
2015 SUMMER COMPETITION NEWSLETTER

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1) Introduction

The Hungarian Parliament adopted a new amendment to the Hungarian Competition Act (“HCA Amendment”), which mostly contain fine-tuning measures after the significant overhaul of the procedural regime back in 2013. The HCA Amendment also corrects a previous Hungarian exemption pertaining to the agricultural sector and introduces the possibility of a warning by the Hungarian Competition Authority (“GVH”) (instead of the outright imposition of a fine) for SMEs who commit a competition law infringement for the first time.

The HCA Amendment enters into force in June 2015 and will be also applicable in ongoing proceedings (with the exception of the agriculture related provisions, which only enter into force as of September 2015).

2) Agricultural sector back under scrutiny

Back in 2012, a statutory amendment was adopted by the Hungarian Parliament in order to derail an investigation of the GVH against the so-called “*watermelon cartel*” (a classical example of “issue-legislation”). That amendment stated that, upon approval of the Minister, a restrictive agreement in the agricultural sector may be exempt from the prohibition of anti-competitive agreements under Hungarian competition law and in such cases no fine can be imposed on the given agreement (even if it was contrary to EU law). A direct effect of this amendment was that the GVH effectively had to close its investigation into the “*watermelon cartel*” and that the GVH initiated no further investigations into the agricultural sector ever since.

The European Commission, however, put into question the conformity of the above amendments with EU law and made steps towards the initiation of an infringement procedure against Hungary. The European Commission was particularly concerned by the provision that the GVH was not able to act freely under EU competition law, and that it was deprived of the possibility to impose a fine for an infringement of EU law. The HCA Amendment now settles this matter, as the provisions on agriculture are amended in a way to once again allow the GVH to impose sanctions (including fines) concerning any arrangement in this sector if such arrangement is contrary to EU law. The HCA Amendment also made clear that it is up to the GVH to decide whether EU law is applicable and if so, then to proceed also under EU law.

“the GVH is once again allowed to impose sanctions (including fines) for any arrangement in the Hungarian agricultural sector that is contrary to EU law”

3) Compliance program / warning as a sanction for SMEs?

Before the GVH, particularly in unfair commercial practices cases, the argument was often put forward by the parties that according to the Hungarian SME Act, any regulatory inspections conducted against SMEs may not lead to a fine in case of the first infringement, but merely to a warning directed against the given SME party. The GVH, however, consistently refused these arguments, which position was also endorsed by the courts. Now, the HCA Amendment attempts to introduce a compromise: it provides the possibility for the GVH to use merely a “warning” when closing GVH proceedings against SMEs who commit an infringement for the first time, but without making this an “obligation” for the GVH.

An even more important special feature of the HCA Amendment is that in case such a “warning” is used by the GVH, then the GVH is also entitled to oblige the given SME to set up internal processes in order to ensure conformity with competition laws and to prevent any further wrongdoing (essentially: a competition compliance program).

4) Procedural fine-tuning

Access to file

Certain rules concerning access to leniency and settlement documents introduced in the 2013 amendments proved to be overly cumbersome. According to the HCA Amendment, the GVH can now rule on the access to file request by one party without consulting the party that submitted the document in question (and the ruling of the GVH in this respect would not be subject to separate judicial review). These changes could speed up the access to file process to a great extent.

Mergers

The express suspension prohibition was introduced by the 2013 amendments. The HCA Amendment now complements and clarifies the exceptions from this suspension prohibition, i.e. where an authorisation to exercise the right to control before clearance appears necessary. Under the amended rules there is a detailed process as to how and when such request can be submitted and what kind of reasoning it should be accompanied with (including the method with which control would be exercised and the expected effects of it).

The HCA Amendment also makes it clear – after some uncertainty created by the 2013 amendments – that the notification form for a concentration can only be submitted to the GVH after the triggering event for the concentration (the publication of the public invitation to tender, the conclusion of the relevant contract, or otherwise the acquisition of control). This entails in practice that there is no possibility to notify a merger simply on the basis of the existence of good faith negotiations (as opposed to the European merger control regime).

Costs of the procedure

The HCA Amendment also extends the general rule concerning the payment of the procedural costs (i.e. that the party which committed an infringement shall bear such costs) to commitment proceedings: from now on, if a party makes a commitment, such party shall also be liable for costs despite the fact that no infringement is established by the GVH.

5) Oppenheim comments

- The possibility of the GVH to once again freely review arrangements in the agricultural sector is a very significant development in the field of Hungarian competition law. It remains to be seen, however, whether and to what extent the GVH will take an active approach this area. It is, for example, possible that the GVH launches smaller cases to test the waters and, if such cases prove to be successful, then to initiate more large-scale investigations. Companies and associations active in this sector are therefore strongly advised to carefully review any

arrangements that may be relevant from a competition law perspective in order to mitigate and control any risks stemming from GVH investigations.

- The GVH's power to prescribe a competition compliance program as a "sanction" for an infringement in case of a first-time SME infringer is an entirely novel feature in Hungarian competition law. It is a welcome development that the GVH will now have the opportunity to spread message of competition compliance to SMEs via such a unique and direct tool. It remains, however, to be seen how often such special sanction will be actually applied and how would such a compliance program look like in practice. It is also an interesting question if a SME is found to be a repeat offender (despite having been obliged to apply a competition compliance program for the first time), then the existence (and ineffectiveness) of such a program could be regarded as an aggravating factor by the GVH.

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