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NEWSLETTER
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THE AMENDMENT OF THE COMPETITION ACT

Dr. Miklós Boronkay

On June 1 2009, significant modifications contained in Act XIV of 2009 amended Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (the "**Competition Act.**"). The amendment affects several parts of the Competition Act including, among others, the following issues:

(1) PROHIBITION ON UNFAIR COMPETITION

The amendment of the Competition Act made it easier and faster to enforce claims concerning violation of business secret (Section 4) and passing-off (Section 6). The amended provisions, which are mainly procedural, follow the EU "enforcement directive" (directive no. 2004/48/EC) related to intellectual property rights. According to the new rules, the preliminary evidence taking procedure may take place and an interim measure request may be submitted even before the initiation of a lawsuit. The court decides on a request for interim measure within 15 days. The provisions on

evidence also became more favourable. The scope of the applicable sanctions has expanded to include the seizure and revocation of products related to an infringement, and also final withdrawal thereof from trade. The amended provisions do not extend to other acts of unfair competition i.e. to the general prohibition on unfair competition (Section 2), the injury of reputation (Section 3), the boycott (Section 5), or the violation of the fairness of bidding (Section 7).

(2) MERGER CONTROL

The rules concerning merger authorisation were also amended. The procedural fee for full merger control proceedings increased from HUF 10 million to HUF 16 million, and for simplified proceedings from HUF 2 million to HUF 4 million. The authorisation test was also amended. According to previous rules, the Hungarian Competition Office ("**HCO**") was not allowed to refuse authorisation if the merger did not create or strengthen dominance. Pursuant to the new rules however, the merger must be authorised if it does not significantly decrease competition on the relevant market. However, the question of whether the merger creates or strengthens dominance must still be taken into consideration. The maximum fine for failing to submit an authorisation application increased from HUF 50 thousand to HUF 200 thousand per day.

(3) LENIENCY POLICY

The HCO's leniency policy was incorporated into the Competition Act and was also amended to a certain extent. Pursuant to the new provisions, the leniency application of an undertaking voluntarily revealing its cartel activity and submitting evidence must still be filed with the HCO Cartel Office but will be decided upon by the Competition Council. It is possible to submit a full application (including evidence) or a marker application to be completed within the deadline set by the HCO. Lastly, there is a new possibility to submit a summary application that can be submitted before both the HCO and the European Commission, which ensures the date of the submission. A further significant change is that the popular marker application can no longer be submitted anonymously. However, in line with previous practice, it is also possible to submit the application orally. The HCO has published a guideline on the leniency policy on its website, where it is also possible to download an application form.

(4) PRIVATE ENFORCEMENT

Significant novelties regarding the actions for damages in connection with cartels were introduced by the amendment. They not only seek to facilitate the aggrieved parties in enforcing their claims, but also aim to avoid situations where actions for damages deter undertakings from voluntarily revealing their cartel activity. To these ends, a presumption was introduced that the infringement (cartel activity) affected the prices applied by the infringer (cartel member) by 10%. The burden to prove that the effect was lower than this lies with the infringing party. However, the amendment of the Competition Act also provides benefits for undertakings that cooperate with the HCO and which are granted full immunity due to their leniency application, in that such undertaking may deny the payment of damages until the claim may be collected from another cartel member liable for the same infringement. The liability of this

undertaking is similar to that of the simple guarantor. The 10% presumption shall be applied in all lawsuits initiated after June 1, 2009 even if the infringing activity was carried out before this date; this facilitates the enforcement of claims of the aggrieved parties. However, an undertaking that was granted full immunity from fines may rely on its position of "quasi simple guarantor" only with respect to its infringing conduct carried out after June 1, 2009.

(5) SANCTIONING OF EXECUTIVE OFFICERS?

Finally, it is worth mentioning that there is a proposed new rule which has not been introduced into the Competition Act due to constitutional concerns. Pursuant to this provision, if an undertaking is fined due to cartel activity, the person who was executive officer during the period of the cartel would then be prohibited from being executive officer in another company for two years. There would also be a remedy against this sanction which the county court would decide on in an out-of-court proceeding. The Constitutional Court has declared this provision unconstitutional (Resolution no. 19/2009. (II. 25.)), as it found that the sanction could mean a form of prohibition from a profession (as a criminal sanction), which may not be applied automatically. A sanction such as this may only be imposed through a fair, public and impartial trial. However, it cannot be excluded that the sanction could be reintroduced in the future in a more detailed form and meeting the requirements of fair trial.

