

AMENDMENTS TO THE HUNGARIAN COMPETITION ACT

This briefing provides a summary of the amendments to the Hungarian Competition Act¹ ("New Rules"), with particular emphasis on the contemplated amendments of the Hungarian merger control rules and private enforcement of competition law. Certain changes are also made regarding leniency applications and fines.

The New Rules were promulgated on 15 December 2016, and most of them will take effect on 15 January 2017.

1. MERGER CONTROL

The new merger control rules will be applicable to concentrations if the change of control takes effect following the entry into force of the New Rules. **Therefore, all deals (including signed deals!) expected to close during or after January 2017 may be caught by the New Rules and should be reviewed in light of the New Rules.**

New thresholds

Certain merger notification thresholds have been raised. According to the New Rules, the requirement for prior approval from the Hungarian Competition Office ("HCO") applies to a concentration where:

- a) the undertakings concerned have a combined turnover that exceeds HUF 15 billion (approximately €48 million) (unchanged from the previous rules); and
- b) each of at least two groups of undertakings (out of all groups of undertakings concerned) has a turnover in excess of HUF 1 billion (approximately €3.2 million) (increased from the previous threshold of HUF 500 million (approximately €1.61 million)).

New HUF 5 billion threshold and self-assessment. Concentrations regarding which it is **not** apparent that the concentration would **not** result in a considerable reduction of competition in the relevant market will be notifiable if the combined turnover of the participants exceeds HUF 5 billion (approximately €16.1 million). If such a concentration is not notified the HCO may launch a merger control procedure *ex-officio* within 6 months from the implementation of the concentration. Note that the sales turnover of Hungarian entities that is generated outside Hungary will no longer be relevant for turnover threshold calculation.

Introducing notification-based and ex officio merger control proceedings

Until now, the merger control proceedings were launched on application. This will be replaced with a system consisting of

- a) an 8-day initial notification phase, at the end of which HCO either issues a certificate that a detailed review is not necessary; or
- b) launches the actual simplified (Phase I) or normal (Phase II) merger control proceedings (taking 30 days or 4 months, as per the current system).

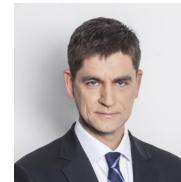
The current filing fees will be adapted to the new system. The fee payable for the initial notification (HUF 1 million, approx. EUR 3,200) will be set against the fees payable for simplified (Phase I) proceedings (additional HUF 3 million, approx. EUR 9,700) or normal (Phase II) proceedings are launched (additional HUF 12 million, approx. EUR 52,000).

The rationale for this amendment is to reduce the administrative burden on the HCO and to accelerate the proceedings. Under the new regime, concentrations which do not lead to any competition concerns could be implemented 8 calendar days after notification. However, in more complicated cases, the standard review process will in practice be prolonged by 8 days.

Dawn raids in merger cases

The circumstances in which the HCO may conduct dawn raids is extended as, with the authorization of the court, the HCO is entitled to conduct site inspections at the premises of undertakings concerned in a concentration. Pursuant to the reasoning of the legislator, this should result in the improvement of the quality of data provided by the undertakings and the effectiveness of the proceedings.

¹ Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition



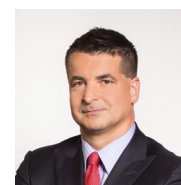
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2. PRIVATE ENFORCEMENT OF COMPETITION LAW

On 26 November 2014, the European Parliament and the Council adopted a “directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union” (“**Directive**”)² which sets out certain rules necessary to ensure that anyone who has suffered damage caused by an infringement of competition law by an undertaking can effectively exercise the right to claim full compensation for that harm from that undertaking. Within the framework of the New Rules, the Hungarian legislator implements the rules of the Directive into the national law. Since the New Rules do not contain any significant deviation from the Directive, we summarize below the main items of the New Rules which are based on the provisions of the Directive. Some of these provisions amending substantive laws will become applicable for claims relating to anti-competitive conduct performed after the date the New Rules entered into force. The procedural law related provisions will be applicable to lawsuits filed after 26 December 2014 (the day the Directive entered into force).

Infringement of competition law

The New Rules define competition law infringement in a way that it applies not only to the infringement of Articles 101 and 102 of TFEU, but also to infringements of Articles 11 and 21 of the Hungarian Competition Act (i.e. cartel and abuse of a dominant position).

Right to full compensation

The New Rules ensure that any natural or legal person who has suffered damage as a result of an infringement of competition law is able to claim full compensation for that damage.

Liability for the damage caused by an infringement of competition law

The New Rules clarify that any natural or legal person who has suffered damage by an infringement of competition law is entitled to claim full compensation according to the general rules of non-contractual liability set out in the Hungarian Civil Code.

Potential claimants

Actions for damages can be brought not only by those who purchased goods or services from the infringer directly but also by purchasers further down the supply chain (i.e. indirect purchasers). For this purpose, the New Rules also contain the definition of direct and indirect purchasers.

Joint and several liability

The New Rules ensure that the undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the damage caused as a result of the competition law infringement.

Effect of the decision of the HCO or the European Commission

If an infringement of competition law has been found by a final decision of the HCO or the European Commission, or by the Hungarian or European review court, it is deemed to be irrefutably established for the purposes of an action for damages brought before the Hungarian courts and the courts are bound by those decisions.

In case of establishing an infringement by a final decision of a competition authority or a review court of a Member State other than Hungary, there is a rebuttable presumption that – until proven otherwise – the behaviour took place and was illegal.

10% presumption of the price distortion

The New Rules maintain the rebuttable presumption already set out in the Hungarian Competition Act regarding the price distortion which establishes that – until proven otherwise – the cartel infringement distorted the price to the extent of 10%. The New Rules broaden the definition of the price which will include any consideration provided under any legal title.

Limitation period

The limitation period commences when the competition law infringement has ceased and the claimant knows, or can reasonably be expected to know:

² Directive 2014/104/EU

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- a) of the behaviour and the fact that it constitutes a competition law infringement;
- b) of the fact that the infringement caused damage to it, and
- c) the identity of the infringer.

If a European competition authority launches a proceeding in connection with the alleged infringement, the limitation period is suspended as from the launch of the proceedings until one year after the infringement decision - rendered by a competition authority or a review court - has become final.

Other provisions

The New Rules - in accordance with the Directive - also establish special provisions regarding - amongst others - the passing-on of overcharges, penalties, disclosure of evidence or the cooperation of the HCO.

3. OTHER AMENDMENTS

Leniency

The New Rules extend the scope of the applicability of leniency. Accordingly, a request for leniency could be submitted not only in case of horizontal agreements but in case of vertical agreements aiming at, directly or indirectly, fixing purchase or resale prices.

Reducing fines

In case of cartel or an abuse of a dominant position, if an undertaking concerned acknowledges their involvement in the competition law infringement and agrees to settle the case, their fine may be reduced up to 30% instead of the current 10%.

4. CONCLUSION

The New Rules introduce important changes which need to be taken into account by market participants, both in relation to future transactions and conduct and also, in certain cases, in relation to past and current situations.

The HCO has opened a consultation on the practical implementation of the New Rules, which will hopefully result in the procedure becoming simpler and more user friendly. The HCO's new right to initiate a review of all deals closed (implemented) after the date the New Rules come into effect (15 January 2017) in the 6 months following such closing makes it necessary to review any merger control assessment made recently for transactions which have not yet closed. In future it will be necessary to consider the advisability of notifying transactions to the HCO if they exceed the HUF 5 billion threshold, in order to limit the potential 'deal uncertainty' created by this new provision.

Should you have any questions, please do not hesitate to contact us.

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