EUROPEAN COMMISSION
DG Competition

PUBLIC VERSION

Case M.10494 - VIG / AEGON CEE

Only the Hungarian text is authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 21(4)
Date: 21/02/2022

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

EUROPEAN
COMMISSION

Brussels, 21.2.2022
C(2022) 1143 final

COMMISSION DECISION

of 21.2.2022

relating to Article 21, paragraph 4, of Council Regulation 139/2004

(Case M. 10494 – VIG / AEGON CEE)

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TABLE OF CONTENTS

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relating to Article 21, paragraph 4, of Council Regulation 139/2004

(Case M. 10494 – VIG / AEGON CEE)

(Only the Hungarian version is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union[1],

Having regard to Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings[2], and in particular Article 21 thereof,

Having given Hungary the opportunity to make its views known on the preliminary position of the Commission,

Whereas:

1. INTRODUCTION

(1) On 6 April 2021, the Hungarian Minister for the Interior prohibited the acquisition by Vienna Insurance Group AG Wiener Versicherung Gruppe ("VIG") of Aegon Magyarország Általános Biztosító Zrt. ("AEGON Hungary") (the "Veto Decision").

(2) The present decision concerns the compatibility of the Veto Decision with Article 21 of Council Regulation (EC) No 139/2004 (the "Merger Regulation").

2. THE OPERATION AND THE UNDERTAKINGS CONCERNED

(3) VIG is the holding company of the Vienna Insurance Group, an international insurance group headquartered in Vienna, Austria. It conducts its business through subsidiaries and branches in 30 countries, mainly in the Central and Eastern Europe region (including in Hungary through its subsidiaries UNION Vienna Insurance Group Biztositó Zrt., UNION-Érted Ellátásszervező Korlátolt Felelősségű Társaság, ERSTE Biztosítási Alkusz Kft., and Money & More Pénzügyi Tanácsadó Zártkörűen Működő Részvénytársaság). It offers life and non-life insurance services.

(4) AEGON CEE is part of AEGON N.V. ("AEGON") and it encompasses the Hungarian, Polish, Romanian and Turkish businesses of AEGON, an insurance group headquartered in the Netherlands. It is active in the fields of life and non-life insurance, pension fund business, asset management services and related ancillary services.

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1 OJ C 115, 9.8.2008, p.47.

2 OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

(5) On 29 November 2020, VIG and AEGON signed a Sale and Purchase Agreement (the "SPA"), pursuant to which VIG will acquire the entire issued share capital of (and thus sole control over) the entities that together form AEGON's businesses in Hungary, Poland, Romania and Turkey, including AEGON Hungary (the "Transaction", with the specific acquisition of AEGON Hungary referred to as the "Hungarian Acquisition").

(6) On 15 July 2021, VIG notified the Transaction to the Commission under Article 4 of the Merger Regulation. On 12 August 2021, the Commission adopted a decision pursuant to Article 6(1)(b) of the Merger Regulation, whereby it (i) established that this operation constituted a concentration within the meaning of Article 3 of the Merger Regulation and that it had a Union dimension pursuant to Article 1 thereof and (ii) declared it compatible with the common market.[3]

3. MEASURES ADOPTED BY HUNGARY IN RELATION TO THE TRANSACTION

3.1. Legislative background

(7) The Hungarian Law on Foreign Direct Investments[4] (the "Hungarian FDI Legislation") requires that a foreign investor must notify the Minister for the Interior (the "Minister") of any proposed acquisition of a controlling interest over or a share of more than 25% (for a private company) in an economic entity registered in Hungary which is active in certain specified sectors.[5] A foreign investor under the Hungarian FDI Legislation was initially defined as a natural person or legal entity (or legal entity ultimately controlled by a natural person, regardless of where the legal entity is registered) established in a country outside the EU, the EEA or Switzerland.

(8) On 28 November 2020, the Hungarian government adopted a decree (the "Hungarian FDI Decree"), whereby it extended the scope of application of the Hungarian FDI Legislation as part of the state of emergency that had been declared in the context of the coronavirus pandemic.[6] In particular, the Hungarian FDI Decree:

(1) amended the definition of "foreign investor" under the Hungarian FDI Legislation such that it also covers companies registered in any EEA country (or Switzerland), with the consequence that Hungary currently considers all investors, including from any EU Member State other than Hungary, as "foreign";[7]

(2) expanded the list of specified sectors in which an acquisition would be subject to the requirements of the Hungarian FDI Legislation to include the insurance and reinsurance sectors.[8]

(9) The Hungarian FDI Legislation has vested the Minister with the power to examine whether the proposed acquisition would "violate Hungary's security interests" and, in case the Minister were to find such a violation, to adopt a decision prohibiting the

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3 Commission decision of 12.08.2021 in Case M. 10102 *VIG / AEGON CEE*.

4 Act LVII of 2018 on the Control of Foreign Investments Detrimental to Hungary's Security Interests.

5 Article 2 of the Hungarian FDI Legislation, and Article 1 of Government Decree 246/2018 (XII. 17.) on the Implementation of Act LVII of 2018 on the Control of Foreign Investments Detrimental to Hungary's Security Interests (the "Implementing Decree").

6 Government Decree 532/2020 (XI. 28.) on economic protective measures during a state of emergency.

7 Article 1(1) of the Hungarian FDI Decree.

8 Articles 1(1) and 1(2)(d) of the Hungarian FDI Decree.

proposed acquisition. The Minister shall communicate such decision to the foreign investor.[9]

(10) The Hungarian FDI Decree was adopted on 28 November 2020, the day before the signing of the SPA between VIG and AEGON, and entered into force on the same day of the signing of the SPA. The direct result of the Hungarian FDI Decree was that the Hungarian Acquisition became subject to the notification obligation under the Hungarian FDI Legislation.

3.2. The procedure under the Hungarian FDI Legislation

(11) On 30 November 2020, the Minister wrote to AEGON indicating that it had become aware of the proposed acquisition of AEGON Hungary by VIG and drawing attention to the fact that the Hungarian FDI Decree had extended the scope of the notification obligations laid down in the Hungarian FDI Legislation.[10] The Minister thus invited AEGON to comply with the requirements of the Hungarian FDI Legislation as amended by the Hungarian FDI Decree.

(12) On 9 December 2020, VIG accordingly formally notified the Hungarian Acquisition to the Minister.[11]

(13) The Minister issued a request for information to VIG on 21 December 2020, to which VIG responded on 23 December 2020.[12] The Minister requested that VIG provide an official Hungarian translation of the SPA (as required by the Hungarian FDI Legislation) on 17 December 2020 and 18 January 2021, which VIG submitted on 26 January 2021.[13] In view of the delayed submission of the translation of the SPA, on 29 January 2021, the Minister decided to extend the period for the review of the Hungarian Acquisition by an additional 60 calendar days.[14]

3.3. The Veto Decision

(14) On 6 April 2021, the Minister adopted the Veto Decision and communicated it to VIG.[15]

(15) In the Section entitled "Reasoning", the Veto Decision:

(1) recalls the fact that the Hungarian Acquisition was notified to the Minister by VIG and outlines the procedural steps described in recitals (5), (12) and (13) above;

(2) explains that, pursuant to the amendments of the Hungarian FDI Legislation by the Hungarian FDI Decree, VIG qualifies as a foreign investor, and that the Hungarian Acquisition relates to the insurance sector and as such is subject to the requirements of the Hungarian FDI Legislation; and

(3) states that: "[a]s a result of the review carried out on the basis of this notification, I declare that the notifying party's acquisition of control violates the national security interest of Hungary".

(16) The Veto Decision therefore prohibited the proposed acquisition of control over AEGON Hungary by VIG.

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9 Article 6(4) of the Hungarian FDI Legislation.

10 Letter dated 30 November 2021 from the Minister to AEGON Hungary, submitted by VIG and AEGON to the Commission as Annex RFI1.Q7-of VIG RFI 1.

11 Paragraph 6 of the Veto Decision, and Annex RFI1.Q6-1 of the response to VIG RFI 1.

12 Annexes RFI1.Q7-2 and RFI1.Q7-3 to the response to VIG RFI 1.

13 Paragraphs 8 and 9 of the Veto Decision.

14 Paragraph 11 of the Veto Decision and Annex RFI1.Q7-5 of the response to VIG RFI 1.

15 Annex 6 of the Minister's response to EC RFI 1.

3.4. The pending appeal before the Hungarian courts

(17) On 5 May 2021, VIG submitted an appeal against the Veto Decision to the Fővarosi Torvenyszék ("Metropolitan Court of Budapest").[16] AEGON was admitted to the proceedings as an interested party on 22 June 2021.[17] The Metropolitan Court of Budapest delivered its judgment on 31 August 2021, by which it dismissed VIG's appeal.

