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and its results and the circumstances under which the administrative offence was committed. Legal persons are not responsible for an administrative offence if it proves that it made the effort required to prevent a violation of the legal obligation.

**Reforms**

**11.182** Currently, the draft amendment to the Czech Competition Act is in its first reading in the Chamber of Deputies. However, this draft amendment will not affect the provisions of the Czech Competition Act concerning merger control.

Finally, the Czech Competition Office is preparing two updated guidelines – the Notice on Calculation of Turnover and the Notice on Concentration. These two guidelines have been already discussed with the public and they are waiting for issuance.

**Hungary****Merger control issues**

**11.183** Hungary's EU accession and the previous law approximation have resulted in significant changes in Hungarian competition law. As regards merger control issues, the most important impact of the accession is that concentrations subject to notification under Council Regulation No. 139/2004/EC (*'Merger Control Regulation'*) and simultaneously reaching the thresholds stipulated in the Hungarian Act LVII of 1996 on the prohibition of unfair and restrictive market practices (*'Competition Act'*) do not need to be notified to the Hungarian Competition Authority (in Hungarian: Gazdasági Versenyhivatal; 'HCA'). Therefore, the *Competition Act* shall only be applied to concentrations, which fall out of the scope of the *Merger Control Regulation*.

**Concentrations***Concentrations subject to authorisation*

**11.184** According to *section 23(1)* of the *Competition Act*, a concentration between undertakings arises if:

- (a) two or more previously independent undertakings merge or an undertaking is integrated with another or a part of an undertaking becomes part of another undertaking which is independent of the first one;
- (b) an undertaking or more undertakings jointly acquire direct or indirect control over the whole or parts of one or more previously independent undertaking(s);<sup>1</sup>

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- (c) more than one undertaking, which are independent of each other, jointly create an undertaking controlled by them, which is permanently able to perform all the functions of an independent undertaking (full function joint venture).

1 Part of an undertaking means assets or rights, including the clientele of an undertaking, the acquisition of which, solely or together with the assets and rights which are at the disposal of the acquiring undertaking, is sufficient for enabling market activities to be pursued.

*Concentrations not subject to authorisation*

**11.185** Temporary acquisition of control or ownership for a period of one year at the maximum by insurance companies, credit institutions, financial holding companies, holding companies with mixed activities, investment companies or property managing organisations for the purpose of preparing resale shall not qualify as concentrations, provided that they do not exercise their control rights or exercise them only to an extent which is indispensable to the attainment of these objectives. The HCA may extend such one-year period upon request if the undertaking concerned proves that it was not possible to carry out the disposal within one year.

*Establishment of control*

**11.186** As section 23(2) of the *Competition Act* provides, direct control may be established if an undertaking or more undertakings jointly:

- (a) hold more than 50% of the voting rights in another undertaking based on a shareholding interest, or hold more than 50% of the voting rights on a contractual basis, or
- (b) are entitled to elect, designate or revoke the majority of another undertaking's executives, or
- (c) based on an agreement, are entitled to influence significantly another undertaking's decision-making, or
- (d) as a matter of fact, are able to influence significantly another undertaking's decision-making (de facto control).

Indirect control refers to the situation where an undertaking ('A') controls another undertaking ('B') through a third undertaking ('C') that is controlled, either directly or indirectly, by the first undertaking, 'A'.

**Thresholds**

**11.187** The Hungarian merger control system is based on obligatory preliminary authorisation; therefore, a concentration must be notified to the HCA provided that the following conditions are met:

- (a) the aggregate net turnover of:
  - (i) all the groups of undertakings concerned; and

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- (ii) the undertakings jointly controlled by members of the groups of undertakings concerned and other undertakings

exceeded HUF 15 billion (approximately €55.5 million, based on a 270 EUR/HUF exchange rate) in the business year prior to the date of the concentration; and

- (b) the net turnover of each of at least two of the groups of undertakings concerned, together with the net turnover of the undertakings jointly controlled by undertakings members of the respective group of undertakings and other undertakings, exceeded HUF 500 million (approximately EUR 1,85 million, based on a 270 EUR/HUF exchange rate) in the business year prior to the date of the concentration.

It should be noted that in assessing whether the above HUF 500 million threshold is met, concentrations – not subject to authorisation – that took place within a two-year period preceding the concentration concerned between: (a) the group of undertakings acquiring control; and (b) undertakings of the group of undertakings, the controlling powers of which cease as a conclusion of the concentration, shall also be taken into account.

In the course of the calculation of the turnover thresholds, the intra-group company turnover must be ignored. Moreover, in the case of a foreign undertaking, only the turnover generated in Hungary must be taken into account. (For undertakings resident in Hungary, their worldwide turnover shall be taken into account.) The net turnover of undertakings jointly controlled by two or more undertakings shall be apportioned equally to each undertaking having control over them. For the purpose of such apportioning, controlling undertakings which belong to the same group of undertakings shall be deemed to be one single undertaking. For parts of undertakings, the net turnover realised in the preceding year by the use of the assets and rights by the undertaking which sold them shall be taken into account.

