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GIDE LOYRETTE NOUEL

newsletter

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COMPETITION LAW: FOCUS ON THE COMPETITION ACT

Important changes to the Competition Act

A recently adopted bill will bring significant changes to Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (the "Competition Act"). The most important modifications among the large number of amendments introduced are briefly presented below.

Merger control

Several amendments were made to the provisions on merger control. From a practical point of view, the most significant change concerns the control exercised by the buyer over the merging party prior to the clearance of the merger by the Hungarian Competition Office ("HCO").

Pursuant to the provisions currently in force, the buyer may exercise its controlling rights over the merging party to the extent necessary to ensure the normal course of business prior to the merger clearance. With the entry into force of the amendment, however, no control shall be exercised over the merging company during this period, unless the HCO gives its approval.

The HCO shall give its consent upon request of the buyer, after having examined the circumstances of the case. The procedural deadline open for the HCO to decide upon the merger clearance shall be reduced to 30 days from 45 days concerning Phase 1 procedures. The full Phase 2 review period remains unchanged at 4 months.

However according to a new provision, if a merger is qualified by the Government as being of strategic importance for the national economy, such transaction will be exempted from the merger clearance procedure.

Besides the above, a number of other issues were also amended, such as the definitions of direct control and of the participants to the merger, as well as the method for calculating the fine in case of failure to notify the merger.

Advertisement law

Provisions on unfair and comparative advertising shall be transferred from Act XLVIII of 2008 on advertising to the Competition Act. This modification aims at simplifying the use of the legislation relating to the competition law issues of advertisements.

Protection of business secret and consultation of documents

Handling of business secrets shall change fundamentally. Pursuant to the new rules, the holder shall now qualify information as a business secret and provide reasons and the data subject. The HCO shall verify whether the conditions of confidential treatment are fulfilled upon receiving requests for document consultation.

The Competition Act shall also be complemented with further rules regarding the consultation of documents. The main principle remains unchanged, meaning that documents pertaining to a case can be consulted following the issuance of the HCO's preliminary opinion. However, upon request of a concerned party, the HCO may authorise it to consult the documents at an earlier stage of the procedure, provided that this does not jeopardize the result of the procedure.

Client-attorney privilege

Documents and letters exchanged between a client and its attorney shall continue to be protected. The protected nature of the document must still be apparent in the document itself. The new terminology of such documents shall be "documents prepared for the purpose of defence".

Market analysis

A new amendment empowers the HCO to carry out market analysis in order to investigate the functioning of markets and to demonstrate market trends. Based on the publicly available information and data gathered by way of questionnaires and consultancies, the HCO shall prepare and publish studies presenting the main findings.

Use of foreign languages during the procedure

Documents drafted in English, French or German may be submitted without their Hungarian translation. This amendment shall significantly reduce the burden to parties engaged in a procedure before the HCO. If, however, several parties are concerned in an on-going case,

they must give their consent to the absence of translation of the documents into Hungarian. In any case, the HCO may at any time order the preparation of a full translation or of an executive summary of a document in Hungarian.

Settlement

The settlement process is a new way to bring antitrust cases to a swift close. Parties involved in cartel and dominant position cases may conclude a settlement with the HCO by declaring having committed the infringement and accepting its legal qualification as determined by the HCO. In return, the HCO shall reduce the amount of the fine by 10%.

It is however to be emphasised that in such case the party shall waive its right of appeal and must not disclose any detail on the settlement process. The declaration can be withdrawn if the preliminary opinion of the HCO differs from the content of the party's declaration (e.g. if the HCO imposes a higher fine).

Commitments

Provisions on commitments remain unchanged; however, a new amendment empowers the HCO to modify the commitments offered by a party.

By means of a commitment, the party agrees to put its behaviour in line with the laws in a way that is beneficial for society as a whole. If the HCO accepts the commitment, there are no longer grounds for action, thus, the HCO shall close the proceeding without establishing infringement. In its decision, however, the HCO makes the commitment binding on the party concerned, meaning that breach of the offered remedy may lead to a fine.

Following the entry into force of the modifications, it will be possible to modify the content of the commitment if, for example, the performance of the commitment originally offered becomes impossible or if its performance is no longer useful for society.

Entry into force of amendments

Except for the provision governing mergers of strategic importance, which has already entered into force, the new provisions will enter into force partly on 1 January 2014 and on 1 July 2014.

CIVIL LAW

The liability of executive officers in light of the new Civil Code

Our firm recently organised a business breakfast where our lawyers presented the various civil and labour law-related issues concerning executive officers' liability with special attention to the rules introduced by the new Civil Code. Please find hereafter a summary of such issues.

It shall first be noted that executive officers' liability may be examined on two separate counts. On the one hand, the "internal" liability refers to the executive officer's liability towards the company, its shareholders, management, etc., while on the other hand, "external" liability refers to liability towards third persons. With regard to the internal relationship between the company and its executive officer, one can differentiate between the contractual liabilities based on an employment contract or a service agreement. Contractual and non-contractual liabilities must be taken into account for the external aspect.