(18) On 19 October 2021, VIG and AEGON filed an appeal against the judgment of the Metropolitan Court of Budapest to the Hungarian Supreme Court.[18] VIG, AEGON and the Hungarian authorities participated in an oral hearing before the Hungarian Supreme Court on 26 January 2022. At the date of the adoption of the present decision the Hungarian Supreme Court's judgment is still pending.

4. THE COMMISSION'S INVESTIGATION

(19) The Commission sent a request for information pursuant to Article 11(6) of the Merger Regulation to Hungary on 20 July 2021 ("EC RFI 1"). The request for information indicated that the Transaction has a Union dimension and referred to Article 21 of the Merger Regulation. The Commission indicated that it was *prima facie* unclear how the Hungarian Acquisition would give rise to a risk for public security, and thus requested the Hungarian authorities to provide additional information regarding the Veto Decision to enable it to assess the compatibility of the Veto Decision with Article 21 of the Merger Regulation.

(20) On 28 September 2021, Hungary responded to EC RFI 1. The responses are described in recitals (37) and (38) below.

(21) On 29 October 2021, the Commission sent a letter to Hungary informing it that the Commission was opening an investigation of the compatibility of the Veto Decision with Article 21 of the Merger Regulation. In this letter, the Commission requested the Hungarian authorities to provide copies of (i) the legislation relevant to the Veto Decision, (ii) all documents sent by the Minister to VIG or AEGON during the course of its review of the Hungarian Acquisition, (iii) the judgment of the Metropolitan Court of Budapest and the submissions of the competent Hungarian authorities during the court proceedings, and (iv) any other documents, analyses or explanations (if necessary in non-confidential form) enabling the Commission to assess the compatibility of the Veto Decision with Article 21 of the Merger Regulation (the "EC RFI 2").

(22) On 22 November 2021, Hungary responded to EC RFI 2. The Hungarian authorities provided the requested documents in listed in points (i) to (iii) of the previous recital, but did not provide any additional documentation or explanation regarding point (iv). Rather, the Hungarian authorities indicated that they maintain the position set out in the response to EC RFI 1 (without providing any more detail on that position).

(23) The Commission also sent requests for information addressed to VIG and AEGON on 25 November 2021 ("VIG RFI 1"), 6 December 2021 ("VIG RFI 2") and 14 December 2021 ("VIG RFI 3"). VIG and AEGON submitted their (joint) responses

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16 Annexes RFI1.Q1-1a and 1b of the response to VIG RFI 1.

17 Order 105.K.703.840/2021/7 of 22 June 2021 of the Metropolitan Court of Budapest granting VIG's request to involve AEGON Europe Holding B.V. as an interested party and to notify AEGON Europe Holding B.V. of its possibility to join the proceedings in front of the Metropolitan Court of Budapest.

18 Annexes RFI1.Q4-1a and 1b of the response to VIG RFI 1.

to these requests on 6 December 2021, 12 December 2021, and 15 December 2021, respectively.

5. THE COMMISSION'S PRELIMINARY POSITION PURSUANT TO ARTICLE 21 OF THE MERGER REGULATION AND THE REPLY OF HUNGARY

(24) On 20 January 2022, the Commission informed Hungary of its preliminary conclusion that the Veto Decision was incompatible with Article 21 of the Merger Regulation (the "Preliminary Assessment"). The Commission requested that Hungary responds to the Preliminary Assessment within 10 working days.

(25) On 31 January 2022, the Hungarian authorities requested an extension of the deadline to respond to the Preliminary Assessment to 10 February 2022. The Commission granted this extension on 7 February 2022.

(26) On 10 February 2022, Hungary replied to the Preliminary Assessment ("Hungary's Response to the Preliminary Assessment"). The arguments made by Hungary are described in Section 6.2 and will be referred to in the relevant sections of this decision.

6. ASSESSMENT OF THE MEASURES UNDER ARTICLE 21 OF THE MERGER REGULATION

6.1. The rights and duties of Member States

6.1.1. Article 21 of the Merger Regulation

General framework

(27) Pursuant to Article 21(2) of the Merger Regulation, the Commission has the exclusive competence to assess the competitive impact of concentrations with a Union dimension as defined in Articles 1 and 3 of the Merger Regulation.

(28) Article 21(3) of the Merger Regulation provides that Member States shall not apply their national legislation on competition to any concentration with a Union dimension.

(29) Article 21(4) of the Merger Regulation provides that "Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law". As a result, Member States may take measures which could prohibit, submit to conditions or in any other way prejudice concentrations, only if: (i) the measures in question protect interests other than those taken into account by the Merger Regulation, and (ii) these measures are necessary for and proportionate to the protection of interests compatible with the general principles and other provisions of EU law.

Measures where no prior communication or approval is required

(30) Public security, alongside plurality of the media and prudential rules, are interests recognised as being legitimate under Article 21(4) of the Merger Regulation ("recognised interests"). Measures that are liable to prohibit, submit to conditions or prejudice a concentration with Union dimension can be adopted and enter into force without prior communication to, and approval by the Commission, provided that they

genuinely aim at protecting a recognised interest and are in clear compliance with the principles of proportionality and non-discrimination.[19]

Measures requiring prior communication and approval

(31) Pursuant to Article 21(4), second indent, of the Merger Regulation, national measures liable to prohibit, condition or otherwise prejudice a concentration with a Union dimension for the protection of any other interest must be communicated to the Commission before their adoption and entry into force. The Commission must then decide whether such measures are necessary for and proportionate to the protection of an interest compatible with EU law and do not constitute a means of arbitrary discrimination or a disguised restriction to fundamental freedoms, such as the freedom of establishment or the free movement of capital or, in any other respect, a breach of general principles or other provisions of EU law. This is referred to as the "Communication and Standstill Obligations".

(32) In order to ensure the *effet utile* of Article 21(4), second indent, of the Merger Regulation, read in conjunction with Article 4(3) of the Treaty on European Union ("TEU") which imposes on the EU and the Member States an obligation of sincere cooperation, the Communication and Standstill Obligations also apply "*whenever there are reasonable doubts as to whether the national measures* […] *genuinely aim to protect a 'recognised interest' and/or comply with the principles of proportionality and non discrimination*".[20]

6.1.2. Freedom of establishment

(33) The Treaty on the Functioning of the European Union ("TFEU") prevents Member States from restricting the freedom of establishment (including by companies).

(34) According to Article 49 TFEU: "(…) restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings (…)".

(35) The TFEU provides for a possible derogation from the provisions on the right of establishment on grounds of public security. The notion of public security needs to be interpreted in line with the case law of EU Courts (see Section 6.1.3). According to Article 52(1) TFEU "*The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health*".

6.1.3. The notion of public security

(36) For the assessment of the present case it should be recalled that, according to well established case-law, the requirements of public security, as a derogation from the fundamental principles of freedom of establishment and free movement of capital,

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[19] Commission decision of 26.09.2006 in Case M.4197 E.ON / Endesa, recital 23.

[20] See the Commission's past practice in Commission decision of 20.12.2006 in Case M.4197 *E.ON / Endesa*, recital 27; Commission decision of 26.09.2006 in Case M.4197 *E.ON / Endesa*, recital 24; and Commission decision of 20.07.1999 in Case M.1616 – *BSCH / Champalimaud* (interim measures), recitals 65-67. The Court of Justice considered that a Commission decision following this approach did not contain any manifest errors of judgment - judgment of 06.03.2008 in Case C-196/07 *Commission v Spain*, C-196/07, EU:C:2008:146, paragraphs 35-36.

must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Union institutions. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interests of society.[21]

6.2. Hungary's submissions

(37) In EC RFI 1 and EC RFI 2, the Commission requested Hungary to explain the reasons for which the Veto Decision is based on grounds of public security or any other recognised interests and why it is considered necessary, proportionate and compatible with the general principles and other provisions of EU law.

(38) In their response to EC RFI 1 (which it stated that it maintained in EC RFI 2), the Hungarian authorities submitted that:

(1) According to Article 21(4) of the Merger Regulation, public security is a recognised interest and as the Veto Decision was taken on grounds of public security, it was not required to be communicated, given that the Communication and Standstill Obligations only apply to "other public interests".

