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## 2012 WINTER/SPRING COMPETITION NEWSLETTER

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### 1) Introduction

The Hungarian competition law scene has been defined by three major recent competition policy / enforcement initiatives: first, the Hungarian Competition Authority ("GVH") undertook a major reform of its merger control procedure, second, the GVH introduced new guidelines on the setting of fines in antitrust cases, and third, the GVH changed its own structure by establishing the Merger Control Unit as well as the Antitrust Unit. We will shortly introduce and evaluate each of these below.

### 2) Merger control procedural reform

Based on a consultation with public stakeholders, the GVH decided to undertake a reform of its merger control procedure, as a result of which, in February 2012 the GVH introduced

- a new merger notification form that shall be used in all merger filings submitted after February 2012, and
- the possibility for informal consultations with the GVH prior to and during the merger control procedure.

The new merger notification form is divided into two parts. In more simple merger cases it is sufficient to submit only the first part of the notification form. The questions here are limited to the description of the transaction, the parties' ownership structure and their activities in Hungary. In contrast to the former notification form, there is no need to provide e.g. a customer and supplier list, a detailed description of the market and the expected changes as a result of the merger or to estimate competitors' market shares. These questions are now contained in the second part of the notification form, which shall only be answered in more complicated cases, ie. if (i) there is an overlap between the parties' activities and the combined market share of the companies reaches 15% on this market or (ii) if there is a (potential) vertical relationship between the parties and the parties' combined market share reaches 20% on both the downstream and the upstream market.

Furthermore, the parties to a merger now have a more formalized possibility to approach the GVH prior to the filing of the notification and start an informal consultation with the GVH. The scope/aim of the consultation procedure may include, inter alia, the existence of a notification obligation, questions as regards the content of the notification form, or, at a later stage, following notification, the additional questions posed by the GVH, the competition concerns raised by the GVH, the possible remedies etc. The informal consultation procedure is treated as highly confidential: the GVH will not record and/or prepare formal minutes of the meetings and the parties may at any time decide to stop the informal consultation without entailing any negative consequence.

### 3) New guidelines on the setting of fines in antitrust cases

The GVH – following a public consultation similar to the merger control reform - issued new guidelines on the setting of fines in antitrust cases, i.e. those relating to anti-competitive agreements or abuses of a dominant position (both under Hungarian and EU competition law). The GVH's earlier guidelines were withdrawn in 2009 due to a series of negative rulings by the Court of Appeal of Budapest. These negative rulings, were, however, later mainly overruled by the Hungarian Supreme Court, which therefore paved the way for the introduction of new guidance by the GVH. The new guidelines resemble - but are in significant aspects different from - the European Commission's 2006 guidelines on the method of setting fines. The guidelines establish a two step process based on a relatively fixed, mathematical calculation of various relevant factors:

- first, the GVH establishes the basic amount of the fine, and
- second, it corrects such basic amount with further relevant factors.

As to the first element, the establishment of the basic amount of the fine is generally the most decisive feature of the final calculation: the GVH calculates this by multiplying 10 % the "relevant turnover" with the "relevant points" (which range from 1 to 100). As a result, in the most serious case (resulting in 100 points), the basic amount of the fine will be equal to the "relevant turnover" itself. The "relevant turnover" for a given undertaking is defined as the turnover achieved by that undertaking from the market affected by the infringement in the course of the entire duration of the infringement (a notable exception is for infringements affecting tenders (typically: bid-rigging cases), where the relevant turnover is defined as three times the value of the affected tender). The "relevant points" are given on the basis of three main factors:

- the infringement's perceived threat to competition ("hard core" cartels, such as horizontal price-fixing and market sharing regarded as the highest threat with max. 30 points),
- the effect of the infringement on the market (max. 30 points), and
- the subjective attitude of the undertaking concerned (max. 40 points).

In the second step, the GVH corrects the basic amount by six specific factors, not all of which are necessarily applicable in the given case. These are the following:

- the repeated nature of the infringement,
- any specific advantages achieved by the given undertaking from the infringement,
- specific increase for deterrence,
- application of the statutory 10 % turnover maximum,
- application of the leniency policy, and
- inability to pay.

From the above six factors, an important addition (when compared to the earlier, withdrawn guidelines) is the emphasis on deterrence. Similarly to the European Commission, the GVH is now entitled to increase the fine on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates. A further important novelty is the express possibility to take into account financial hardship in exceptional cases, again, very similarly to the European Commission's considerations in this respect. Finally, it is to be noted that when the GVH checks the statutory 10 % turnover maximum, it makes its check not only in respect of the given company / legal entity being subject to the investigation, but rather of the entire company group concerned.

#### 4) Structural changes at the GVH

As of 1 March 2012, two entirely new units have been established at the GVH: the Merger Control Unit as well as the Antitrust Unit. These new units in fact replace the former Financial Services, Production and Services and Network Industries units of the GVH.

The establishment of the Merger Control Unit reflects the changes to the merger notification form and is aimed at increasing the speed, efficiency and quality of the merger control related tasks of the GVH, in particular with a view to facilitating the expected increase in pre-notification discussions with the parties. The establishment of the Antitrust Unit is to concentrate all antitrust related activities of the GVH (excluding "hard core" cartel activities, which are dealt with by the specialised cartel unit) in one single structural sub-entity in order to ensure a unified competition policy approach in all cases across the board. As a result, the case-handlers of this unit will be entrusted with the task of investigating in all specific antitrust proceedings (excluding cartel proceedings) and sectoral inquiries, while it would still be for the Competition Council (a body independent from the units of the GVH, but structurally still integrated within the GVH), to decide on the merits of the case.

#### 5) Oppenheim comment

- The reform of the merger control procedure – especially the possibility to use a short form – could indeed significantly reduce the administrative burden on the parties concerned and could result in a better allocation of resources by the GVH. It is therefore clearly a welcome development. At the same time, it remains to be seen how the new procedural rules can be implemented in practice, especially since in the case of more complicated cases, the new notification form appears to be far more comprehensive than its predecessor (requiring a more detailed description of the affected markets, the parties' pricing policy, etc.). The parties would therefore have to proceed with utmost care when answering these questions to reduce any potential anti-trust risks.
- The new fining guidelines are also welcome, as they are expected to provide highly awaited legal certainty to any party already engaged in competition proceedings or any undertaking wishing to have an advance assessment of competition law enforcement risks (for example in the course of an internal compliance exercise). Nevertheless, an important feature of the guidelines is that they are not binding "acts of law" within the Hungarian legal system and therefore it is still not entirely clear as to what extent these are binding on the GVH itself. Although the GVH states in the guidelines that it would only deviate from the methodology stated therein in "exceptional cases", it remains to be seen in practice how seriously the GVH could be "held accountable" for any such deviations (i.e. legally speaking whether and to what extent Hungarian courts would protect the legitimate expectations of parties in this respect).
- A further contentious point in the new fining guidelines is the apparent "automatism" by which the turnover of company groups is taken into account – as opposed to the turnover of specific subsidiaries under investigation – when checking the 10% statutory ceiling. It is still unclear – and in fact currently being litigated – whether the GVH may automatically reach beyond the turnover of the given subsidiary or whether this can only be done in case certain extra procedural and substantive conditions are fulfilled (e.g. those similar to the respective European law rules on parental liability).

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