The fundamental change in the new Civil Code concerns the non-contractual external liability of executive officers. Under the general rule currently in force, the company is liable for the actions of its executive officers and third parties who suffered damage due to the actions of an executive officer shall only sue the company. Nevertheless, if the company is required to compensate the third party, it may claim damages from its executive officer. The new Civil Code will introduce, however, the joint and severable liability of the corporate entity and its executive officer towards third parties for damages caused by the executive officer. In other words, third parties will be able to sue the corporate entity and its executive office separately or at the same time.

In light of the above, insurance companies may therefore develop specific products for executive officers, which may be integrated into the executives' compensation packages. Companies may also provide other coverage. In addition, it is worth noting that the company's board may discharge the executive officer from its liability along with the approval of the annual financial statements or at the end of the relationship between the company and the executive officer. This may be revoked if circumstances change or if the accusations were made based upon false or incomplete evidence. Nonetheless, this discharge protects the executive officers only from internal liability.

New rules regarding the registration of pledges over movable assets

Under the current legislation, agreements on pledges over movable assets must be concluded in writing, in the form of a notarial deed. Upon drawing up the deed, the notary has the obligation to enter the pledge into the public register held by the Hungarian Chamber of Notaries and to issue the client an official record together with the drawn up copy of the contract. The public registry allows third parties to obtain information whether or not the respective movable asset is pledged.

With the entry into force of the New Civil Code, the rules on the registration of pledges over movable assets will change significantly. As of 15 March 2014, pledges over movable assets will be registered directly by the contracting parties or their representatives on an electronically-operated register accessible online. The Chamber of Notaries will therefore have to set up the new secured electronic database for this purpose. In order to register a new pledge, the consent of the pledger will be required, while the consent of the pledgee will be necessary for its deletion. Moreover, it is worth noting that the registering party shall be subject to prior registration with the Chamber of Notaries.

The registration fee ensuring the validity of each registration will be established by a separate government decree. The new Civil Code stresses that the new pledge registration shall be applied in connection with sales contracted with retention of ownership, as well as for lease and factoring contracts.

DATA PROTECTION

New whistleblowing legislation from January 2014

Adopted on 14 October 2013, Act CLXV of 2013 on Complaints and Public Interest Disclosure (hereafter the "Whistleblowing Act" or the "Act") will come into force on 1 January 2014, replacing the legislation of 2009 on the Fair Process. The Whistleblowing Act will create new obligations for employers with regard to whistleblowing schemes.

According to the Act, in order to investigate reports, employers will, as of next January, have the obligation to register their whistleblowing scheme with the Hungarian Authority for Data Protection and Freedom of Information (the "NAIH") and publish on their website a detailed description, in Hungarian, of the procedural rules and codes of conduct whose violation may be subject to reporting.

The Act allows the receipt and investigation of reports submitted by any kind of whistleblower (employees, contractors or any other third natural or legal person). The reports must be investigated within 30 days following their submission. This deadline may be extended to a maximum of 3 months in exceptional circumstances. In case the submitted report is anonymous, the investigation is not mandatory for the employer and, in case of investigation, the 30-day deadline cannot be extended.

Regardless of whether the report is submitted on an anonymous basis, the Whistleblowing Act imposes strict confidentiality obligations on the investigators and prohibits the processing of any sensitive data. However, the Act allows the transfer of such personal data to the competent authorities, courts and any entity involved in the investigation within and outside the European Economic Area, provided that the adequacy of the transferred data is ensured and that an agreement is concluded.

The new Data Protection Act infringes the European legislation regarding the independence of the data protection supervisory authority

As we informed our readers in the February edition of our Newsletter in 2012, on 17 January 2012, the European Commission called on Hungary to provide clarification on its new Data Protection Act, which was considered a violation of the EU ruling regarding the independence of the data protection supervisory authority. Three points of the new Act were considered problematic: the premature termination of the previous data protection commissioner's mandate, the lack of consultation of the previous commissioner about the new Act and the power of the President of the Republic and the Prime Minister to terminate the mandate of the president of the new data protection authority at any time at their own discretion.

While maintaining its position, Hungary answered that the premature termination of the commissioner's mandate was related to a whole institutional framework change. It also argued that the independence required of the supervisory authority is to be understood as functional independence, which is not violated in the new Act since neither the President of the Republic nor the Prime Minister are involved in the performance of the authority's missions. Despite Hungary's explanations, the European Commission brought an action against Hungary for failure to fulfil its obligations under EU law.

On 10 December 2013, the Advocate General rendered his opinion. He supports the Commission's position on each of the substantive points raised. In particular, he considers that the independence required of the data protection supervisory authority is not only a functional independence but also implies that the authority is free from any external influence. The mere possibility that the President of the Republic or the Prime Minister might influence the authority is sufficient to lead to a form of obedience by the President of the authority. The Advocate General therefore considers that Hungary is in breach of EU rules.