(2) It is a well-recognised principle under EU law that the fundamental freedoms can be derogated from for public security reasons, provided the measure is necessary and proportionate.[22]

(3) It is common practice for Member States to screen foreign investments in certain strategically important sectors and other Member States have similar rules that apply to "foreign" investments by EU companies. The underlying Hungarian legislation was introduced in the context of the coronavirus pandemic.

(4) The Veto Decision was based on classified data, the disclosure of which is not permitted under national law, namely Act CLV of 2009 on the protection of classified information (the "Classified Information Law").

(5) These issues (and the classified information underlying the Veto Decision) have been reviewed by the Metropolitan Court of Budapest, which ruled in the Hungarian government's favour by considering that the Communication and Standstill Obligations do not apply and that the measure can be considered necessary and proportionate.

(39) In Hungary's Response to the Preliminary Assessment, the Hungarian authorities argued that:

(1) The objective and scope of the Merger Regulation is only to assess the compatibility of concentrations with a Union dimension with the internal market.[23] The Merger Regulation applies only insofar as it relates to

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21 As indicated in Commission decision of 20.12.2006 in Case M.4197 *E.ON/Endesa*, recital 61, referring to judgment of 4.6.2002 in *Commission v Belgium*, C-503/99, EU:C:2002:328, paragraph 47, judgment of 4.6.2002 in *Commission v France*, C-483/99, EU:C:2002:327, paragraph 48, and judgment of 13.5.2003 in *Commission v Spain*, C-463/00, EU:C:2003:272, paragraph 72. See also to that effect, judgment of 14 March 2000, *Église de scientologie*, C-54/99, EU:C:2000:124, paragraph 17 and judgment of 18.6.2020 in *Commission v Hungary*, C-78/18, EU:C:2020:476, paragraph 91.

22 Hungary refers to paragraph 45 of the judgment of 26.3.2009 in *Commission v Italy*, C-326/07, EU:C:2009:193, Article 4(2) of the Treaty on European Union, and Articles 52 and 65 of the Treaty on the Functioning of the European Union.

23 In this regard, Hungary's Response to the Preliminary Assessment refers in particular to recitals 15, 23, 28, 33 and 38 of the Merger Regulation.

competition matters or the relationship between Union and national competition laws.[24] In contrast, the Veto Decision was taken pursuant to the Hungarian FDI Legislation, and accordingly was exclusively focused on the question of whether the Hungarian Acquisition would threaten Hungary's national/public security interests. Given that the legal basis and subject matter of the Veto Decision did not relate to competition issues, nor was it taken in respect of a concentration with a Union dimension (see next point), the Veto Decision falls outside of the scope of the Merger Regulation and Article 21(4) of the Merger Regulation is not applicable to the Veto Decision.[25]

(2) The Veto Decision relates exclusively to the acquisition by VIG of AEGON Hungary; it does not relate to the remainder of the Transaction, i.e. VIG's acquisition of AEGON's businesses in Poland, Romania and Turkey. Recital 20 of the Merger Regulation indicates that it is appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition. The Commission's Jurisdictional Notice[26] clarifies that this applies where one transaction would not have been carried out without the other. However, the Veto Decision does not prevent the completion by VIG of the remainder of the Transaction, which should therefore not be considered a single concentration with the Hungarian Acquisition. By itself, the Hungarian Acquisition does not constitute a concentration with a Union dimension within the meaning of Article 1 of the Merger Regulation, as the turnover thresholds therein are not met.[27]

(3) The Preliminary Assessment is incorrect in considering that the Veto Decision infringed Articles 21(2) and (3) of the Merger Regulation, given that the Veto Decision is not based on Hungarian competition law. For the same reason, the Veto Decision does not interfere with the Commission's exclusive competence, which relates only to the assessment of competition aspects of concentrations.[28]

(4) The Commission's assessment of the Veto Decision, and in particular its characterisation as a "particularly intrusive restriction" on VIG's freedom of establishment, does not adequately take into account the fact, expressed by the Minister, that the Veto Decision does not prohibit the acquisition by VIG of a stake in any Hungarian-registered companies, but only prohibits the acquisition of AEGON Hungary following an assessment of the specifics of this acquisition.[29]

(5) The Preliminary Assessment states that Hungary has not acknowledged the Commission's confidentiality obligations or explained why they are considered inadequate. However, pursuant to the Classified Information Law, a third party organisation's confidentiality provisions are not considered sufficient for the disclosure of Hungarian classified information. According to the procedures of the Classified Information Law, access can only be granted to individuals who have signed a confidentiality declaration confirming their adherence to the Classified Information Law and acknowledging their confidentiality

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24 In this regard, Hungary's Response to the Preliminary Assessment refers in particular to recital 18 and Articles 4(4), 4(5), 9(6), 9(9), 21(3) and 22(3) of the Merger Regulation.

25 Point 1 on pages 1-2 of Hungary's Response to the Preliminary Assessment.

26 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008

27 Point 2 on page 3 of Hungary's Response to the Preliminary Assessment.

28 Point 3 on page 3 of Hungary's Response to the Preliminary Assessment.

29 Point 4 on page 3 of Hungary's Response to the Preliminary Assessment.

obligations. The Hungarian authorities cannot disregard these legal requirements.[30]

6.3. The Commission's assessment

6.3.1. Scope of Article 21 of the Merger Regulation

(40) In relation to certain arguments made by the Hungarian authorities in Hungary's Response to the Preliminary Assessment, the Commission makes the following observations regarding the scope of Article 21 of the Merger Regulation and its application in this case.

6.3.1.1. Assessment of public security interests under Article 21(4) of the Merger Regulation

(41) The Hungarian authorities claim that the Veto Decision falls outside the scope of the Merger Regulation, on the basis that the Veto Decision, like the legislation pursuant to which it was adopted, relates exclusively to national security concerns, whereas the Merger Regulation exclusively relates to the assessment of whether a given concentration is compatible with the common market, i.e. from a competition perspective.[31] This argument is to be rejected.

(42) Firstly, the argument that the Commission does not have the competence to assess the Veto Decision on the basis that its subject matter is public security and not competition law is misconceived.

(43) The Merger Regulation grants the Commission the exclusive competence to scrutinise concentrations with a Union dimension from a competition perspective.[32] This is necessary to meet the objective of ensuring that competition in the internal market is not distorted and for the further development of the internal market.[33] Article 21(4) of the Merger Regulation makes clear that the Commission's assessment from a competition perspective of a concentration with a Union dimension should not prejudice the ability of Member States to take appropriate measures to protect their legitimate interests relating to non-competition matters.[34]

(44) However, the specific purpose of Article 21(4) of the Merger Regulation is to set out the conditions under which a measure may be taken by a Member State to protect interests other than competition law, in particular, that they must be "*compatible with the general principles and other provisions of Community law*". The third paragraph of Article 21(4) of the Merger Regulation explicitly provides for "*an assessment of [the measure's] compatibility*" by the Commission for national measures that do not relate to competition law. Indeed, in past cases, the Court of Justice has upheld the Commission's finding that national measures taken to protect interests other than competition infringe Article 21(4) of the Merger Regulation.[35]

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30 Point 5 on page 4 of Hungary's Response to the Preliminary Assessment.

31 Point 1 on pages 1-2 of Hungary's Response to the Preliminary Assessment.

32 See recitals (27) and (28) above, see also recitals 17 and 18 of the Merger Regulation.

33 Recital 2 of the Merger Regulation.

34 Article 21(4) of the Merger Regulation, which states that "[n]*otwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law*".

35 See, for example, judgment dated 22.06.2004 in *Portugal v Commission*, Case C-42/01, EU:C:2004:379, in which the Court of Justice upheld the Commission's finding that Portugal had infringed Article 21(4) of the Merger Regulation due to certain measures adopted by the Minister for Finance pursuant to legislation relating to the privatisation of state owned companies. The interests protected by the legislation, and the Portuguese Minister for Finance's decision, related to Portugal's economic and industrial objectives, and not to competition law.

(45) Secondly, the argument that the Commission does not have the competence to assess the Veto Decision because its legal basis is legislation that relates to public security and not competition law must be rejected.

