

**MERGER CONTROL IN HUNGARY**  
**FOLLOWING THE RECENT AMENDMENTS OF THE COMPETITION ACT**

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On February 1, 2001, Act CXXXVIII of 2000 came into force, which act amended Act LVII of 1996 on the Prohibition of Unfair Market Practices and Economic Competition (“**Competition Act**”). This paper presents the amendments relating to the new merger control provisions and focuses on the issue when a merger triggers a notification or filing requirement under the Competition Act. Thus, it is necessary to analyze **(i)** the scope of application of the Hungarian competition rules, **(ii)** the concept of the acquisition of control, **(iii)** the applicable thresholds, **(iv)** the filing requirements and procedure, and **(v)** the possible decisions of the Competition Office.

The purpose of the amendments was the improvement of the harmonization of the Hungarian competition rules with EC Regulation 4064/89 on the control of concentration between undertakings (“**EC Merger Control Regulation**”). The amendment formalizes the previous practice of the Competition Office and in order to enhance legal certainty, the amendments clarified certain concepts used in the practice of the Competition Office.

**1. APPLICATION OF THE HUNGARIAN COMPETITION ACT**

1.1 The Competition Act applies to the market behaviour of natural persons, legal entities and unincorporated economic associations (hereinafter together "undertakings") who are active in the territory of Hungary. Market behaviour and activities which are carried out exclusively abroad, such as take-overs, also fall under the legal scope of the Competition Act, *if the effects of these activities may have an impact in the territory of Hungary.*

1.2 In the case where the concentrations described in the Competition Act involve undertakings domiciled outside of Hungary, the legal commentary as well as the interpretations of the Competition Office suggest that in order for the Competition Act to validly assert extraterritorial jurisdiction, both the acquirer and the target involved in the concentration, as direct participants in the transaction, must have a nexus to Hungary, either in the form of **(i)** control over a business association located in Hungary or export sales to Hungary, and **(ii)** the total amount of the sales revenues must meet the thresholds discussed below.

With respect to concentrations effectuated outside of Hungary, the jurisprudence of the Hungarian Competition Office has established the principle according to which if both concentrating entities have a right of control over Hungarian business associations, such transaction should be deemed as one which may have an impact in the territory of Hungary. However, no jurisprudence has established a principle according to which a concentration pursuant to the Competition Act *could* have an impact in the territory of Hungary *only if either or both concentrating entities had subsidiaries in Hungary*. Therefore, even if the concentrating entities themselves exercise no control over Hungarian business associations, the transaction may qualify as having an impact in Hungary if the concentrating entities both have sales revenues from Hungary.

## 2. ACQUISITION OF CONTROL; CONCEPT OF CONCENTRATION

- 2.1 The Competition Act generally applies if **(i)** undertakings shall merge from two or more previously independent companies, or **(ii)** an undertaking shall merge into another undertaking, or **(iii)** part of an undertaking shall become part of another undertaking which is independent of the first undertaking. In addition, the Competition Act applies in the case where an undertaking or several undertakings shall jointly - directly or indirectly - acquire control over the whole or a part of one or several independent undertakings, or if several independent undertakings establish an undertaking to be controlled by them in which they merge their similar activities, provided that this does not qualify as an agreement restricting competition (Section 23 of the Competition Act).

The amendments attempt to clarify that acquiring control shall be relevant from the point of view of the Competition Act only if the merger occurs between independent undertakings. Thus, any restructuring within the same group of companies should not trigger any notification requirements.

- 2.2 The scope of the application of the Competition Act was further clarified by the amendments by the providing of definitions regarding: **(i)** direct and indirect control, and **(ii)** part of the undertaking.