In case of insurance companies, investment service providers and funds, credit institutions and financial enterprises, the *Competition Act* stipulates special rules for the replacement of the net turnover, eg for insurance companies, the gross insurance premiums shall be taken into account instead of the net turnover.

### **The rules of the Competition Act on groups of undertakings concerned**

**11.188** According to *section 26(5)* of the *Competition Act*, a group of undertakings concerned consists of the direct participants and the indirect participants.

Direct participants are the acquirer undertaking and the target undertaking.

As *section 26(3)* of the *Competition Act* provides, indirect participants are the other members of the group of undertakings, to which the direct participants belong. An undertaking belongs to the same group of undertakings which:

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- (a) are under the direct or indirect control of it, or
- (b) have direct or indirect control over it, or
- (c) are under the direct or indirect control of the undertakings referred to in point (b) above, or
- (d) are under the joint control of two or more of the undertakings referred to in points (a)–(c) above.

For the meaning of direct and indirect control, please see **11.187** above.

It is also worth mentioning that merger control focuses on the status that comes into existence as a result of the concentration. Therefore, in establishing the indirect participants, the undertakings whose right to control will cease as a result of the concentration, must be left out.

**Notification**

**11.189** If the above thresholds are met, the authorisation of the HCA is required. The notification is statutory and shall be made prior to the merger. The *Competition Act* has extra-territorial effect, the jurisdiction of the HCA is based on the Hungarian sales of the undertakings, ie Hungarian merger control procedure may even take place, if all the participants are foreign undertakings but their Hungarian sales exceed the thresholds mentioned above.

*Responsibility for notification*

**11.190** In the event of merger or integration, the merger control notification shall be filed by the direct participants, while in any other cases, it shall be filed by the party acquiring the part of undertaking or the direct control.

*Timing of notification*

**11.191** The merger control notification must be filed within 30 days of the date of the publication of the takeover bid, the conclusion of the contract for the acquisition or the acquisition of the controlling rights, whichever is the earliest. In contractual relationships, this is typically handled in the manner that the contract is signed but the HCA approval is treated as a condition precedent to the closing of the transaction. The notification shall be submitted by filing the standard fill-in-form published by the HCA together with all necessary attachments [*sections 28(2), 68(2) of the Competition Act*]. The form is available at the website of the HCA, [www.gvh.hu](http://www.gvh.hu). In the form, detailed information is required, inter alia, on the participants, on other interested undertakings (eg suppliers) and on the relevant product(s) and the geographical market.

*Regulatory Aspects of Acquisitions in the EU* **11.195****Procedural issues***Pre-merger consultation*

**11.192** The HCA may be consulted on how to answer the questions of the form (the form requires rather extensive and detailed information). Such pre-notification consultation may help to resolve interpretation problems and to identify the relevant information, but this informal consultation is not part of the official proceedings.

*Simplified and full procedure*

**11.193** According to *section 63(3)(a)* of the *Competition Act*, the concentration must be approved within 45 days if:

- (a) the transaction does not constitute a concentration; or
- (b) based on the net turnover figures of the participants, the thresholds mentioned above are not met; or
- (c) granting authorisation for the concentration may clearly not be refused (simplified procedure). The deadline may be extended by another 20 days.

Otherwise, the decision must be granted within 4 months (full procedure), whereas the deadline may be extended by another two months. If the HCA requires additional information or documents, the time period whilst these are produced must be added to the normal time period of the procedure.

As a general rule, the competition council (in Hungarian: versenytanács) shall pass its decision without holding a hearing. However, each party may request passing the decision with holding a hearing [*section 74(1)* of the *Competition Act*].

*Filing fees*

**11.194** The fee of a merger control procedure is HUF 4 million (approximately EUR 14,800, based on a 270 €/HUF exchange rate) in case of a simplified procedure and HUF 16 million (approximately €59,300, based on a 270 €/HUF exchange rate) if the approval is granted after a full procedure [*section 62* of the *Competition Act*]. The fee of the simplified procedure shall be paid at the time of filing the notification, and, if the case is decided in a full procedure, the additional fee shall be paid following the receipt of the decision of the HCA.

*Sanctions*

**11.195** According to *section 79* of the *Competition Act*, if the responsible participant fails to notify the concentration to the HCA, the HCA may impose a fine of HUF 200,000 (approx €740) per day.

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### *Judicial review*

**11.196** The decision of the HCA may be reviewed by the court. The statement of claim shall be submitted within 30 days of the conveyance of the HCA's decision.

### **Substantive issues**

#### *Dominant position*

**11.197** The latest major modification of the *Competition Act*, effective from 1 June 2009, has introduced the concept of 'significant impediment of effective competition' (the so called SIEC or SLC test), instead of the previous 'dominance test'. According to the *Competition Act*, the HCA shall not deny granting the approval if the concentration does not significantly impede the competition on the relevant market, especially as a result of the creation or strengthening of dominant position on the relevant market. In the course of the procedure, the HCA will have to evaluate the advantages and disadvantages connected to the concentration. The HCA will examine, among others:

- (a) the structure of the relevant market; existing or potential competition on the relevant market; procurement and marketing possibilities; the conditions and the costs of entry into the market and the exit from the market and the technical, economic and legal conditions thereof; the impact of the concentration on the competition on the market;
- (b) the market position and strategy, economic and financial capacity, business conduct, internal and external competitiveness of the participants; and
- (c) the impact of the concentration on the suppliers, business partners and consumers.