(46) To accept this interpretation put forward by Hungary would render Article 21(4) of the Merger Regulation ineffective by giving Member States the possibility of easily circumventing that provision. This interpretation would mean that Article 21(4) of the Merger Regulation would only allow the Commission to act in a situation where a Member State has relied on national competition legislation to intervene in a concentration in order to safeguard public security, media plurality, prudential regulation or other legitimate interests. However, any intervention based solely on legislation specifically aimed at protecting those interests would be exempt from the requirements of Article 21(4) of the Merger Regulation. There is no basis for such a distinction, which would undermine the *effet utile* of this provision, based on the wording or spirit of the Merger Regulation or of Article 21(4) of the Merger Regulation. The Court of Justice has in past cases upheld the Commission's finding that national measures taken under specific, non-competition legislation may infringe Article 21(4) of the Merger Regulation.[36]

6.3.1.2. The notion of a single concentration

(47) Hungary claims that the Transaction does not constitute a single concentration within the meaning of recital 20 of the Merger Regulation, because the Veto Decision prevents the completion of the Hungarian Acquisition but not the remainder of the Transaction. This argument must be rejected, for the following reasons.

(48) In the first place, Article 3 of the Merger Regulation defines a concentration as "a change of control on a lasting basis [which] results from […] the acquisition […] by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more undertakings". In the present case, VIG proposed to acquire sole control over AEGON CEE, which is AEGON's Hungarian, Polish, Romanian and Turkish businesses. The Transaction was agreed in one single Sale and Purchase Agreement between the Parties, for one agreed consideration for the whole of AEGON CEE. The Sale and Purchase Agreement makes clear that the completion of the Transaction is subject to the satisfaction of certain conditions, including that VIG must obtain regulatory approval from the Hungarian National Bank (which is the Hungarian insurance supervisor) with respect to the Hungarian Acquisition, and that similar approvals must be obtained from the relevant authorities in Poland, Romania and Turkey.[37] Until each of these conditions is satisfied, the Transaction, as a whole, cannot be completed and the failure to fulfil all conditions before the long stop date enables either VIG or AEGON to terminate the whole Transaction.[38] The Sale and Purchase Agreement does not specifically provide for any opportunity to complete only part of the Transaction. There is therefore no doubt that the Transaction constitutes a single concentration.

(49) Hungary's arguments as regards the concept of single concentration are therefore misplaced. This concept is referred to in recital 20 of the Merger Regulation, which states: "*[i]t is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a*

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36 See cases referred to in the previous footnote.

37 Clauses 2.1 and 5.1(b) of the Sale and Purchase Agreement dated 29 November 2020, provided by VIG to the Commission in response to the Commission's request for information dated 14 February 2022.

38 Clauses 6.13 to 6.16 of the Sale and Purchase Agreement.

series of transactions in securities taking place within a reasonably short period of time". As is clear from this provision, as well as from the Commission's Jurisdictional Notice,[39] the concept of a "single concentration" applies to the question of whether several separate transactions ought properly to be considered to be one concentration. In a situation where the Transaction is agreed between the two Parties as a single transaction, under one Sale and Purchase Agreement, for one agreed consideration in respect of the whole target business (AEGON CEE), it is inappropriate to evaluate under recital 20 whether the Transaction could constitute multiple separate concentrations.[40]

6.3.1.3. Relationship between Article 21(2) and (4) of the Merger Regulation[41]

(50) The Hungarian authorities claim that the Veto Decision does not constitute an infringement of Article 21(2) of the Merger Regulation, as the Veto Decision does not relate to competition law.

(51) In this regard, the Commission notes that Articles 21(2) and 21(4) of the Merger Regulation are interrelated. Article 21(2) of the Merger Regulation states that: "*Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation*". It therefore provides for the Commission's exclusive competence over concentrations with a Union dimension. Article 21(4) of the Merger Regulation applies "*notwithstanding paragraphs 2 and 3 [of Article 21]"* and enables Member States to take appropriate measures to protect legitimate interests subject to certain conditions. The Commission considers that, by taking a measure which does not comply with Article 21(4) of the Merger Regulation, a Member State interferes with the Commission's exclusive competence over concentrations with a Union dimension and thus the effectiveness of the Commission decisions provided for in the Merger Regulation.

6.3.2. Breach of the duty to communicate under Article 21(4) of the Merger Regulation

(52) Hungary claims that the Veto Decision was adopted on grounds of public security, which is one of the recognised interests under Article 21(4) of the Merger Regulation. However, the Commission considers that there are reasonable doubts as to whether the Veto Decision genuinely aims to protect such recognised interest.

(53) In the present case, there is no apparent reason why the acquisition of AEGON Hungary by VIG would amount to a genuine and sufficiently serious threat to a fundamental interest of society. In particular, it is unclear how the Hungarian Acquisition could directly or indirectly affect public security in Hungary.

(54) *First*, AEGON and VIG appear to present a similar profile. The two companies are well-established EU insurance groups listed on various European stock exchanges and both have operated in Hungary already prior to the Hungarian Acquisition. There

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39 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.4.2008, paragraphs 38 and 43.

40 In any event, and for the avoidance of doubt, the Commission notes that the Hungarian Acquisition and the remainder of the Transaction are linked by mutual conditionality and would not take place without each other (see recital (48) above), and so would clearly be interdependent. The fact that Hungary has decided only to adopt the Veto Decision against part of the Transaction does not change this conclusion – in fact, due to the Veto Decision (which means the SPA conditions required to be met in advance of closing have not been fulfilled), at the date of this decision VIG was not able to complete the non-Hungarian parts of the Transaction either.

41 For the avoidance of doubt, in this decision the Commission does not consider that Hungary has infringed Article 21(3) of the Merger Regulation, on the basis that Hungary does not claim to apply its national competition legislation through the Veto Decision.

is thus no clear reason as to why the Hungarian Acquisition would pose any threat to public security.

(55) AEGON is a Dutch insurance group. AEGON's shares are listed on both the Amsterdam (Euronext) and New York (NYSE) stock exchanges.[42] AEGON has activities in more than 20 countries across the Americas, Europe and Asia. AEGON acquired AEGON Hungary in 1992, meaning that AEGON Hungary has been under non-Hungarian (but EU-based) ownership for almost 30 years.[43]

(56) VIG is a publicly-traded company headquartered in Austria, with shares listed on the Vienna (Wiener Börse) and Prague stock exchanges. It has a strong credit rating of A+ with a 'stable' outlook from Standard & Poor's. [44] It has been present in Hungary since 1996, where it offers insurance products and other services under its brand "Union". Union is a member of MABISZ, the Hungarian association of insurers.[45] VIG also controls two insurance intermediation companies active in Hungary. [46]

(57) Over the past 25 years of VIG's activities in the Hungarian insurance sector, Hungary did not raise any public security concerns with VIG over its operations.[47] To the contrary, there are strong elements to indicate VIG's good standing in Hungary, for example:

(a) VIG has acquired Hungarian insurance providers in recent years and received approval for these acquisitions from the relevant national insurance regulator (the Hungarian National Bank). Notably, in 2014, VIG acquired all of the shares of AXA Biztosító Zrt, a Hungarian life insurance company and in 2018, VIG undertook an intra-group restructuring process to merge two of its subsidiaries (ERSTE Vienna Insurance Group Biztosító Zrt. and Vienna Life Vienna Insurance Group Biztosító Zrt., which were merged into UNION Vienna Insurance Group Biztosító Zrt.). These transactions were reviewed and approved by the Hungarian National Bank.[48]

(b) In the last 10 years, VIG and its Hungarian subsidiaries have won more than 30 tenders to provide insurance services to a number of public authorities and public undertakings in Hungary. [Information on tenders won by VIG in Hungary in 2018 to 2021].[49] In fact, two of these tenders were awarded to VIG by public authorities subsequent to the adoption of the Veto Decision.[50]

(c) VIG and its subsidiaries have won a number of awards in Hungary, including in 2021, when Union won (i) the Green Insurance and Pension Fund Award from the Hungarian National Bank (which is the Hungarian insurance regulator); (ii) a Presidential Award from the Hungarian Association of

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42 AEGON Annual Report 2020, available at https://www.aegon.com/contentassets/5a2428e87caf4185abb1ff55f476f147/aegon-integrated-annual-report-2020.pdf (last accessed on 3 December 2021)

43 https://www.aegon.com/about/what-we-do/our-businesses/aegon-international/

44 VIG Annual Report 2020 available at https://www.annual-report.vig/2020/servicepages/downloads/files/entire-vig-ar20.pdf (last accessed on 3 December 2021).

45 https://mabisz.hu/kapcsolatok-es-tagok/ and https://mabisz.hu/en/homepage/ (last accessed on 3 December 2021).

