Hungary: The Hungarian Competition Office rules on ancillary restraints and provides an overview of its related practice

On 20 December 2012 the Hungarian Competition Office ("HCO") cleared a concentration between two Hungarian companies active in forwarding and logistics (Waberer's Logisztika Kft. ("Waberer") as acquirer and Szemerey Transport Zrt. ("Szemerey") as target) and provided a useful summary of the HCO's attitude to ancillary restraints.

In the notified transaction Waberer acquired 75%+1 of the votes in Szemerey (which resulted in Waberer's sole control in Szemerey), while the seller, Mr. Lóránd Szemerey, kept 25%-1 votes in Szemerey and acquired a 40% stake in Waberer.

The parties to the concentration also agreed that for a period of three years after the alienation of Mr. Lóránd Szemerey's minority shareholding, Mr. Szemerey's close relatives and companies controlled by Mr. Lóránd Szemerey shall not be entitled to carry out logistics and forwarding activities in competition with that of Waberer and Szemerey without the prior written consent of Waberer International Zrt., the majority shareholder of Waberer.

Due to the low market shares of Waberer and Szemerey on the relevant markets, the HCO cleared the transaction in simplified proceedings.

In addition, in the decision the HCO reviewed its historic and recent practice as regards ancillary restraints relating to concentrations, as follows:

First, the HCO made it clear that in accordance with the European Commission's practice, when reviewing the ancillary restrictions relating to the concentration, it will not decide whether such restriction complies with competition law. In this regard, the HCO highlighted that within the meaning of the Hungarian Competition Act (Act LVII of 1996) ancillary restrictions will be deemed as such if they are necessary for the implementation of the concentration, i.e. the concentration could not be reasonably carried out without such restriction (see HCO decision no. Vj-135/2005).

The HCO also noted that if the ancillary restriction takes the form of a non-compete undertaking by the seller, the scope of such restriction must be limited in time and must not extend beyond the operation of the target as regards product scope and geographical scope (see HCO decision no. Vj-19/1999). Finally, the HCO indicated that the duration of an ancillary restriction will be automatically accepted by the HCO if it does not extend beyond three years. A longer period can be permitted only exceptionally, if the life-cycle of the relevant product is relatively long and customer loyalty is significant (see HCO decisions Vj-57/2002, Vj-94/2003, Vj-132/2005).

Next, the HCO provided some guidelines for the participants to assess whether the ancillary restriction in the relevant case meets the requirements of the Competition Act due to the fact that contrary to the previous cases before the HCO, the relevant case involved the transfer of sole control in a manner that the seller maintained a minority shareholding in the target.

The HCO deemed that it was necessary to assess whether (a) a non-compete obligation can lawfully be agreed if the minority shareholding in the target exceeds three years, and (b) whether a non-compete obligation can lawfully extend in time beyond the alienation of the minority shareholding in the target.

The HCO deemed that the HCO's practice thus far has acknowledged a restriction that prevented the seller from engaging in a competing activity within three years as from the completion of the transaction as being ancillary to the concentration. Therefore, a restriction that prevents the seller from

carrying out a competing activity during the entire duration of its minority shareholding in the target is disproportionate and cannot be regarded as ancillary. The possibility that the seller may obtain sensitive business information in the target shall be dealt with by means other than the restriction of completion, such as confidentiality obligation or the implementation of a Chinese wall.

The HCO also referred to its practice that the restriction undertaken by the two parent companies of a joint venture not to compete with the joint venture for the entire duration of the JV's operation should be regarded as an ancillary restriction. In two decisions adopted in 2012 (see HCO decisions Vj-88/2012 and Vj-93/2012), the HCO extended this approach to the acquisition of joint control over an undertaking that is already operating. However, the HCO indicated that it would normally not apply such approach to a minority shareholding in a subsidiary.

Finally, the HCO discussed whether the non-compete obligation extending three years after selling the minority shareholding in Szemerey would be regarded as ancillary. The HCO indicated that since a non-compete obligation would normally be justifiable for maximum three years in the case of a simple minority shareholding, and for the duration of the joint control in the case of a jointly controlled undertaking, the non-compete obligation extending three years beyond the sale of the minority shareholding would not qualify as ancillary, unless the parties prove otherwise.

Source: *Eszter Ritter, The Hungarian Competition Office rules on ancillary restraints and provides an overview of its related practice (Waberer/Szemerey), 20 décembre 2012, e-Competitions, N°51292, www.concurrences.com*

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