

COMPETITION NEWSLETTER

2016 WINTER

1. Introduction
2. Merger control: increased thresholds, new notification system
3. Private enforcement: compliance with the EU damages directive
4. Miscellaneous matters (settlements and leniency)
5. Oppenheim comment

1. INTRODUCTION

Last week, the Hungarian Parliament adopted a new amendment to the Hungarian Competition Act (“**HCA Amendment**”), which entails a major overhaul of the Hungarian competition regime, especially in terms of merger control, private enforcement and some miscellaneous matters (including settlements and leniency). We will detail the main changes below.

2. MERGER CONTROL: INCREASED THRESHOLDS, NEW NOTIFICATION SYSTEM

Increase of the second turnover threshold

According to the existing rule in the Hungarian Competition Act (“HCA”), a merger has to be approved by the Hungarian Competition Authority (“GVH”) if

- i. the aggregated net turnover of all undertakings concerned achieved in Hungary exceeded HUF 15 billion in the previous business year, and
- ii. there are at least two groups of undertakings concerned, the net turnover of which from Hungary exceeded HUF 500 million each in the previous business year.

The HCA Amendment has now increased this second, HUF 500 million threshold to HUF 1 billion, meaning that an approval by the GVH is only required if at least two groups of undertakings concerned had a net turnover from Hungary in excess of HUF 1 billion each.

Introduction of a new, special notification system

In addition to the above change, the HCA Amendment also introduces **a rather special notification system for those mergers that do not reach the above “standard” thresholds**. The aim of the legislator with such system was to capture mergers below the “standard” thresholds in those markets where competition problems are nevertheless present and thereby provide an opportunity for the GVH to intervene.

“the aim of the legislator was to capture mergers below the “standard” thresholds in those markets where competition problems are nevertheless present”

Such intervention, however, is limited in a number of ways:

1. No notification obligation exists at all for those mergers, where the aggregate net turnover of all undertakings concerned from Hungary did not exceed HUF 5 billion in the previous business year.
2. The notification obligation to the GVH exists for all those concentrations where (i) the above 5 billion threshold is met, but where (i) it is not obvious that the concentration would not significantly impede effective competition.
3. Very importantly, the **suspension obligation does not apply for these concentrations**, ie the GVH cannot impose sanctions on the parties for closing their transaction even if the GVH finally decides to intervene.
4. Finally, it is also a significant feature of the system that the GVH may only initiate proceedings to review a concentration falling under this special notification system within **6 months** after the implementation of the given concentration.

Procedural changes – faster procedure in very simple cases

The HCA Amendment also introduces a **new “fast track” procedure**, whereby mergers which “obviously” do not significantly impede effective competition will be cleared within **8 calendar days**. The fee for such “fast track” procedure would also be significantly lowered (and will be set at HUF 1 million). A formal merger control procedure will only be initiated in cases where- on the basis of the notification- such impediment on effective competition cannot be obviously excluded.

Entry into force

The new thresholds (both the increased second threshold as well as the new conditional mandatory notification system) will be applicable to concentrations that take place on the 31st day following the entry into force of the relevant provisions of the HCA Amendment, ie. early January 2017. This means that, in the most typical case, if the relevant transaction document (typically, the share sale and purchase agreement) is signed after this date, the HCA Amendment’s new rules would already be applicable.

3. PRIVATE ENFORCEMENT: COMPLIANCE WITH THE EU DAMAGES DIRECTIVE

The HCA Amendment’s other main **aim was to harmonise Hungarian law with the EU Private Damages Directive** by introducing special rules into the HCA. The HCA Amendment’s new rules basically provide for a special and rather complex regime for competition private damages cases both in terms of their procedure as well as in terms of their substance (ie by way of deviation from the general rules of Hungarian civil procedure and Hungarian civil law). The key features of the new regime are as follows:

1. Hungarian law is based on the principle of full compensation, to which all injured parties should be entitled to (ie including direct and indirect purchasers, consumers, etc).
2. A notable feature is that the special Hungarian „10% presumption” remains, ie in case of cartels, the plaintiff may rely on a rebuttable presumption that the infringement had a 10% effect on the price applied by the cartel.
3. The HCA Amendment clarifies that a defendant may very well rely on the passing-on defence. At the same time, it will bear the burden of proof to show that such passing on indeed occurred. The HCA Amendment in this respect introduces a further presumption of passing-on to an indirect purchaser, provided the presence of certain additional conditions can be shown.
4. Interestingly, the HCA Amendment also makes it possible for the court is to **ask the GVH** about the existence / extent of damages in the given case (the GVH, however, is not obliged to respond and its assessment is not binding on the court),
5. Special rules will apply for **damages caused by multiple defendants**, in particular, SMEs as defendants may be afforded more favourable treatment.
6. Although under the law of Hungarian civil procedure, the burden of proof remains on the plaintiff to prove the defendant’s liability in damages (with the exception of the 10% presumption as stated above), certain new rules are introduced on disclosure, making it possible for the court to order any other party to disclose documents, provided such documents are not in the possession of the party requesting **disclosure** and they would be relevant for the adjudication of the private damages claim. The court may order disclosure only to certain, precisely defined sets of evidence, to the extent this is absolutely necessary and also with a view to balancing the interests of the opposing parties. Non-compliance with a disclosure order will be subject to the imposition of a procedural fine by the court.

4. MISCELLANEOUS MATTERS (SETTLEMENTS AND LENIENCY)

1. The HCA Amendment also changes the current Hungarian leniency rules, by **allowing an application for leniency also in case of vertical price-fixing arrangements** (but not for any other categories of vertical agreements).
2. Furthermore, the HCA Amendments now allows the GVH to conduct unannounced inspections (“**dawn raids**”) also in connection with **merger cases**, while this was previously reserved for cartel and abuse of dominance matters.
3. Finally, the HCA Amendment also changes the **settlement** rules in the GVH proceedings. With a view to the GVH’s experience on the effectiveness of the settlement proceedings, the legislator now mandated the GVH to offer an increased percentage for the reduction of the fine: namely, the GVH may reduce the fine on a company engaged in settlement discussions with a percentage **between 10 and 30 percent** (as opposed to the previous 10% rule).

5. OPPENHEIM COMMENTS

- The changes to the Hungarian merger regime are significant. Business will very much welcome the “fast track” procedure (and the reduced filing fee) in the most straightforward cases. At the same time, businesses would have to use utmost care in case of any merger falling under the new special notification system (ie any merger above the HUF 5 billion “de minimis” threshold, but not falling under the “standard” notification thresholds). Although no suspension obligation applies to such special cases, the sword of Damocles may still hang over the head of the parties for six months after closing in the form of a possible “ex post” GVH review proceedings.

As a result, merging parties are advised to undertake at least a cursory self-assessment to see whether the impediment to competition is “obvious” in the given case, ie whether there is a reasonable chance for the GVH to intervene. In a number of cases, this self-assessment could be relatively easy to carry out. However, in markets where there is no clear past

practice by the GVH or in case of foreign-to-foreign mergers (where it is difficult to foresee whether the GVH would have an appetite to intervene), this could be more difficult.

- The changes in private enforcement were to be expected and it is a clearly favourable development that from now on, Hungarian private enforcement rules would also be part and parcel of the overall European framework. In this light, it would be particularly interesting to see if the HCA Amendment will result in a growth in the use of the Hungarian 10% presumption of cartel damages, ie if due to a harmonised European framework, Hungary will be selected as a particularly favourable forum to pursue competition damages. Certainly, this will also very much depend on the subsequent practice of the Hungarian civil courts applying the new rules.
- In terms of the settlement provisions, the possibility for the GVH to award a much higher reduction of the fine (up to 30%) gives both the businesses involved and the GVH a much greater room to manoeuvre. It will be up to the GVH to develop in its case-law and soft law instruments the relevant conditions and characteristics for such a reduction.

FURTHER INFORMATION

Gábor Fejes, LLM

Phone: +36 1 486 22 22

E-mail: gabor.fejes@oppenheimlegal.com

Zoltán Marosi, LLM

Phone: +36 1 486 22 25

E-mail: zoltan.marosi@oppenheimlegal.com