46 Erste Biztositasi Alkusz Kft ("Erste Alkusz") and Money & More Pénzügyi Tanácsadó Zártkörüen Müködö Részvénytársaság ("Money & More").

47 Response to question 9 VIG RFI 2.

48 Response to question 1 of VIG RFI 2.

49 Response to question 6 of VIG RFI 2 and Annexes RFI 2.Q6-1 and RFI 2.Q6-2.

50 [Information on contracts awarded to VIG by public authorities in Hungary subsequent to the adoption of the Veto Decision] – response to question 2 of VIG RFI 3.

Independent Insurance Brokers (Független Biztosítási Alkuszok Magyarországi Szövetsége – FBAMSZ) for the insurance company which has responded most flexibly to the difficulties arising in the most difficult phases of the Covid period and which has provided the greatest help to brokers; and (iii) a gold award in the category of service-based health insurance from the Association of Hungarian Insurance Brokers (MABIASZ – Magyar Biztosítási Alkuszok Szövetsége).[51] VIG and its subsidiaries have won a number of other awards in Hungary in the last decade,[52] as well as more than 40 awards in other Member States over the last 5 years.[53]

(d) The current CEO of Union (VIG's primary insurance brand in Hungary) is a member of the board of MABISZ, the Hungarian association of insurers.[54]

(e) In 2012, Mr Günter Geyer, who was VIG's CEO at the time (and is still the chairman of the supervisory board of VIG) was awarded the Officer's Cross of the Order of Merit of Hungary, one of the highest decorations of Hungary. Mr Geyer's services to the Hungarian insurance industry were one of the elements praised during the award ceremony.[55]

(58) The Veto Decision, and the limited explanations provided by Hungary, fail to establish why the profile of the new investor in AEGON Hungary, namely VIG, would entail an increased risk to public security compared to the current owner of AEGON Hungary, namely AEGON.

(59) *Second,* the Commission regularly assesses concentrations with a Union dimension in the insurance sector, without Member States raising public security concerns. In the last three years alone (since 2018), the Commission has assessed (under its non-simplified review procedure) cases addressing the markets for life and/or non-life insurance products in Croatia,[56] Czechia,[57] France,[58] Germany,[59] Greece,[60] Italy,[61] Norway,[62] Portugal,[63] Poland,[64] Slovenia,[65] Slovakia,[66] and the United Kingdom.[67]

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51 Annex RFI 2.Q7-2 of VIG RFI 2.

52 Annex RFI 2.Q7-2 of VIG RFI 2, including awards from the Hungarian Public Relations Association (MPRSZ) in 2020, CSR Hungary in 2017, the Hungarian Association of Independent Insurance Brokers (Független Biztosítási Alkuszok Magyarországi Szövetsége – FBAMSZ) in 2013, 2014 and 2017, Netrisk.hu in 2015, 2016, 2017 and 2018, MoneyMoon in 2012, 2013, 2014, 2015 and 2016, and Superbrands in 2011, 2012, 2103, 2014, 2015, 2016, 2017, 2018, 2019 and 2020.

53 Including in Austria, Bulgaria, Croatia Czechia, Germany, Lithuania, Poland and Romania – Annex RFI 2.Q7-1 of VIG RFI 2.

54 Response to question 8 of VIG RFI 2.

55 Response to question 8 of VIG RFI 2.

56 Commission decision of 10.12.2018 in Case M.9056 *Generali CEE / AS*.

57 Commission decision of 29.07.2020 in Case M.9796 *Uniqa / AXA (insurance, asset management and pensions - Czechia, Poland and Slovakia)*.

58 Commission decision of 08.12.2020 in Case M.9974 *Groupe Credit Agricole / Groupe Generali / Europ Assistance France / Viavita*.

59 Commission decision of 26.07.2018 in Case M.8905 *AXA Group / Roland*.

60 Commission decision of 07.12.2021 in Case M.10447 *NN / Metlife Greece / Metlife Poland*.

61 Commission decision of 21.10.2021 in Case M.10360 *Assicurazioni Generali / Società Cattolica di Assicurazione*. Commission decision of 29.06.2021 in Case M.10229 - *Allianz / Aviva Italia*. Commission decision of 26.07.2018 in Case M.8905 *AXA Group / Roland*.

62 Commission decision of 13.08.2019 in Case M.9398 *Centerbridge Partners / Amtrust Corporate Member*.

63 Commission decision of 20.11.2019 in Case M.9531 *Assicurazioni Generali / Seguradoras Unidas / Advancecare*.

64 Commission decision of 07.12.2021 in Case M.10447 *NN / Metlife Greece / Metlife Poland*. Commission decision of 06.08.2021 in Case M.10326 *Allianz Holding / Santander / Aviva Companies /*

No Member State raised public security concerns in any of these cases. In the Commission's experience it is therefore rare for public security to be at issue in merger cases in the insurance sector.

(60) Furthermore, the Transaction itself covers insurance markets beyond Hungary, including in particular Poland and Romania in the EU, as VIG is also acquiring AEGON's businesses in these Member States. Neither the Polish nor the Romanian government raised public security concerns in relation to the Transaction, despite the fact that the relevant product markets are largely the same (concerning primarily life and/or non-life insurance products) and the identity of the acquirer, namely VIG, is the same across all three Member States.

(61) Insurance markets also typically involve a variety of companies offering various insurance products, which are largely interchangeable across providers. In fact, the life insurance sector in Hungary involves numerous providers besides AEGON and VIG, including Talanx/Magyar Posta, NN, Groupama, Generali, Allianz, Uniqa, MetLife and Signal Iduna.[68] The same situation arises in the non-life insurance sector, where Allianz, Generali, Groupama, KBC, Uniqa and Waberer are among the players active in addition to AEGON and VIG.[69]

(62) *Third*, the Hungarian authorities have not provided any substantive reasoning to the Commission (or to VIG or AEGON), beyond the mere assertion that the Hungarian Acquisition would threaten public security in Hungary.

(63) According to the Hungarian authorities, the Veto Decision was based on an individual assessment of the Transaction.[70] However, the Hungarian authorities have presented no element (either to the Parties or to the Commission) in relation to how the acquisition of AEGON Hungary (specifically) by VIG (specifically) would impact public security in Hungary.

(64) The Commission considers that the lack of any substantive reasoning provided to VIG and AEGON at the time of the adoption of the Veto Decision (and in the process leading up to it) is itself grounds for reasonable doubts as to whether the measure aims to genuinely protect public security. The only statement contained in the Veto Decision is that VIG's acquisition of control over AEGON Hungary "*violates the national security interest of Hungary*". Given that the only substantive basis on which the Hungarian authorities can object to a transaction pursuant to the Hungarian FDI Legislation is the violation of Hungary's national security interests, this statement amounts to no more than saying that the Hungarian authorities are applying a public security veto for public security reasons.[71] At the time of the Veto

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Santander Aviva Companies. Commission decision of 29.07.2020 in Case M.9796 *Uniqa / AXA (insurance, asset management and pensions - Czechia, Poland and Slovakia)*.

65 Commission decision of 10.12.2018 in Case M.9056 *Generali CEE / AS*.

66 Commission decision of 29.07.2020 in Case M.9796 *Uniqa / AXA (insurance, asset management and pensions - Czechia, Poland and Slovakia)*.

67 Commission decision of 26.09.2019 in Case M.9432 *Allianz Holdings / Legal and General Insurance*.

68 Commission decision of 12.08.2021 in Case M. 10102 *VIG / AEGON CEE*, recital 60.

69 Commission decision of 12.08.2021 in Case M. 10102 *VIG / AEGON CEE*, recital 73.

70 See paragraph 114 of the Minister's Statement of Defence to the Metropolitan Court of Budapest dated 31 May 2021: "*the Respondent did not generally prohibit the Claimant from acquiring shares in companies incorporated under Hungarian law, but as a result of the examination of the notified specific legal transaction it concluded that the transaction subject to the notification violates national security*".

71 See Article 6(3) of the Hungarian FDI Legislation. The Commission notes further that the Hungarian FDI Legislation requires that in the event of a prohibition decision the Minister communicates "a simplified justification" to the foreign investor. While the Commission is not in a position to assess the compliance of the Veto Decision with the Hungarian FDI Legislation, the Commission notes the

Decision, no other explanation of the rationale for the Veto Decision was communicated to VIG or AEGON and likewise throughout the review process under the Hungarian FDI Legislation the Minister did not indicate any substantive concerns. This lack of any effective reasoning at the time of the Veto Decision despite the *prima facie* lack of any clear link between national security and the characteristics of the Parties (as described above) gives rise to reasonable doubts.[72]

(65) In addition, even after the adoption of the Veto Decision, the Hungarian authorities have failed to provide sufficient information to the Commission (or VIG or AEGON) to remove these reasonable doubts.