THE HUNGARIAN COMPETITION OFFICE'S NEW LENIENCY POLICY

Dr. Miklós Boronkay

The amendment of the Competition Act (Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices), which entered into force on June 1 2009, has significantly affected the so-called *"leniency policy"*. The main point of the leniency policy is that undertakings cooperating with the Hungarian Competition Office ("**HCO**") in revealing cartels can be rewarded with reduced fines, or in some cases even with full immunity from fines. Before this amendment, the leniency policy was fully regulated by the legally non-binding notice of the HCO (notice of the HCO President and of the Competition Council President no. 3/2003 as amended by notice no. 1/2006). As of June 1 2009, this important field of law is regulated in the Competition Act. The HCO has published its guidelines on interpreting the new legal provisions on its website (www.hco.hu), and provides more information on the "Frequently Asked Questions" page.

(1) THE CONDITIONS OF IMMUNITY FROM FINE / REDUCTION OF FINES

a) The nature of the infringement revealed

An application for leniency may only be submitted in case of voluntary disclosure a cartel *in its narrow sense,* i.e. in case of an agreement or concerted practice between competitors which aims to directly or indirectly fix the purchase or selling prices, share the market (including bid rigging) or define production and selling quotas, and which

violates Section 11 of the Competition Act or Article 81 of the EC Treaty. A leniency application therefore cannot be submitted in case of vertical restraints, abuse of dominant position or misleading of consumers.

b) Full immunity from fines

An undertaking may be granted full immunity if it is the first to submit a leniency application and evidence, which

(i) enables the HCO to obtain a preliminary court permission to carry out a dawn raid in connection with the infringement. (The HCO must also not have already had (as of the date of the submission of the application) sufficient evidence to obtain the permission; a dawn raid inspection must also not have previously been carried out); or
(ii) proves the infringement, if the HCO had insufficient evidence at the time the application was submitted to prove the infringement and no undertaking has fulfilled the conditions in point *(i)* above.

Therefore, in the first place an undertaking may be awarded immunity if it submits evidence on the basis of which the HCO may obtain a preliminary court permission for a dawn raid. This evidence need not prove the infringement beyond doubt: it is enough if the infringement can be demonstrated (made probable) for the court to grant permission for the dawn raid. If however a dawn raid had already been carried out, immunity may be awarded only if the submitted evidence, which was previously unknown to the HCO, is capable of proving the infringement, and not just demonstrating it.

An undertaking that takes steps to coerce other undertakings into participating in the infringement cannot be rewarded with full immunity, but may be granted a reduced fine.

c) Reduced fines

Even if full immunity cannot be granted, fines may be reduced if the undertaking submits evidence with significant additional value compared to the evidence the HCO already had at the time of the submission of the application.

The amount of the reduction of the fine is as follows:

(i) for the first undertaking meeting the above requirements: 30-50%;
(ii) for the second undertaking: 20-30%;
(iii) for the third or later undertaking: up to 20%.

If the undertaking submits evidence regarding a fact which the HCO was not previously aware of in connection with the infringement and which has direct significance in determining the amount of the fines, then the HCO will not take this aggravating evidence into consideration when determining the amount of the fine for this undertaking.

According to a new, stricter provision, an application for a reduced fine cannot be submitted during the whole competition supervisory procedure. This may only be submitted before sending the statement of objection of the Competition Council, or by the starting date of the inspection of the file of the case, whichever is earlier.

d) General conditions of leniency

It is a precondition for obtaining both full immunity and reduction of fines that the applicant:

(i) has immediately ceased its participation in the infringement; and
(ii) fully and continuously cooperates in good faith with the HCO until the end of the competition supervision procedure.

As a general rule, the applicant must cease its participation in the infringement immediately after submitting its application. If aggravating evidence is submitted, participation shall cease immediately after such proof is submitted. As an exception, the HCO may permit participation in the infringement in such a manner and to such an extent that might be necessary for the HCO to carry out a successful dawn raid investigation.