The EU Commission will presumably follow this position, and consider that the new Data protection Act does not guarantee sufficient independence of the data protection supervisory authority.

Hungary had managed to avoid a previous action from EU relating to its new legislation on media after the government agreed to amend it in response to pressures from the Commission, but it did not calm tensions with the IMF, concerned by the independence of the chair of the Hungarian Central Bank. Even if its forthcoming decision will only have a declaratory effect, a new disagreement on its national legislation with international institutions would not be in Hungary's interest.

EU LAW

Hungarian company MOL did not receive illegal State aid

The European Union's court of first instance has overturned a decision by the European Commission ordering the oil and gas company MOL to pay 122 million euros back to the Hungarian State, corresponding to a discount on mining fees. The amount of mining fees paid by MOL was set in an extension agreement concluded with the Hungarian State in 2005 pursuant to the Hungarian Mining Act. This agreement provided that the fees would not increase for five years, and exempted MOL from the increase in the mining fee resulting from an amendment to the Mining Act dated 2008. In 2009, after conducting investigations, the European Commission had concluded that the combined effect of the 2005 agreement and the 2008 amendment was to confer an unfair advantage on the applicant, and that the advantages enjoyed by MOL should be considered as illegal State aid.

Measures are classified as illegal State aid if they (i) are taken by the State or involve State resources, (ii) are liable to affect trade between Member States, (iii) confer an advantage on the recipient, and (iv) distort or threaten competition. It is apparent from settled case law that measures which, whatever their form, are likely to directly or indirectly favour certain parties, are to be regarded as an unfair economic advantage which the recipient party would not have obtained under normal market conditions. Such measures constitute illegal State aid.

In the MOL case, the Court examined whether the conclusion of the agreement was selective or applicable to any potentially interested operator in a similar situation. The Court followed a reasoning that was different from that of the Commission. It considered that since the criteria laid down by the Mining Act for the conclusion of an extension agreement are objective and applicable to any potentially interested operator which fulfils such criteria, the conclusion of the agreement on the basis of that act did not unfairly favour MOL. The fact that a company is the only party to benefit, in practice, from a State measure does not mean it is subject to selective treatment.

TAX LAW

Corporate income tax changes as of 2014

Self-revision of non-significant errors

If a taxpayer must perform a self-revision for its benefit due to non-significant errors which occurred in previous tax years, then it may decide to take the difference into consideration in the preparation of the tax return for the financial year in which such errors are revealed (the actual financial year), instead of performing self-revision for the tax year in which the error

occurred. In this case, the tax base of the actual financial year should not be increased by the amount of the determined difference.

Easing rules for reported participation

The rules for reported participation are amended in a way that the minimum percentage of participation subject to reporting will be decreased from 30% to 10%, while the deadline for reporting such participation will be extended to 75 days, instead of 60 days under the current legislation.

Restaurant services considered as business expense

The expenses of restaurant services incurred for business entertainment purposes as described by the Personal Income Tax Act will be considered as expenses related to business activities, if a receipt is available and the payment was performed via a credit card or a bank card.

Utilisation of tax losses carried forward

The adopted amendments clarify that in the course of preferential transformation and preferential transfer of assets, profit before tax can be first decreased by tax losses taken over during the tax year, including on the day of the transformation or asset transfer.

Deductible R&D costs of related entities

As of 2014 the corporate income tax base may be decreased by expenses arising from the R&D activity of related entities. The deduction may be applied provided that the related entity provides a declaration indicating the amount of direct expenses and the deductible amount, and that such expenses are directly attributable to the business activity of both the taxpayer and the related entity.

Tax allowances on sponsorship

The deadline for using tax allowances related to sponsoring cinema and performing art organizations, as well as spectacular team sports, is extended from 3 to 6 years following the year in which the sponsorship is granted. In addition, supplementary grants, which were previously applied only to sponsoring spectacular team sports, are to be introduced for sponsorship of cinema and performing arts organizations.

On the basis of the newly adopted regulations, in order to benefit from the tax allowance on sponsorship, the taxpayer will in practice have to perform a supplementary payment to a beneficiary set out in the Act in an amount of at least 75% of the net tax benefits. For example, in the case of performers' sponsorship, the taxpayer may perform the supplementary payment whether to the ministry entitled to grant subsidies (Ministry of human resources) or to the beneficiary organization, depending on the supporter's decision. Supplementary grants do not qualify as costs incurred in the interest of the business upon assessing the corporate income tax base and therefore they should be taken into account as items increasing tax base.

PUBLIC LAW

New rules on tobacco stores

On the basis of the amendment to Government Decree 181/2013 (VI. 7.) on the retail of tobacco products, tobacco products will be removed from the shelves of gasoline stations and grocery stores and tobacco stores operating in hypermarkets with a shopping area exceeding 2,500 sqm must close as of 1 June 2014.

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