(66) As described in recital (19) above, the Commission indicated in the EC RFI 1 sent on 20 July 2021 that it was *prima facie* unclear how the Hungarian Acquisition would give rise to a risk for public security.[73] The Commission thus asked the Hungarian authorities to explain why the Veto Decision is justified under Article 21(4) of the Merger Regulation and is considered necessary, proportionate and compatible with the general principles and other provisions of EU law.[74] Hungary's reply to the EC RFI 1 did not answer these questions. Instead, the Hungarian authorities simply mentioned that the Veto Decision "*was based on classified data, the disclosure of which is not permitted under national law*".

(67) On 29 October 2021, the Commission sent an additional request for information (the "EC RFI 2") asking the Hungarian authorities to provide additional documents and information, in particular documents, potentially redacted in a non-confidential version, "*enabling the Commission to understand and verify the genuineness, necessity and proportionality of the Veto Decision for the purpose of protection [of] public security, as well as its compatibility with the general principles and other provisions of EU law relating*". On 22 November 2021, the Hungarian authorities provided a reply to the EC RFI 2, which again did not provide any additional element in relation to the justification for the Veto Decision.

(68) Similarly, in the version of its submissions to the Metropolitan Court of Budapest relating to the appeal of the Veto Decision by VIG which it provided to the Commission, Hungarian authorities did not provide additional elements relating to the justification of the decision.[75]

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apparent lack of any simplified justification (in the ordinary meaning of the words) for the Veto Decision (as explained above, the reasoning given amounts to a circular statement that a public security veto is applied for public security reasons).

72 In relation to the Minister's claim that the underlying information is classified, see the Commission's analysis in recitals (83) to (89) below. The Commission notes that not even a high level non-confidential summary of the essence of the concern has been made available to VIG or AEGON.

73 The EC RFI 1 reads specifically that "*prima facie, it is unclear how the acquisition of the Hungarian subsidiary of AEGON CEE by VIG would give rise to an appreciable risk for public security in light of the case law of the Court of Justice. In these circumstances, any application of public security grounds in order to prohibit or impose conditions on the concentration would require close scrutiny by the Commission by reference to the criteria in Article 21(4) EUMR*".

74 The EC RFI 1 was sent to the Permanent Representation of Hungary with a request for it to be transmitted to the relevant authorities in the Hungarian government, as is standard practice in State aid cases.

75 Submissions of the Minister to the Metropolitan Court of Budapest provided to the Commission in response to EC RFI 2.

(69) Hungary itself considers that public security can only be relied upon provided the restriction in question is necessary and proportionate,[76] but does not provide any element to support the necessity and proportionality of the Veto Decision.

(70) Restrictions based on public security are derogations from the Merger Regulation as well as the fundamental principles of free movement of capital and freedom of establishment.[77] As a result, any party relying on such justification, in the present case Hungary, should be able to provide elements showing that the measures taken genuinely aim at protecting recognised public interests, and are not disproportionate (even if certain classified information could not be disclosed).[78]

(71) In light of the foregoing, the Commission finds that there are reasonable doubts as to whether the Veto Decision genuinely aims to protect a recognised interest (public security) and is compatible with the general principles and provisions of EU law. As a result, as provided for by Article 21(4) of the Merger Regulation, the Veto Decision should have been communicated to (and approved by) the Commission prior to its implementation and there has thus been an infringement of the Communication and Standstill Obligations. In line with the Commission's precedents,[79] this failure is sufficient to conclude that there has been a procedural infringement of Article 21 of the Merger Regulation by Hungary.

6.3.3. The Veto Decision is not compatible with EU law

(72) The infringement of the Communication and Standstill Obligations provided for by Article 21(4) of the Merger Regulation, as described in Section 6.3.1 above, does not deprive the Commission of its power to assess, pursuant to this provision, whether the Veto Decision would be compatible with the general principles and other provisions of EU law.[80] Where a Member State has not communicated the measure, and not provided full information to the Commission, the Commission may take its decision on the basis of the information which it has at its disposal.[81]

(73) The Commission considers that the Veto Decision is incompatible with the general principles and other provisions of EU law. Notably, for the following reasons, the Commission considers that the Veto Decision[82] constitutes an infringement of the freedom of establishment under Article 49 TFEU.[83]

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76 Hungary's response to EC RFI 1 reads that "*According to Articles 52 and 65 TFEU, the freedom of establishment and the free movement of capital are not absolute fundamental rights, as Member States have the possibility to restrict the fundamental freedoms on grounds of overriding public interest (such as national security and public security), subject to the requirements of necessity and proportionality*" (emphasis added) and that "*Hungary's national security is a legitimate objective recognised by the EU, and the [Veto] Decision complies with the requirements of necessity and proportionality*" (emphasis added).

77 See recital (36) above.

78 See for instance recitals (76) *ff.* and (83) *ff.* below.

79 Commission decision of 20.12.2006 in Case M.4197 *E.ON / Endesa*, recital 55.

80 Judgment dated 22.06.2004 in *Portugal v Commission*, Case C-42/01, EU:C:2004:379, paragraph 57.

81 Judgment of 22.06.2004, *Portugal v Commission*, C-42/01, EU:C:2004:379, paragraph 58.

82 For the avoidance of doubt, by this decision the Commission assess the compatibility of the Veto Decision (only) with the general principles and provisions of EU law pursuant to Article 21(4) of the Merger Regulation. This decision is without prejudice to the assessment of the compatibility of the FDI Legislation or the Hungarian FDI Decree with EU law.

83 In this decision, the Commission focuses on the freedom of establishment and does not assess separately the free movement of capital. The Veto Decision is a measure primarily targeted at the freedom of establishment (i.e. it relates to individuals' ability to have a definite influence on the decisions of a company in another Member State), and its impact on the freedom of capital is a secondary and unavoidable consequence of the infringement of the freedom of establishment and as

(74) *First*, by acquiring AEGON Hungary, VIG seeks to exercise its freedom of establishment. It is well-established that the freedom of establishment includes the right to acquire a controlling stake in a company by virtue of a cross-border transaction.[84] The Court of Justice has explained that "*the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State […] Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC [49 TFEU] "*.[85] In this case, VIG, established in Austria, has sought to exercise this right through a cross-border acquisition of AEGON Hungary as part of a broader transaction acquiring AEGON's Hungarian, Polish and Romanian (and Turkish) businesses.

(75) Second, the Veto Decision is a restriction to VIG's freedom of establishment. The Court of Justice has established that "Article 43 EC [49 TFEU] requires the elimination of restrictions on the freedom of establishment. All measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as such restrictions".[86] In this case, the Veto Decision is an outright prohibition on VIG's attempt to acquire a Hungarian company and so constitutes an obstacle to VIG's exercise of its freedom of establishment. As the Veto Decision arises from the fact that VIG is considered to be a "foreign investor" pursuant to the Hungarian FDI Legislation and Hungarian FDI Decree, the prohibition represents a form of direct discrimination against VIG on grounds of nationality.

(76) *Third*, Hungary has failed to establish to the requisite standard that the Veto Decision can benefit from a derogation to the freedom of establishment. Article 52(1) TFEU recognises that, in principle, "public security" can be a ground for derogation from the freedom of establishment. However, the Court of Justice has established that the concept of public security, as a derogation from the fundamental freedoms, must be interpreted strictly, such that there must be a "*genuine and sufficiently serious threat to public policy*" for it to apply. The Court of Justice has elaborated that this means that the scope of the public security derogation cannot be determined unilaterally by each Member State without control by the institutions.[87]

(77) The Court of Justice has also made clear that the burden is on the national authority to prove that the measure foreseen is a suitable and proportionate response to a genuine and sufficiently serious threat to public security. The Member State's decision must be accompanied "*by precise evidence enabling its arguments to be*

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such need not be independently examined – judgment dated 12.09.2006 in Case C-196/04 *Cadbury Schweppes*, C-196/04, EU:C:2006:544paragraphs 31-33.

84 See judgment of dated 21.10.2010 in *Idrima Tipou*, C-81/09, EU:C:2010:622, paragraph 47, which confirms that "*provisions of national law which apply to… holdings of capital of a company…allowing them to exert a definite influence on the company's decisions and to determine its activities fall within the ambit ratione materiae of Article 49 TFEU*".

