the prospective buyer will only use confidential information for the purpose of evaluating the acquisition and that both parties will keep negotiations secret. It will also usually contain non-solicitation covenants (covering employees and customers).

Under Hungarian law, it is a problem for the seller that the remedy for breach of contract is payment of damages since it is very difficult to prove breach and the level of damages suffered by the non-breaching party. It is therefore common for sellers to retain sensitive confidential information until the second stage of due diligence exercises, especially if the buyer is a strategic investor or direct competitor.

ASSET SALES

6. Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded from the purchase?

The rights and obligations existing under employment relationships at the time of the transfer of a going concern will automatically be transferred to the buyer who must employ the transferred employees on the same terms (*section 36 (1), Act 1 of 2012, Labour Code*).

7. Do creditors have to be notified or their consent obtained to the transfer in an asset sale?

As a general rule, creditors do not have to be notified or their consent obtained to the transfer in an asset sale. However, liabilities can only be taken over by the buyer with the express agreement of the relevant creditors.

SHARE SALES

8. What common conditions precedent are typically included in a share sale agreement?

Conditions precedent may include:

- The approval of competition authorities.
- Reorganisation of the target business.
- Any industry specific consents.
- Relevant third party consents (for example, change of control provisions in contracts).
- Shareholder approval (according to the market practice of Hungarian transactions this is rarely accepted because normally such approvals should be obtained prior to the signing of the share sale agreement).

Conditions can be subjective and within the power of only one party to fulfil (in which case the relevant party will normally be required to use reasonable endeavours to fulfil the conditions). The contract will normally provide for a cut-off date for conditions precedent to be satisfied.

SELLER'S TITLE AND LIABILITY

9. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

Under the general provisions of the Hungarian Civil Code, sellers must transfer unrestricted ownership title to the buyer over the shares in the case of a private company limited by shares (Zrt) or quotas in the case of a limited liability company (Kft) (*see Questions 1 and 2*).

If there is any third party right restricting the buyer's ownership rights, the buyer can rescind the sale and claim damages. This implied warranty does not work in favour of the buyer if the buyer must have known at the time of the conclusion of the sale and purchase contract that it would not be able to acquire unrestricted ownership title, unless the seller in the sale and purchase contract specifically guaranteed (*jótállás*) unrestricted ownership title.

Sale and purchase contracts usually contain a seller's warranty of good title and that the seller has unrestricted ownership rights over the shares (Zrt) or quotas (Kft), free of any third party rights, claims, litigation and encumbrances. If there is any potential issue of concern regarding unrestricted ownership title in the transaction, it is advisable to expressly deal with the effect of the buyer's knowledge relating to this warranty.

10. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements or similar matters?

Seller

Misrepresentation may qualify as fraud (a criminal offence), if the seller intentionally misrepresented certain facts with a view to obtain or increase profit, and as a result of such misrepresentation the buyer incurred damages (*Act 100 of 2012, Criminal Code*).

Misrepresentation can also lead to civil law actions. If the buyer's mistake about significant facts was caused by the seller (or the seller must have been aware of this mistake), then the buyer is entitled to rescind the sale and purchase contract by court procedure.

By using an "entire agreement" clause, the risk of legal action for pre-contractual misrepresentation can be decreased.

Advisers

In theory the seller's advisers can be liable for misrepresentation in the context of mergers and acquisitions transactions. A claim would be based on the general rules of liability for damages. The buyer would have to prove:

- The damages suffered.
- Breach of the law by the advisers (primarily their professional rules).
- The culpability of the advisers.
- A causal connection between the damages suffered and the breach.

In practice, such actions are extremely rare.

MAIN DOCUMENTS

11. What are the main documents in an acquisition and who generally prepares the first draft?

The main documents in an acquisition, whether a share or quota sale, are:

- Sale and purchase agreement.
- Disclosure letter (prepared by the seller).

In an asset sale the main document is the asset sale and purchase agreement, which will have several annexes, such as the:

- List of contracts.
- Employees.
- Assets.
- IP rights transferred.
- Notice form for contractual partners requesting approval of the transfer of contracts.

In a one-to-one transaction it would be common for the buyer to prepare the first draft of the sale and purchase agreement. In an auction procedure it is usually the seller who prepares the first draft, which can be commented on by the bidders.