Pursuant to Section 23 of the Competition Act, the acquisition of **direct control** may be effectuated under different circumstances; **(i)** by way of the acquisition of the majority of shares or quotas (as the ownership interest in a limited liability company (LLC)) representing voting rights or by the acquisition of the majority of voting rights in the controlled undertaking; or **(ii)** even without the acquisition of the above-mentioned majority of shares or quotas, through the granting of a right to nominate the majority of the managing directors of the controlled undertaking; or **(iii)** based on an agreement with other shareholders or quotaholders of the controlled undertaking; or **(iv)** in case where a shareholder or a quotaholder has the *de facto* ability to control the business decisions of the controlled undertaking.

The *de facto* ability to control the business decisions of the controlled undertaking - which was inserted into the Competition Act by the amendments - means circumstances where the control is realized for example by the mutual participation in the decision making bodies of the undertakings or control over the decisions of the undertaking by a minority portion of shares, i.e. when the shareholder with 25% of shares is able to control the undertaking since the remaining 75% of shares is held by a very large number of “independent” shareholders. The aim of introducing such provision was not to broaden the scope of application of the Competition Act, but rather to take into consideration those undertakings under *de facto* control.

On the basis of the practice of the Competition Office, it was necessary to establish the legal definition of **indirect control** which means that an undertaking shall be deemed to have indirect control over another undertaking when the latter is controlled, whether independently or jointly, by one or more undertakings under the control of the former.

- 2.3 Based on the previous practice, the amended Competition Act provides a legal definition

regarding the **part of an undertaking** which means the assets or rights, including clients and customers, that, if acquired, enable the acquiring undertaking to carry out market activities by itself or through the assets and rights at its disposal.

- 2.4 The amendments set forth more precisely when a **temporary acquisition of control** does not qualify as a concentration, by setting a time limit and by further limiting the exercising of the acquirer's rights. Thus, a concentration shall not be deemed to arise where credit institutions, insurance companies, financial holding companies, investment companies or property management companies hold shares on a temporary basis - *up to maximum of one year* - which they have acquired in an undertaking pursuant to the objective to resell them, provided that they do not *exercise control rights or only in such a manner which is indispensable for preparing the disposal* concerning the shares. The one-year period may be extended by the Competition Office pursuant to a request where the undertaking can evidence that the transfer was not possible within one year.

### 3. DEFINITION OF DIRECT AND INDIRECT PARTICIPANTS

For the purposes of the calculation of the thresholds, the turnover of the following entities must be taken into account: **(i)** the direct participants, and **(ii)** the indirect participants.

The following entities qualify as indirect participants: **(a)** the undertakings directly or indirectly controlled by the direct participants; **(b)** the undertakings which control directly or indirectly the direct participants, and **(c)** the undertakings controlled by the indirect participants mentioned under point (b) above, and **(d)** undertakings controlled jointly by 2 or more participants, whether direct or indirect participants.

### 4. THRESHOLDS

- 4.1 In addition, however, the concentration in question is only subject to the approval of the Hungarian Competition Office **(i)** if the aggregate net sales revenues in Hungary of the direct or indirect participant undertakings (as defined above) in the financial year preceding the acquisition exceeds HUF 10 billion (approximately EURO 38.5 million); provided that **(ii)** the net sales revenues from Hungary of the acquired undertaking together with the net sales revenues from Hungary of the business entities which it controls directly or indirectly exceed HUF 500 million or if within the two years preceding the acquisition in question, the acquiring undertaking acquired control over an undertaking the net sales revenues of which exceeded the threshold of HUF 500 million together with the net sales revenues of the newly acquired undertaking.

In my view, with respect to the applicable devaluation of the HUF over the last few years, the thresholds which were established five years ago should have been increased in order not to superfluously increase the workload of the Competition Office.

- 4.2 With regards to the *calculation of the net sales revenues* of undertakings whose corporate headquarters are located outside of Hungary, the net sales revenues generated in the previous business year from goods sold in the territory of Hungary shall be taken into account. Further, the turnover generated between the undertakings concerned or between the parties

involved shall be disregarded for the purposes of calculating the net sales revenue. In respect of the alienation of a part of an undertaking, the net revenue received by the undertaking from the utilization of assets and rights shall be taken into consideration.