85 Judgment of 13.12. 2005 in *SEVIC Systems AG*, C-411/03, EU:C:2005:762, paragraphs 18-19.

86 Judgment of 28.02.2008 in *Deutsche Schell v Finanzamt Hamburg*, C-293/06, EU:C:2008:129, paragraph 28; judgment of 30.11.1995 in *Gebhard*, C-55/94, EU:C:1995:411, paragraph 37; and judgment of 5.10.2004 in *Caixabank France*, C-442/02, EU:C:2004:586 , paragraph 11.

87 See, for example the judgment of 14.03.2000 in *Association Eglise de scientology*, C-54/99, EU:C:2000:124, paragraph 17; judgment of 28.10. 1975 in *Rutili*, C-36/75, EU:C:1975:137.

substantiated" and it is not sufficient that the Member State "*merely invoke[s] in a general manner*" the threat in question "*without putting forward any precise evidence capable of establishing that the potential [harm] constitutes a genuine and sufficiently serious threat to a fundamental interest of society*".[88]

(78) In this regard, it must be noted that the Veto Decision merely states that the Transaction is prohibited as it "*violates the national security interests of Hungary*". However, Hungary has not provided any evidence or explanation in support of the claim that the Veto Decision seeks to guard against a genuine and sufficiently serious threat to public policy. Notably, the Veto Decision does not specify any link between the Hungarian Acquisition and the purported risk to public security. In addition, in its submissions to the Commission (including the submissions made to the Metropolitan Court of Budapest it shared with the Commission), the Hungarian authorities have not provided any explanation of this purported link.[89] As explained in Section 6.3.1 above, there are strong elements to cast doubt on whether the Veto Decision is genuinely intended to protect public security. It is therefore clear that Hungary has failed to discharge its burden of proof to show that the Veto Decision seeks to guard against a genuine and sufficiently serious threat to public policy.

(79) *Fourth*, even if it were accepted that the Veto Decision seeks to achieve the objective of protecting public security, Hungary has failed to establish that it is suitable and proportionate to that aim. According to the case law of the Court of Justice, Member States can derogate from the fundamental freedoms to protect public policy only insofar as the measure is "*necessary for the protection of the interests which they are intended to guarantee and only insofar as those objectives cannot be obtained by less restrictive measures*".[90] Again, the reasons invoked by the Member State to justify the derogation must be accompanied by an analysis of the appropriateness and proportionality of the measure, with precise evidence enabling its arguments to be substantiated.[91]

(80) The Commission notes that an outright prohibition of the Hungarian Acquisition is a particularly intrusive restriction on VIG's freedom of establishment and so an adequate analysis of the appropriateness and proportionality of the restriction is particularly important. This is all the more so given that VIG has already been operating in Hungary for 25 years and that AEGON Hungary is already pre-Transaction owned by a foreign investor (AEGON Group, of the Netherlands) for nearly 30 years (see recitals (55) and (56) above). Nevertheless, Hungary has failed to provide to the Commission any evidence or explanation as to the appropriateness or proportionality of the Veto Decision to protect public security. In particular, despite the severity of this restriction, the Hungarian authorities have not provided any analysis of whether any less restrictive measure could achieve the same aim, for example, by imposing justified conditions on the Hungarian Acquisition or on how

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88 See, for example the judgment of 22.12.2008 in *Commission v Austria*, C-161/07, EU:C:2008:759, paragraphs 36-37 and case law cited therein; judgment of 7.07.2005 in *Commission v Austria*, C-147/03, EU:C:2005:427, paragraph 63; and judgment of 6.10.2020 in *Commission v Hungary*, C-66/18, EU:C:2020:792, paragraph 204.

89 In relation to the argument that certain elements underlying the Veto Decision constitute state secrets, the Commission notes that the Minister has not even attempted to provide a non-confidential summary of the reasons why the Hungarian Acquisition would pose a threat to public security. See also recitals (83) to (89) below.

90 See, for example the judgment of 14.03.2000 in *Association Eglise de scientology*, C-54/99, EU:C:2000:124, paragraph 18; judgment of 22.12.2008 in Case C-161/07 *Commission v Austria*, C-161/07, EU:C:2008:759, paragraphs 36-37.

91 See case law cited in footnote 88.

VIG is to operate AEGON Hungary (in any event, such conditions could also be subject to the Commission's scrutiny under Article 21(4) of the Merger Regulation). Hungary has therefore failed to discharge its burden of proof to show the appropriateness and proportionality of the measure.

(81) In this respect, the Hungarian authorities submit in Hungary's Response to the Preliminary Assessment that the Veto Decision should not be considered a particularly intrusive restriction on VIG's freedom of establishment, as it does not prohibit the acquisition by VIG of a stake in *any* Hungarian-registered companies, but only prohibits the acquisition of AEGON Hungary following an assessment of the specifics of the acquisition.[92] However, the mere fact that the Hungarian authorities could have imposed additional measures concerning other possible transactions, which would be unrelated to the particular exercise of the freedom of establishment that VIG sought to undertake by the Transaction, does not mean that the restriction at hand is not in itself particularly serious. The Veto Decision constitutes an outright prohibition of VIG's acquisition of AEGON Hungary and, as such, entirely blocks VIG from exercising its freedom of establishment through this cross-border transaction. If the Hungarian authorities had imposed (justified and proportionate) conditions on the Hungarian Acquisition with a view to protecting public security, or elaborated in the Veto Decision their specific concerns such that VIG could attempt to restructure the Hungarian Acquisition to receive approval, this would have enabled VIG to at least partially exercise its freedom of establishment. Instead, the Hungarian Acquisition is simply prohibited. This also has the consequence, as explained in recital (48), that VIG is unable to complete the remainder of the Transaction, i.e. its acquisition of AEGON's businesses in Poland, Romania and Turkey. Thus, not only does the Veto Decision prevent VIG's acquisition of AEGON Hungary, but it additionally has the effect of indirectly restricting VIG's freedom of establishment also in Poland and Romania. Therefore, the Veto Decision can be considered a particularly serious interference with VIG's freedom of establishment.

(82) In any event, the Commission notes that, even if the measure were not considered to be a particularly serious interference, the Hungarian authorities are still subject to the obligation to justify a measure restricting the freedom of establishment (see recital (80)) and, absent any evidence or explanation as to the reasons justifying the Veto Decision and as to its proportionality, Hungary has failed to discharge its burden of proof.

(83) *Fifth,* Hungary's claim that the Veto Decision was based on classified information protected under the Classified Information Law is insufficiently reasoned and cannot be accepted without frustrating the *effect utile* of Article 21 of the Merger Regulation.

(84) It should be recalled that Member States have a duty of sincere cooperation in assisting the EU in carrying out its tasks, which flow from the Treaties.[93] This duty also extends to the provision of information necessary for the EU to carry out its tasks,[94] as more specifically expressed in the Commission's ability to request necessary information from Member States to carry out its duties under the Merger Regulation.[95]

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92 Point 4 on page 3 of Hungary's Response to the Preliminary Assessment.

93 Article 4(3) TEU.

94 Judgment of dated 15.12.2009 in *Commission v Germany,* C-372/05 EU:C:2009:780, paragraph 76.

95 Article 11(6) of the Merger Regulation.

(85) Article 346(1)(a) TFEU contains a derogation from the provisions of the Treaties, such that "no Member State shall be obliged to supply information the disclosure of which it considers to the essential interests of its security". However, the Court of Justice has examined the scope of this derogation and found that:

(a) The scope of this derogation is limited and the burden of proof is on the Member State. In this context, the Court explained that: "*the competent national authority has the task of proving, in accordance with the national procedural rules, that State security would in fact be compromised by precise and full disclosure to the person concerned of the grounds which constitute the basis of a decision taken [*on the basis of alleged public security grounds*]. It follows that there is no presumption that the reasons invoked by a national authority exist and are valid.*"[96] It is well-established that the derogations under Article 346(1) TFEU are to be construed narrowly and that they do not confer on a Member State the power to depart from the fundamental freedoms based on no more than reliance on those interests.[97] A Member State wishing to avail itself of the derogation in Article 346(1)(a) TFEU "*must show that the derogation is necessary in order to protect its essential security interests*".[98] Thus, the burden of proof is clearly on the Member State.