ACQUISITION AGREEMENTS

12. What are the main substantive clauses in an acquisition agreement?

The key substantive clauses in a sale and purchase agreement are the:

- Date.
- Parties.
- Definitions (sometimes in a schedule to the agreement).
- Conditions precedent (such as the approval of the competition authority and new employment agreements with key employees).
- Agreement to purchase and sell.
- Price and price adjustments.
- Closing mechanics.
- How the business is to be run if there is a gap between signing and closing.
- Warranties and representations (warranties are often contained in a schedule to the agreement).
- Limitations on claims under warranties.
- Non-compete clause.
- Tax covenant (this would not be contained in an asset purchase agreement).

- Boilerplate clauses, including:
 - that the agreement constitutes the entire agreement between the parties;
 - confidentiality and public announcements;
 - restrictions on assignment;
 - governing law and jurisdiction; and
 - rules on severability.

13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

A share purchase agreement can provide for a foreign governing law. In several cases where the buyer is an international company, there is demand for a foreign governing law, usually UK law.

If a foreign law is agreed as the governing law for the contract, Hungarian national law would not generally apply except for mandatory laws relating to, for example, the transfer of shares, employment issues, competition law and securities legislation.

WARRANTIES AND INDEMNITIES

14. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

It is usual to draft a share purchase agreement with extensive warranty protection. The warranties will usually cover:

- Corporate standing.
- Free and clear ownership title.
- All assets (including real estate).
- Liabilities.
- Employees.
- Contracts.
- Competition issues.
- IT.
- IP rights.
- Taxation issues.

15. What are the main limitations on warranties?

Limitations on warranties

Common limitations on warranties are:

- Right to make disclosures against the warranties. In most transactions, disclosed information also includes data room content. By way of example, if the target provides a warranty that it is not engaged in employment litigation but documentation relating to employment litigation is placed in the data room, the buyer will not be able to claim damages for the breach of the warranty.

- A cap on the total recovery (usually 50% of the consideration or less, except for title for shares and taxes).
- A minimum aggregate claim threshold in the region of 1% of the consideration, but this may be too high if the consideration is large.
- Exclusion of small claims (on the basis that they are immaterial and a nuisance).
- Time limits for bringing claims (typically in the range of 18 to 36 months, except for title for shares and taxation).
- Prevention of double recovery under warranties, indemnities and insurance policies.
- A conduct of claims provision.
- A qualification that some warranties are made “so far as the seller is aware”.

Qualifying warranties by disclosure

Warranties are usually qualified by disclosure. The seller usually states in the share purchase agreement that warranties are subject to disclosure and prepares a separate disclosure letter qualifying the warranties.

In the disclosures, sellers provide both:

- General disclosures (disclosure of certain matters which appear in public records and/or which the buyer ought to know on the basis of searches or enquiries which a buyer might or ought to make).
- Specific disclosures (relating to actual matters which, if not disclosed, would be in breach of warranty/warranties given in the share purchase agreement).

Specific disclosures are usually cross-referred to the warranties to which they relate, but a seller would usually insist that this will not stop the disclosures applying to all the warranties.

It is common to include the data room contents in the disclosed information.

16. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

Remedies

The following remedies are available in the event of a breach of warranty:

- Damages for breach of contract (subject to proving loss which is in causal connection with the breach and the duty to mitigate).
- Rescission (this is often excluded by the agreement, except however, if the title warranties are breached).

Time limits for claims under warranties

Time limits for general warranty claims are typically in the range of 18 to 36 months. Time limits are not applicable to breach of title warranties. For taxation the time limitation extends until the tax authorities are entitled to examine the target and establish any shortage of tax payment. Time limits for identified risks, such as environmental claims, can extend for longer periods of time.

CONSIDERATION AND ACQUISITION FINANCING

17. What forms of consideration are commonly offered in a share sale?

Forms of consideration

The most common form of consideration is cash, either funded out of the buyer's own resources or sometimes (partly) funded by debt.

Shares in the buyer are rarely issued but are used if the buyer is a listed company and are typically combined with a cash element. If part of the consideration is shares in a listed company, the seller acquiring these shares must agree to lock out restrictions.

