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**THE HUNGARIAN COMPETITION AUTHORITY WILL PUBLISH A NEW
NOTICE ON THE METHOD OF SETTING FINES IN CASES RELATING TO B2B
AND / OR B2C COMMERCIAL COMMUNICATION**

I. Background

The Hungarian Competition Act gives the right to the Hungarian Competition Authority (hereinafter "HCA") to publish notices on the legal practice of the HCA. Based on this rule, the HCA has published numerous notices concerning different topics.

The importance of these notices is especially high when the HCA determines the amount of a fine. This is because the legislation grants a wide discretionary right to the HCA in this respect. Its amount can be insignificant, but it can also be as high as 10 percent of the net turnover of the undertaking. Thus, the HCA has published notices regarding what are the main factors and circumstances it considers when the HCA sets the fine in different types of proceedings. While these notices do not have a binding force, they are important in practice as they show the established practice of the HCA, which is, as a general rule, followed by the authority. If the notice is not followed, the HCA is obliged to justify the reasons for the deviation.

II. The new notice

One of these notices concerns the method of fine setting in B2B and B2C commercial communication related cases (hereinafter the "Notice"). The HCA is currently planning to revise and amend the Notice and has already published a draft version of the new Notice (hereinafter: the "new Notice").

The new Notice will not change the method of setting the fines substantially, but contains important changes and amendments, incorporating significant decisions of the HCA, which were rendered since 2007 when the Notice was published.

A detailed presentation of the new Notice would of course exceed this article, so here we would like to focus on some of the more important or interesting parts.

III. The method of setting the fine

The process to determine the amount of the fine consists of four main steps: **(i)** the first step is determining the initial amount for setting the fine, **(ii)**, then the HCA considers the mitigating and aggravating circumstances as a result of which the base amount of the fine is determined; **(iii)** the base amount may be modified by other factors and circumstances of the case; **(iv)** finally it adjusts the amount of the fine taking into account the maximum amount that may be imposed.

IV. Mitigating and aggravating circumstances and other factors for setting the fine

As a general rule, the initial amount of the fine is based on the amount, which is spent on the unlawful commercial communication. The idea behind this is that the undertaking would at least aim to obtain the price of the advertising as profit when it conducts a marketing campaign.

Then the new Notice lists the mitigating and aggravating circumstances. The list of these is a lot longer and more detailed in the new Notice than in the previous ones. Below are some of the examples of the mitigating and aggravating circumstances and other factors, which are newly introduced or are important from a practical point of view:

An interesting new mitigating condition is if the undertaking operates an advertising compliance program. By that, the HCA acknowledges that even if such compliance program fails sometimes, the efforts to comply with the regulations is a sign of good faith on the part of the undertaking. It is important to note though that not any compliance program would be considered as a mitigating circumstance; a number of conditions have to be fulfilled for that. The most important of these conditions is that independent parties also have to be involved in the compliance check. This independent party can for example be a professional organization or an external counsel.

It will be considered as an aggravating factor if the goods in connection with the unlawful communication was conducted are not widely known on the market yet, and thus the consumers have little experience with them. This is because this information asymmetry could result in more damage to the consumers compared to communications related to goods the consumers and the market are more familiar with.

Even after considering the mitigating and aggravating factors, the HCA can deem the amount of the fine to be too low if it thinks that the fine would not prevent the undertaking from committing infringements in the future. In this case the HCA can impose a higher fine, which it deems proportionate to the infringement.

V. Conclusion

While the final version of the new Notice has not been published yet, it is safe to say that the new Notice is an improvement compared to the previous one and will improve legal certainty by making the decision making process of the HCA more transparent and the possible outcome of a procedure more foreseeable.

This summary is a publication of Szecskay Attorneys at Law intended for guidance purposes only. It should not be regarded as legal advice or a legal opinion. Should you have any legal questions on a specific matter or require more information, please contact our colleagues on the contact details below:

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