As the SIEC test has only been introduced into Hungarian law recently and the HCA applied the new SIEC test in a limited number of cases, the principles of the HCA in interpreting the 'significant impediment of effective competition' cannot be established yet.

#### *Simplified procedure*

**11.198** As mentioned in **11.193** above, if certain conditions are met, the concentration may be approved in a simplified procedure, within 45 days from the filing of the application. The considerations in differentiating between concentrations subject to authorisation in simplified or full procedure are laid down in Notice No. 3/2009 of the president of the HCA and the chairman of the competition council of the HCA. The notice is not binding, its function is to state how the HCA will apply the legal provisions and to explain the factors and considerations used by the HCA when deciding whether to assess an application under simplified or full procedure in respect of concentrations subject to authorisation (ie **11.193(c)** above).

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According to the above notice, the HCA applies the simplified procedure to the following types of concentrations:

- (a) The concentration has no horizontal, vertical or portfolio effects, ie:
  - (i) there is no relevant market on which at least two participating groups of undertakings are active; and
  - (ii) there is no relevant market on which any two participating groups of undertakings are/may be in a supplier – buyer relationship; and
  - (iii) the participating groups of undertakings are in no way (production, distribution, etc.) involved in any activity on the markets of complementary products.

Even if the above conditions are satisfied, the concentration may be assessed in a full procedure, if, as a result of conglomerate effects, the group of undertakings with previously weaker financial status: (a) would substantially reinforce its financial status, (b) would increase its market share to over 30 % on any of the relevant markets, and (c) taking into account the features of the market, there is a reasonable danger that restrictive strategies (eg predatory pricing) might be applied relying on the improved positions.

- (b) The concentration has horizontal and/or vertical and/or portfolio effects; but:
  - (i) there is no relevant market on which the combined market share of the participating groups of undertakings exceeds 20%; and
  - (ii) there is no relevant market connecting any two participating groups of undertakings on which the market share of either the supplier-group or the buyer-group exceeds 25%; and
  - (iii) there is no relevant market affected by portfolio effects on which the market share of any participating groups of undertakings exceeds 25%.
- (c) If the combined market share of the participating groups of undertakings exceeds the 20% threshold mentioned in point (b)(i) above on the relevant market, but the increase of the concentration resulting from the transaction on this relevant market is insignificant, ie:
  - (i) without having regard to the group of undertakings concerned, the market share of which is higher than that of any other group of undertakings concerned on this relevant market, the combined market share of the other groups of undertakings concerned does not exceed 5% on this relevant market; and
  - (ii) on this relevant market, there is a competitor with a market share which is similar to that of the largest participating group of undertakings; and
  - (iii) the concentration may not substantially reduce potential competition as it can be reasonably expected that the shares of undertakings currently having low market shares would not increase to an appreciable extent in the future.

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As the market share of the participating groups of undertaking is a significant issue for the assessment of the above criteria, the definition of the market share, based on unambiguous, objective and verifiable information, is a precondition for the simplified procedure.

#### Special rules

**11.199** Besides the merger control rules described above, there are several other legal rules which may affect the execution of a merger. Without aiming at completeness, the following issues may have importance in connection with a merger:

- (a) The *Capital Market Act* and the *Business Associations Act* stipulate certain notification and disclosure obligations in connection with takeovers.
- (b) There are prior approval and notification requirements relating to the acquisition of interest in investment enterprises, financial institutions and insurance companies, as well as in authorised operators in the energy and natural gas sector.
- (c) If the merger qualifies as employer's legal succession, the rules of the Hungarian Labour Code pertaining to consultation obligation, liability, etc. of the employer shall also be applied.
- (d) The *Media Services and Mass Communication Act*, in order to maintain the varied media market and prevent the creation of information monopolies, contains several restrictions regarding the acquisition of interest in media service companies.
- (e) The *Medicinal Products Distribution Act* prohibits the realization of concentrations in consequence of which a company or group of companies would acquire direct or indirect control over more than 4 pharmacies (or, in case of townships with less than 20,000 residents, more than 3 pharmacies).

#### United States

**11.200** Given the importance of the US market and the fact that many multinational mergers require a consideration of both EU and US merger control legislation, this section sets out the main US regulatory obligations. The principal statutory instrument in the United States for regulating acquisitions or mergers is *section 7* of the *Clayton Act* (15 U.S.C. section 18). *Section 7* forbids the consummation of an acquisition or a merger the effect of which 'may be substantially to lessen competition, or to tend to create a monopoly'. However, in an enforcement action, the United States Department of Justice may also proceed under *section 1* of the *Sherman Act*, which forbids concerted action, namely a 'contract, combination or conspiracy' that is 'in restraint of trade' (15 U.S.C. section 1). This summary will focus primarily on the regulation under *section 7* of the *Clayton Act* as it applies to horizontal mergers, the type of merger most likely to have anti-competitive effects.