Factors in choice of consideration

The seller's choice and negotiation position are key factors. Sellers typically wish to receive all the consideration in the form of cash or it may wish to retain an interest in the combined business and therefore, wish to receive some of the consideration in the form of shares. The buyer may offer part of the consideration in shares to ensure the seller has a continuing commitment to the combined business or because it has insufficient cash.

18. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares, how is the issue typically structured? What consents and regulatory approvals are likely to be required?

Structure

Hungarian listed companies usually finance an acquisition by cash or debt. It is also possible to issue shares to raise cash to fund an acquisition.

Consents and approvals

The general meeting of the respective company decides on the issuance of shares. It can authorise the board of directors to increase capital. In this case, the board of directors decides on the issuance of shares within the limits determined in the resolution of the general meeting (*section 250, Act 4 of 2006, Companies Act*).

Requirements for a prospectus

In the case of the public issuance of shares or the introduction of shares to a regulated market, the issuer must publish a prospectus and a notice (*Article 31, Regulation (EC) No. 809/2004 implementing Directive 2003/71/EC as regards prospectuses and dissemination of advertisements (Prospectuses Regulation)*).

- However, the Capital Market Act provides a number of exemptions from this provision, including, for example, if the (*sections 22 (1) (b), (c) and (4) (a), Act 120 of 2011 on the Capital Market*):
 - shares to be issued represent, over a period of 12 months, less than 10% of the number of shares of the same class already admitted to trading on the same regulated market; and
 - shares are offered in connection with a merger or a takeover by means of an exchange offer, a document containing information which is regarded by the Hungarian Financial Supervisory Authority as being equivalent to that of a prospectus which is already available.

19. Can a company give financial assistance to a potential buyer of shares in that company?

Restrictions

Companies limited by shares (Zrts) must not provide any loan or encumbrance or pay any financial liability prematurely if the sole purpose of the transaction is to assist a third person to acquire the shares issued by the company. Any contract made in violation of this rule will be null and void (section 229, Act 4 of 2006, Companies Act). This rule does not apply to the acquisition of limited liability companies (Kfts) (see Questions 1 and 2).

Exemptions

The financial assistance prohibition does not apply to (section 229 (3), Act 4 of 2006, Companies Act):

- Transactions relating to the acquisition of shares, directly or indirectly, by employees of the company, or by organisations established by employees for that purpose.
- Agreements concluded by banks and other credit institutions in the course of their normal business to assist the acquisition of the shares of the bank or credit institution.

SIGNING AND CLOSING

20. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?

Signing

Documents commonly produced and executed at signing meetings include:

- Acquisition agreement (the agreement to sell and purchase shares).
- Disclosure letter (in which the seller makes disclosures against warranties in the share purchase agreement). Disclosure letters are not common in asset sales.
- Power of attorney (if an attorney needs to be appointed to execute documents in the absence of one of the parties).

Closing

Documents commonly produced and executed at closing meetings include:

- Minutes of general meetings containing withdrawals of the directors/supervisory board members of the target appointed by the sellers and the buyer's appointment of new persons for the positions.
- In the case of a share sale involving a private company limited by shares (Zrt):
 - minutes of general meetings containing amended articles of association reflecting the buyer's ownership;
 - an amended share register to be produced by the board of directors confirming the buyer as the new owner of the shares;
 - new bye-laws for the board of directors and the supervisory board (especially in joint venture structures);
 - new service agreements for directors of the target company.
- In the case of a quota sale involving a limited liability company (Kft), a list of new members to be produced by the managing director confirming the buyer as new owner.

- Bank transfer certificates showing the transfer of/receipt of sale proceeds.
- Escrow agreement (if applicable).
- Closing minutes.

21. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

Generally, contractual documents do not have different legal formalities. A company incorporated in Hungary must execute documents with the signature of the authorised representative(s) referred to in its articles of association. The articles can stipulate joint or sole representation rights.

In the context of a share sale, it is advisable for documents signed by a private Hungarian individual seller to have either two witnesses or be countersigned by an attorney. The documents will then be considered as having full probative force.