(b) The Member State must in any event apply the least restrictive approach. The Court of Justice has an established practice of considering that derogations under Article 346(1) TFEU should not be applied if a less restrictive solution is available.[99] More specifically, the Court of Justice assessed the question of what information is to be provided to an individual who faces a negative decision by a public authority, where the public authority claims it cannot disclose the information on the basis of public security grounds. It took into account the requirements of Article 47 of the Charter of Fundamental Rights (the right to an effective remedy and to a fair trial) and concluded that "*even if it turns out that State security does stand in the way of disclosure… the person concerned must be informed, in any event, of the* ***essence of the grounds*** *on which a* [negative decision affecting them] *is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard".*[100]

(86) In the present case, the Commission requested the Hungarian authorities to provide any documents, analyses or explanations (if necessary in non-confidential form) to

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96 Judgment of 4.6.2013 in *ZZ v Secretary of State for the Home Department*, C-300/11, EU:C:2013:363, paragraph 61. The case related to the freedom of movement of persons, specifically where an EU citizen had been denied the right of entry into a Member State on public security grounds. However, the general principles determined by the Court apply equally to the freedom of establishment.

97 See judgment of 4.6.2013 in *Commission v Finland*, C-284/05, EU:C:2009:778, paragraphs 47 and 49; judgment of dated 4.9.2014 in *Schiebel v Bundesminister für Wirtschaft, Familie und Jugend*, C-474/12, EU:C:2014:2139, paragraph 34.

98 Judgment of 28.3.2018 in Case C-187/16 *Commission v Austria*, C-187/16, EU:C:2018:194, paragraph 78.

99 See, by analogy, Judgment of 7.6.2012 in Case C-615/10 *Insinööritoimisto InsTiimi*, C-615/10, EU:C:2012:324, paragraph 45, which related to an attempt by a Member State to apply the public security derogation in Article 346(1)(b) TFEU. The case law of the Court of Justice indicates that the considerations and principles relevant to Articles 346(1)(a) and 346(1)(b) TFEU are similar – see e.g. the Court's reliance of the case law relating to Article 346(b) TFEU when assessing a measure pursuant to Article 346(1)(a) in Judgment of the Court dated 4 June 2013 in Case C-300/11 *ZZ v Secretary of State for the Home Department*, paragraph 61.

100 Judgment of 4.6.2013 in *ZZ v Secretary of State for the Home Department*, C-300/11, EU:C:2013:363, paragraph 65.

enable it to understand and verify the genuineness, necessity and proportionality of the Veto Decision for the purpose of the protection of public security, as well as its compatibility with the general principles and other provisions of EU law.[101] In response, the Hungarian authorities simply stated that "[t]*he* [Veto] *Decision was based on classified data, the disclosure of which is not permitted under national law (*[Classified Information Law]*)*".[102] Likewise, Hungary has not provided any additional information to VIG regarding the rationale behind the Veto Decision.

(87) The Commission considers that Hungary has failed to meet the requirements necessary to rely on Article 346(1)(a) TFEU in withholding disclosure of the rationale behind the Veto Decision from VIG and from the Commission, for the following reasons.

(88) Firstly, Hungary has not discharged its burden of proof that the application of this derogation is necessary:

(a) Hungary has not made any attempt to argue that it is relying on this provision in order to withhold the information from VIG or from the Commission.[103]

(b) Hungary has not indicated to the Commission the reason why the information is considered classified. The Classified Information Law foresees various possible public interests that could be protected,[104] thus the rationale for withholding the information is unclear.

(c) Hungary has not provided any reasoning or evidence as to how the disclosure of this information would harm the relevant public interest. It cannot be assumed that just because the Hungarian authorities consider that the Hungarian Acquisition endangers public security, the disclosure of the reasoning behind the Veto Decision would harm public security.

(d) With respect to disclosure to the Commission, pursuant to Article 339 TFEU and Article 17(1)-(2) of the Merger Regulation, the Commission and its officials are bound by an obligation of professional secrecy and may only use information received pursuant to the application of the Merger Regulation for the purposes of the relevant request or investigation. The Hungarian authorities have not acknowledged the Commission's confidentiality obligations, indicated that they consider them insufficient to protect their interests, or explained why this would be the case. Hungary's Response to the Preliminary Assessment indicates that the Hungarian authorities cannot depart from the requirements of the Classified Information Law, which foresees that a third party organisation's confidentiality provisions are not considered sufficient to allow disclosure of Hungarian classified information. However, the Hungarian authorities also indicate that under certain conditions individuals can be granted access to Hungarian classified information.[105] Firstly, it must be noted that the Hungarian authorities have made no attempt to engage with the Commission to explore whether any particular procedures may be followed to grant access, or to explain in detail why this would not be possible. Secondly, the argument that

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101 EC RFI 2, question 5. See also EC RFI 1.

102 Hungary's response to EC RFI 1. In its response to EC RFI 2 Hungary provided no additional information, simply referring back to its response to ECI RFI 1.

103 Neither in its submissions to the Commission nor in its submissions to the Metropolitan Court of Budapest, according to the documents submitted by Hungary to the Commission in response to EC RFI 2.

104 Article 5(1)-(2) of the Classified Information Law.

105 Point 5 on page 4 of Hungary's Response to the Preliminary Assessment.

national law prevents the disclosure of this information to the Commission would frustrate the *effet utile* of Article 21(4) of the Merger Regulation. Such an argument would enable national authorities to adopt restrictive measures allegedly based on national security grounds and then refuse to notify or explain those measures to the Commission, thereby hindering the Commission's assessment under Article 21 of the Merger Regulation. Accordingly, this argument cannot be accepted.

(89) Secondly, Hungary has not shown that there is no less restrictive solution available. Notably, the Hungarian authorities have not explained why it would not be feasible to provide a non-confidential summary of the rationale underlying its view that the Hungarian Acquisition would endanger public security. By way of illustration, the Hungarian authorities have not even indicated whether the risk arises due to a characteristic of VIG (i.e. that it poses a security risk as a purchaser of a Hungarian insurance company, in general or during the exceptional circumstances of the coronavirus pandemic), or a characteristic of AEGON Hungary (i.e. that a security risk arises from it being acquired by a foreign investor (other than AEGON) in general or VIG specifically). The Hungarian authorities have simply stated that *"the notifying party's acquisition of control violates the national security interest of Hungary"*. It is difficult to conceive of a scenario where it is impossible to disclose any high level information/summary to indicate how the Hungarian Acquisition threatens public security without this (partial) disclosure giving rise to harm.

(90) In light of the foregoing, the Commission concludes that the Veto Decision infringes the freedom of establishment. Therefore, the Veto Decision is not compatible with the general principles and other provisions of EU law and, as such, cannot be an appropriate measure within the meaning of Article 21 of the Merger Regulation.

7. ADDRESSEE

(91) The present decision is addressed to Hungary.

8. CONCLUSION

(92) On the basis of the foregoing, the Commission has come to the conclusion that Hungary has infringed Article 21 of the Merger Regulation (and in particular paragraphs 2 and 4 thereof) since:

(a) the adoption and the entry into force of the Veto Decision, without prior communication to (and approval by) the Commission infringes the specific communication obligation provided for by such provision; and

(b) the Veto Decision is contrary to the EU rules on the freedom of establishment, and therefore unduly interferes with the Commission's exclusive competence to decide on a concentration with a Union dimension.

(93) The fact that the Veto Decision has been challenged before the Hungarian Supreme Court does not have an impact on this conclusion, as the appeal before the Hungarian Supreme Court did not prevent the Veto Decision from producing its legal effects. Moreover, the outcome of such procedure cannot be predicted. In such a situation, the fact that the Veto Decision may be subject to modifications does not prevent the Commission from reaching a conclusion on the illegality of the Veto Decision as it stands.

(94) It is therefore appropriate to require the Hungarian authorities to withdraw the Veto Decision without delay, and in any event by 18 March 2022.

HAS ADOPTED THIS DECISION:

Article 1

Hungary infringed Article 21 of Regulation (EC) No 139/2004 by adopting, without prior communication to and approval by the Commission, the decision of the Hungarian Minister for the Interior of 6 April 2021 prohibiting VIG's acquisition of AEGON Hungary, which is incompatible with Article 49 of the Treaty on the Functioning of the European Union, and therefore unduly interferes with the Commission's exclusive competence to decide on a concentration with a Union dimension.

Article 2

Hungary shall withdraw by 18 March 2022 the prohibition of VIG's acquisition of AEGON Hungary imposed by the Hungarian Minister for the Interior, which has been declared incompatible with Union law by Article 1 of the present decision.

Article 3

This Decision is addressed to Hungary.

Done at Brussels, 21.2.2022

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President