## **5. FILING WITH THE HUNGARIAN COMPETITION OFFICE**

- 5.1 In case the above-mentioned thresholds are met, the obtaining of the Competition Office's approval is mandatory. Such agreement relating to the concentration shall only become effective upon the issuance of the approval of the Competition Office. The application for approval should be filed by **(i)** in the case of a merger or amalgamation, the direct participant(s); or **(ii)** in any other cases, the undertaking(s) acquiring control.

An approval application to conclude a merger must be filed with the Competition Office within thirty (30) days from the occurrence of the earliest of the following events: **(i)** the publication of the public invitation to tender; **(ii)** the conclusion of the contract; or **(iii)** the acquisition of the right of control. As opposed to the previous 8-day deadline for filing, the new deadline introduced by the amendments makes it easier for the undertakings to prepare and file a complete application with the Competition Office.

- 5.2 If a transaction is executed without the approval of the Competition Office, a fine may be imposed upon the acquiring undertaking(s) (which shall be responsible for obtaining the approval). The amendment sets the upper limit of the fine as a maximum of 10% of its net sales income realized in the year preceding the transaction. In addition, if the Competition Office acquires knowledge of the transaction and it finds that an approval should have been obtained, it may oblige the acquiring undertaking(s) to sell the acquired quotas or shares, or may even require other measures in order to avoid any negative impact on the Hungarian market.

## **6. TWO-PHASE PROCEDURE IN MERGER CONTROL**

The amendments shortened the period of time for rendering the decision in the procedure started pursuant to the request of the undertaking. Partly following the EU Merger Control Regulation, the amendments introduced a two-phase merger control procedure. The advantage of such model is that undertakings may obtain the approval in a shorter period of time if there is no concern with respect to the effect of the concentration on the relevant market.

The merger control procedure should be finalized within 45 days if **(i)** there is no concentration or the concentration is established only on a temporary basis by a financial enterprise (as set forth previously); **(ii)** the thresholds are not met in respect of the concentration; or **(iii)** the authorization cannot be denied on the basis that the contemplated concentration does not create or increase the dominant position in so far as to cause a detriment to the effective competition on the relevant market.

In any other case, where further investigation is required, the Competition Office shall render its decision within 120 days.

The fee to be paid by the applicant shall be calculated with respect to the phase of the procedure. Upon the submission of the application for approval, a fee of HUF 2,000,000 must be paid. If the Competition Office specifies that certain conditions are to be met for the effectuation of the transaction, an additional fee of HUF 8,000,000 must be paid. If the approval is granted as requested by the applicant, no additional fee must be paid.

## 7. DECISIONS OF THE COMPETITION OFFICE

- 7.1 The Competition Office may not refuse to grant its authorization if the concentration does not create or increase the dominant position in so far as to cause a detriment to the development, maintenance or expansion of effective competition on the relevant market or to a considerable part thereof.

In the interest of reducing the detrimental effects of the concentration, the Competition Office may make its authorization dependent upon the effectuation of certain prior or subsequent conditions; certain obligations as having to sell off certain business units or other assets within a prescribed deadline; or the termination of control over an undertaking that is indirectly involved.

If authorization is conditionally granted pursuant to the fulfillment of any prior condition, it shall become operative once the condition has been satisfied. A conditional authorization pursuant to the fulfillment of any subsequent condition shall become operative when it is granted; however, it shall be cancelled if the condition is not duly satisfied.

- 7.2 The concentrations involve in several cases *agreements which restrict competition* and therefore their exemption would be required. If such restriction is necessary for the realization of the concentration, the authorization rendered in respect of the concentration also covers those restrictions to competition which are necessary for such realization. Thus, no other procedure is necessary in this respect. The Competition Office has previously decided that in case of the transfer of a part of an undertaking or control rights over an undertaking, a non-compete clause may be considered as a justified restriction on competition, if it is restricted in duration and if the scope of the restrictions relates to goods as well as the relevant geographical market (relating to the prior relevant market).