In some cases Hungarian legislation requires further execution conditions, for example, countersigning by an attorney or notary. This may be relevant for ancillary documents in mergers and acquisition transactions where the amended articles of association of the target company must be countersigned by an attorney. It may be advisable for a pledge or mortgage documentation to be incorporated into a notarial deed to ensure quicker enforcement.

22. What are the formalities for the execution of documents by foreign companies?

Foreign companies must execute documents in accordance with the law of their incorporation. If documents are executed in Hungary under a power of attorney, the power of attorney must meet certain formalities depending on the place of its signature, such as being notarised, apostilled or certified by a consulate.

23. Are digital signatures binding and enforceable as evidence of execution?

Advanced electronic signatures are accepted as equal to traditional handwritten signatures. Electronic documents attached with an advanced electronic signature qualify as written documents. Detailed rules concerning electronic signatures, including acknowledgement of foreign electronic signature certifications are set out in the Electronic Signatures Act (sections 4 (1) and 5, Act 35 of 2001 on Electronic Signatures).

24. What formalities are required to transfer title to shares in a private limited company?

Limited liability companies

The following formalities are generally required to transfer title to quotas in limited liability companies (Kfts) (sections 123, 126, 127 (2) and (4), Act 4 of 2006, Companies Act):

- Written sale and purchase agreements.

- Declarations of the existing members of the company and the company waiving their pre-emption right.
- Approval by the company of the transfer, if required by the articles of association.
- Compliance with any other restriction prescribed by the articles of association.
- Registration of the buyer on the company's register of members.
- Notice by the buyer to the company on the transfer.
- Notice to the Court of Registration on the transfer.

Private companies limited by shares

In the case of private companies limited by shares (Zrts), the Companies Act distinguishes between the transfer of printed and electronic shares (*section 179, Act 4 of 2006, Companies Act and section 338/B (1), Act 4 of 1959 on the Civil Code*):

- The formalities required to transfer title to printed shares are:
 - full or empty endorsement (*forgatmány*) drawn up on the reverse side of the shares or attached to them. The conclusion of an agreement regarding the share transfer is not sufficient;
 - actual handing over of the shares.
- The transfer of electronic shares must be carried out through a transfer between securities accounts, following the conclusion of a sale and purchase agreement (*section 180, Act 4 of 2006, Companies Act*).

In either case, the share transfer must be registered in the share book of the company. In the absence of registration, the share transfer is not effective as against the Zrt and the buyer is not entitled to exercise its shareholder rights.

TAX

25. What transfer taxes are payable on a share sale and an asset sale? What are the applicable rates?

Hungary has no generally applicable transfer tax although gains for companies from the sale of quotas, shares or assets may be subject to corporate income tax (*see Question 27*).

Share sale

Real estate stamp duty must be paid on the acquisition of a shareholding interest in a company which either owns:

- Real estate in Hungary.
- At least 75% of the quotas or shares directly or indirectly in a company which owns real estate in Hungary.

Provided in both cases that the company's main activity includes one of the following:

- the development of building projects;
- construction of residential and non-residential buildings;
- renting and operating own or leased real estate; or
- buying and selling own real estate.

The real estate stamp duty becomes payable if the quotas or shares owned by the purchaser, together with its affiliates, reach 75% of the

total quotas or shares of the company (*sections 18 and 102(o), Act 93 of 1990 on Stamp Duty*).

The stamp duty rate is 4% of the market value of each property owned by the acquired company up to HUF1 billion plus 2% of the excess market value of the real estate with a maximum of HUF200 million per real property (*section 19, Act 93 of 1990 on Stamp Duty*).

Asset sale

If the asset sale includes real property, the purchaser must pay real estate stamp duty according to the rates above.

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

A buyer does not pay real estate stamp duty in any of the following circumstances (*section 26(g) and (t), Act 93 of 1990 on Stamp Duty*):

- It acquires less than 75% in a real estate company.
- It acquires the shareholding interest in the course of a preferential exchange of shares.
- The parties to the transaction are affiliated companies.

Asset sale

Real estate stamp duty is not payable on the acquisition of real estate if it takes place between affiliated companies, on condition the buyer's main activity is either:

- Renting and operating its own or leased real estate.
- Buying and selling its own real estate.

