

NEW REGULATIONS IN COMPETITION LAW

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Background

Through Act CXXX VIII of 2000 (the “Act”) passed by the Hungarian Parliament on December 19, 2000, considerable changes were implemented to Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (the “Competition Act”) regarding non-compete agreements, concentration control, filing fees to be paid and certain procedural actions which may be carried out by the Office of Economic Competition (“OEC”). According to the legislative intent, the Act shall improve the application (interpretation) of the competition regulations without substantially changing the existing ones.

Entering into Force

Pursuant to Section 49 (1), the Act came into force as of February 1, 2001, except for the amended regulations with respect to insignificant non-compete agreements concluded by February 1, 2001 for which the amended provisions shall only be applicable as of February 1, 2002. During this one year-period, the parties to the non-compete agreement may accordingly modify their agreement or, if any prohibition is applicable, may request the approval or exemption from the prohibition of the Hungarian Competition Office.

Non-compete Agreements

The Competition Act in lieu with Article 81 (ex Article 85) of Treaty on European Union previously has already generally prohibited non-compete agreements and also specified certain specific prohibitions. Exemptions from the prohibitions are (i) either specified in the Competition Act, or in Government Decrees on certain exempted groups of agreements, i.e. exclusive distribution agreements. Or individual exemption may be requested from the OEC. Insignificant non-compete agreements, the financial impact of which would be considered as minor were already “*ipso iure*” exempted from cartel prohibition, provided that the parties thereto jointly did not possess less than 10 % of the market. One of the most significant provision of the amendment of the Act is that, whereas previously, only the market shares of the competitors itself had to be ascertained, now the market shares of the competitors and of all related companies have to be included. Furthermore, whereas previously all non-compete agreements of minor importance were exempted, according to the new provisions, a non-compete agreement between competitors may fall under the cartel prohibition if it has as its objective the fixing of prices or division of the market.

Concentration Control

Contrary to the previous respective provisions, the Act now clearly provides that in case of a concentration of companies through the acquisition of control, the approval of the Hungarian Competition Office shall be necessary only if the acquisition of control takes place between two or more unrelated companies. Consequently, any acquisition of control between related companies may be carried out without the approval of the Hungarian Competition Office.

The modification to the Act implements the so-called “de facto” control concept as a means of directly controlling a company. For example, even a minor shareholder (e.g., 25%) may have “de facto” or actual control if the remaining 75% of shares are divided among small shareholders who would be unable to coordinate their voting power. It should be noted, however, that even in lack of clear underlying regulation the “de facto” control concept previously has already been implemented as well in the practice of the OEC.

The modification to the Act newly defines the term “part of an undertaking” as the whole of such assets and rights, the purchase of which alone or together with the assets and rights of the purchaser is sufficient to carry out business on the respective market. In addition, the Act provides that the profits previously generated by utilizing the sold assets and rights shall be included as well in the profits of the seller company in order to ascertain whether the profits of the seller company exceed the thresholds stipulated in the Competition Act, and therefore requiring the approval of the Hungarian Competition Office.

Filing Fees

With respect to concentration control filings substantial amendments were made with respect to the payment rules and amount of the filing fee. The previous filing fees amounting to HUF 500,000 were increased to HUF 2,000,000 with respect to the approval of the merger/acquisition. A filing fee will not be reimbursed if the Hungarian Competition Office ascertains that no approval is necessary, or if the approval can obviously not be rejected. If the Hungarian Competition Office issues a decision which would depart from the above (because - as the case may be - the approval is bound on certain requirements to be fulfilled or the approval is rejected) an additional amount of HUF 8,000,000 may be requested to be paid by the requesting party.

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