According to the Guidelines published by the HCO, the requirement for acting in good faith applies, albeit to a limited extent, already prior to the submission of the leniency application. For instance, if the undertaking destroys evidence immediately before submitting the application then it cannot be granted immunity or even reduction of the fines.

(2) SUBMITTING THE APPLICATION

A leniency application can basically be submitted in three different ways: as a full application, as a marker application and as a summary application, the latter of which is a new possibility.

a) Full application

In case of a full application, the undertaking submits its evidence to the HCO along with the application.

b) Marker application

In case of a marker application, the undertaking discloses the known data of the infringement to the HCO and the list of evidence at its disposal but does not submit the evidence immediately. In this case the HCO sets a deadline for the submission of the evidence. The identity of the applicant must always be revealed; an anonymous application may no longer be submitted (this is a new feature of the marker application). A marker application may only aim for full immunity, not reduced fines.

c) Summary application

It is reasonable to submit a summary application if in case of a cartel violating community law, the European Commission will presumably proceed but, due to parallel jurisdiction, the procedure of HCO cannot be excluded either. In this case the undertaking may simultaneously submit a full application to the European Commission and a short summary application to HCO. The summary application remains pending until it is decided whether the European Commission or the HCO is to proceed. If the HCO proceeds, then it requests the undertaking to submit its evidence, and the HCO will regard the date of the submission of the original summary application when determining the undertaking's place in the order of the leniency applicants.

d) The form of the application

As a general rule, the application shall be submitted using the application form published by HCO on its website, irrespective of whether it is a full, marker or summary application. However, the HCO also allows applicants to submit their application orally. Furthermore, the undertaking may request the HCO to announce its decision on the full or partial immunity orally. These rules are important because undertakings prefer oral communication with the HCO, especially due to the discovery rules in the US.

(3) DECISION ON THE LENIENCY APPLICATION

As a new rule the leniency application is decided upon by the Competition Council. There is no exact deadline for the decision which shall be rendered "*without delay, taking into account the time which is necessary for the evaluation of the application*". If more than one undertaking has submitted an application, the HCO decides on the order in which the applications arrived. In case of marker and summary applications it is the original date of submission (and not of the completion) that counts.

The decision on the leniency application is binding upon the Competition Council when it decides on the merits, except if it turns out that the conditions of full or partial immunity are not met (e.g. the undertaking did not cooperate with HCO after the submission of the application or did not act in good faith).

The application for full immunity may be revoked until it is decided upon. If an undertaking submitted an application for full immunity but does not meet the conditions thereof, the Competition Council *ex officio* takes it as an application for a reduced fine. However, the undertaking may instead revoke its application and the submitted evidence.

There is no separate remedy against the resolution on the non-imposition or reduction of the fine, but such a resolution may be challenged when challenging the resolution of HCO on the merits rendered at the end of the competition proceeding.

It is important to note that the HCO may use the leniency application and the attached documents only for the purposes of the decision thereupon and in order to apply for judicial dawn raid permission. Only the case handler, the proceeding Competition Council and the court are allowed to inspect these documents. The submitted

application and documents with its eventual copies are to be returned to the applicant undertaking if the application is rejected by HCO or it is revoked by the applicant.

AMENDMENTS TO THE LABOUR CODE AND THE ACT ON LABOUR INSPECTION

Dr. Zoltán Balázs Kovács, LL.M.

On 1 June 2009, a few amendments to the Labour Code and the act on labour inspection came into force. Among others, Act no XXXVIII of 2009 on the amendments to the acts governing organized labour relations and on other necessary labour measures ("**Act**") introduced a new prohibition on terminating employment by employer's notice, in addition to those already provided for by the Labour Code. This new prohibition means that, until 31 December 2011, an employer may hand over neither an ordinary termination notice for reasons of restructuring, nor an information letter on ordinary termination as per Section 94/E Paragraph (1) of the Labour Code (governing mass lay-offs), to an employee whose weekly working hours exceed 40 hours, calculated as per the new Section 117/C of the Labour Code.

The Act also amended the provisions of the act on labour inspection that govern the levy of fines, making it compulsory, in certain cases, to impose a labour fine. Pursuant to the new rules, a labour fine must be imposed if, for example, the employer failed to (i) put the employment agreement in writing, (ii) comply with its reporting obligations following entry into an employment relationship or (iii) carries out activities aiming at the hiring-out of employees without being properly registered for that purpose.

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