Further exemptions are set out in the Stamp Duty Act, for example, in connection with the building of flats (*section 26(a) and (t), Act 93 of 1990 on Stamp Duty*).

27. What corporate taxes are payable on a share sale and an asset sale? What are the applicable rates?

Gains from the sale of quotas, shares or assets realised by companies which are tax-resident in Hungary or have a permanent establishment in Hungary (that are involved in the transaction) will form part of the general tax base and be subject to corporate income tax. The corporate income tax rate is 10% for a tax base of up to HUF500 million, and 19% for amounts in excess of that threshold (*section 19, Act 81 of 1996 on Corporate Tax*).

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

The Corporate Tax Act implements Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different member states (*Merger Directive*). Under Hungarian law, the meaning

of transformation and exchange of shares are wider than under the Directive. Accordingly, reference is made to “preferential transformation” (*kedvezményezett átalakulás*) and “preferential exchange of shares” (*kedvezményezett részesedéscsere*). If the transaction complies with the detailed rules of the Corporate Tax Act, these may benefit from special provisions enabling postponement of the payment of corporate tax (*section 4.23(a) and 23(c), Act 81 of 1996 on Corporate Tax*).

Asset sale

The payment of corporate tax can be postponed if the asset sale qualifies as a “preferential transfer of assets” (*kedvezményezett eszközátruházás*) (*section 4.23(b), Act 81 of 1996 on Corporate Tax*) (see above, *Share sale*).

If the buyer reports the royalty income as an eligible intangible asset to the tax authority within 60 days, it qualifies as a reported intangible asset. Capital gains on a reported intangible asset held for at least one year are exempt from corporate tax. As above, any resulting losses are non-deductible from the corporate tax base (*sections 4, 5(a) and 7(1) (e), Act 81 of 1996 on Corporate Tax*).

29. Are other taxes potentially payable on a share sale and an asset sale?

The sale of shares is exempt from VAT.

The sale of assets is generally subject to VAT at the standard rate which is currently 27% (*sections 17(4) and 82(1), Act 127 of 2007 on Value Added Tax*).

Depending on the choice of the seller, the transfer of an entire business can be exempt from VAT if certain conditions set out in the Value Added Tax Act are fulfilled.

30. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

Under Hungarian law, companies in the same group are not entitled to surrender losses to each other for tax purposes. The interest expenses incurred by a bid vehicle can only be set off against profits of the target if the bid vehicle and the target merge together and the merger complies with the requirements of the Corporate Tax Act.

EMPLOYEES

31. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

Asset sale

If the asset sale results in the transfer of employees, the transferor (or if the parties agree, the transferee) must notify the workers’ council or representative, or in the absence of either, the employees in writing of (*section 38(2), Act 1 of 2012 on the Labour Code*):

- The date or proposed date of the transfer.

- The reason for the transfer.
- The legal, economic and social implications of the transfer for the employees.
- Any measures envisaged in relation to the employees.

If there is a workers’ council or representative, the transferor must commence negotiations on the envisaged measures. However, there is no obligation on the transferor to reach an agreement (*section 265(2), Act 1 of 2012 on the Labour Code*). The consent of the employees for the asset sale is not required.

If the transferor is subject to a collective agreement, that agreement may also contain information or consultation obligations in respect of employees.

Share sale

There is no specific information or consultation obligation concerning a share or quota sale. However, according to the general rule of the Labour Code, the target company as employer must consult with the workers’ council or representative before passing a decision in respect of any plans for actions and adopting regulations affecting a large number of employees (for example, the reorganisation of the target and the introduction of new technology). If a collective agreement applies at the target company, it may also contain provisions that must be adhered to (*section 264, Act 1 of 2012 on the Labour Code*).

The consent of the employees for the share sale is not required.

32. What protection do employees have against dismissal in the context of a share or asset sale? Are employees automatically transferred to the buyer in a business sale?

Business sale

The transfer of employment on the sale of a business sale is not a ground for termination by the employer. Employment relationships can only be terminated in accordance with the general rules of the Labour Code (*section 66(3), Act 1 of 2012 on the Labour Code*).

Generally, an ordinary dismissal must be justified. The reason for the dismissal must be connected to either the:

- Abilities of the employee.
- Behaviour of the employee in relation to his/her employment relationship.
- The employer’s operation (for example, reorganisation or termination of position).

Termination by reason of large scale redundancy qualifies as a specific subcategory of ordinary dismissal. Special notification and consultation requirements must be satisfied.

Share sale

Hungarian labour legislation does not have any specific provision which would protect employees against dismissal in the context of a quota/share sale. However, according to judicial practice, the quota/share sale is not itself a ground for termination.

Transfer on a business sale

According to the Labour Code implementing Council Directive 2001/23/EC on safeguarding employees’ rights on transfers of undertakings,

businesses or parts of businesses (Transfer of Undertakings Directive), all rights and obligations arising from employment relationships existing at the time of transfer are transferred to the buyer as if the contracts of employment have originally been made between the employees concerned and the buyer (*section 36(1), Act 1 of 2012 on the Labour Code*).

PENSIONS

33. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

Private pension schemes

Participation in the national pension fund is mandatory in Hungary. Employees can also join voluntary pension funds, although this is not common since the recent redirection of private pension funds into the national system. Besides national and voluntary pension funds, a legal framework exists for private pension funds established by employers (*Act 117 of 2007 on Private Pensions established by the Employer and its Organisations*). In practice, these private pension funds are rare in Hungary.

Pensions on a business transfer

If an employer provides private pension contributions to its employees, this must form part of the employment agreement. In the case of a transfer, according to the general rule of the Labour Code, this obligation will transfer to the transferee together with all other rights and obligations arising out of the employment agreement. In practice, employer private pension fund contributions are rare in Hungary.

COMPETITION/ANTI-TRUST ISSUES

34. Outline the regulatory competition law framework that can apply to private acquisitions.

Triggering events/thresholds

A concentration must be notified to the Hungarian Competition Authority (HCA) if the following conditions are met:

- Aggregate net turnover of all the groups of undertakings concerned exceed HUF15 billion in the business year prior to the date of the concentration.
- Net turnover of at least two of the groups of undertakings concerned exceeded HUF500 million per group of undertaking in the business year prior to the date of the concentration (*section 24(1), Act 57 of 1996, Competition Act*).
- A concentration between undertakings arises if either (*section 23(2), Act 57 of 1996, Competition Act*):
 - two or more previously independent undertakings merge or an undertaking is integrated with another or a part of an undertaking becomes part of another undertaking which was previously independent of the first one;
 - an undertaking or more undertakings jointly acquire direct or indirect control over the whole or parts of one or more previously independent undertaking(s);

- more than one undertaking, which are independent of each other, jointly create an undertaking controlled by them, which is permanently able to perform all the functions of an independent undertaking (full-function joint venture).

The detailed rules concerning the thresholds and the merger control system are regulated by the Competition Act.

Notification and regulatory authorities

The Hungarian merger control system is based on obligatory preliminary authorisation. If the thresholds set out above are met (*see above, Triggering events/thresholds*), the concentration must be notified to the HCA. In contractual relationships, HCA approval is typically treated as a condition precedent to the closing of the transaction (*section 29, Act 57 of 1996, Competition Act*).

In the event of merger or integration, the merger control notification must be filed by the direct participants. In all other cases, it must be filed by the party acquiring part of undertaking or the direct control. The notification must be submitted by filing the standard fill-in-form published by the HCA together with all necessary attachments (*section 28, Act 57 of 1996, Competition Act*).

Substantive test

The HCA must grant the approval if the concentration does not lead to a substantial lessening of competition (SLC) in the relevant market (for example, through the creation or strengthening of a dominant position in the market) (*section 30(2), Act 57 of 1996, Competition Act*).

ENVIRONMENT

35. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

The general rules of the Act on the Protection of Environment apply to the contamination of land.

The current owner, possessor or user of the land on which the damaging or potentially damaging activity to the environment is or was carried out will be jointly and severally liable for the damage, in the absence of evidence to the contrary. The owner or user of the land may be relieved from liability if it is able to prove that the environmental damage was caused by another entity.

In an asset sale which includes real estate, the buyer can be found liable for remedying contamination it did not cause if the buyer is unable to prove it was caused by someone else. The buyer may be able to claim compensation from the seller based on the general obligation of sellers to inform buyers about important facts (*Civil Code*). Nonetheless, in asset sales containing real estate, it is advisable to agree detailed warranties for environmental liability issues (*sections 102 and 104, Act 53 of 1995 on the Protection of Environment*).

In a share sale, the target company remains the owner of the land. There is no change in liability for environmental issues. However, warranties typically included in the sale and purchase agreement can enable the buyer to recover damages from the seller.

ONLINE RESOURCES

W <http://net.jogtar.hu/>

Description. Updated collection of Hungarian legislation by a major Hungarian legal content provider, free (only in Hungarian).

W www.gvh.hu/domain2/files/modules/module25/129678A2868BD0C90.pdf

Description. Translation of the Competition Act (unofficial).

W www.ilo.org/dyn/natlex/docs/MONOGRAPH/89886/103369/F-622727815/HUN89886.pdf

Description. Translation of the Labour Code (unofficial).

W https://hirkozpont.magyarorszag.hu/hatteranyagok/iv2006_en

Description. Translation of the Companies Act (unofficial).

W www.icnl.org/research/library/files/Hungary/civilcode_ENG.pdf

Description. Translation of the Civil Code (unofficial).

W www.ebrd.com/downloads/legal/securities/hungary2.pdf

Description. Translation of the Capital Market Act (unofficial).

W http://english.nmhh.hu/dokumentum/150091/actxxxvof2001_110210.pdf

Description. Translation of the Electronic Signatures Act (unofficial).

W www.icnl.org/research/library/files/Hungary/corporate_ENG.pdf

Description. Translation of the Corporate Tax Act (unofficial).

W www.icnl.org/research/library/files/Hungary/duty_ENG.pdf

Description. Translation of the Stamp Duties Act (unofficial).

W www.icnl.org/research/library/files/Hungary/vatact_ENG.pdf

Description. Translation of the Value Added Tax Act (unofficial).

W <http://faolex.fao.org/docs/html/hun6567E.htm>

Description. Translation of the Environmental Protection Act (unofficial).

Practical Law Contributor Profiles

Dr Zoltán Forgó, Managing Partner

Forgó, Damjanovic & Partners Law Firm

T +36 1 214 0080

F +36 1 214 0078

E forgoz@fdlaw.hu

W www.fdlaw.hu

Professional qualifications. Attorney-at-law, Hungary

Areas of practice. Corporate/M&A; private equity; competition; employment; life sciences; arbitration.

Recent transactions

- Advised a client in the sale of its Hungary-based group, with leading position in Europe in the sports nutrition market, to a private equity group.
- Provided pre-litigation advice on a complex M&A case relating to the sale by the client of its shareholding interest in a listed company to a global private equity investor.
- Advised a EU-based client on the sale of its Hungarian business in an asset sale transaction.
- Advised an international strategic investor on the proposed acquisition of a Hungarian blue chip company listed on the Budapest Stock Exchange.
- Assisted a EU-based client in the proposed acquisition of a group of Hungarian companies engaged in the pharmaceutical logistic business.

Languages. Hungarian, English

Professional associations/memberships. Registered Arbitrator of the Money and Capital Markets Arbitration Court in Budapest; Hungarian Venture Capital Association: Member of the Ethics Committee.

Dr Zsófia Füzi, Partner

Forgó, Damjanovic & Partners Law Firm

T +36 1 214 0080

F +36 1 214 0078

E fuzizs@fdlaw.hu

W www.fdlaw.hu

Professional qualifications. Attorney-at-law, Hungary

Areas of practice. Corporate/M&A; competition; employment; life sciences.

Non-professional qualifications. xxxxxx

Recent transactions

- Assisted a client in the sale of its Hungary-based group, with leading position in Europe on the sports nutrition market to a private equity group.
- Assisted a client in the acquisition of a Hungarian brewery in a European-wide cross-border transaction.
- Assisted a client, a leading European engineering company in the contemplated acquisition of an energy transmission and distribution technology business.
- Assisted a client in the contemplated acquisition of a plastic manufacturing plant in Hungary.

Languages. Hungarian, English

Publications. Co-author of the Hungary chapter, *Company Acquisitions Handbook on the regulatory aspects of acquisitions in the EU* (Bloomsbury Professional Limited, 2011).