Competition - Hungary

De Minimis Anomalies: Searching for a Regulatory Solution

December 17 2009

Author

Almos Papp

After almost two decades of evolution, Hungarian competition law has become almost identical to that of the European Union. The harmonization has taken place in several steps, with the Competition Act being revised in line with the latest developments in EU competition law. These regular amendments have allowed the legislature to take a systematic approach to rectifying the remaining ambiguities or contradictions in the law; this convergence, in both substantive and procedural terms, is one of the success stories of Hungarian legislation.

The one difference that has never been amended - or even raised for review - is the *de minimis* rule. This might imply that the legislature considers the rule to be sufficiently clear and effective; however, its application is not as obvious as it might first appear.

The rule states that an agreement is deemed to fall outside the scope of the Competition Act if it is of minor importance. The rule applies if the aggregate market share held by the parties to the agreement, together with their related parties, is less than 10% of the relevant market, unless the agreement is aimed at fixing prices or dividing the market between competitors.

Unlike the EU rule, the Hungarian version applies the same market share threshold and calculation method to vertical and horizontal agreements. This apparently simpler approach does not pose serious interpretation problems when applied to agreements among competitors, as it is relatively easy to aggregate the market shares of competitors in the same horizontal market. However, it has significant drawbacks when trying to gauge whether the *de minimis* exemption applies to a vertical agreement, as it is difficult to calculate an aggregate market share for a supplier and its reseller in the absence of a horizontal affected market in which they both operate. Simply adding the supplier and reseller's respective market shares gives a misleading result because it counts the same product twice - once on the supplier's side and once on the reseller's side.

The Competition Office has made various attempts to solve the problem. Decision Vj-57/1998 introduced the corrected cumulative method for vertical relationships whereby the parties' aggregate market share is expressed as a fraction. The numerator is the supplier's total turnover from the sale of the relevant products, plus the reseller's total turnover from the sale of other products (obtained from other suppliers) that may be substituted for the supplier's products. The denominator is the aggregate turnover of the given product market. The Competition Office has also reached the same result simply by adding the market shares of the supplier and its reseller, then subtracting the overlap (ie, the products sold by the supplier to the reseller).(1) However, the main problem with these solutions is that they combine market shares as if the supplier and the reseller were related parties, which is not necessarily the case. In addition, they add together dissimilar market shares: the supplier has a share of the market on which it sells its products, whereas the reseller has a share of the market on which it purchases the relevant products for resale. Thus, it is debatable whether the results of such calculations accurately represent the parties' positions.

More recently, the Competition Office decided that only one market share is deemed to count in vertical relationships.(2) However, this method requires an investigation to establish which party's level of trade has the restrictive effect. This party's separate market share on the affected market is used as the aggregate market share for the application of the exemption. The problem with this approach is that the act explicitly refers to the parties' aggregate market share. This calculation method appears to circumvent the law without providing a clear legal basis in its place.

The Competition Office has since advanced a third approach. For the purpose of the rule, the aggregate market share is deemed to be the largest individual share held by a party to the vertical agreement. This method seems to be the least satisfactory of the three, since it takes no account of the economic effects associated with the vertical restraint in question. In one case the approach was applied to a vehicle wholesale agreement between a vehicle importer and many local dealers on identical terms and conditions.(3) The Competition Office assessed the importer's nationwide market share in isolation, supposing it to be greater than those of the local dealers. Since the importers' market share throughout Hungary was well below the 10% threshold on all possible markets, the exemption was held to apply. However, this analysis seems to overlook the fact that local market shares cannot be adequately compared to nationwide market shares.

It is clearly difficult to find a practical method for calculating an aggregate market share in a vertical relationship under the Hungarian *de minimis* rule. In the Competition Office's defence, it appears to be impossible to follow the law to the letter and calculate joint market shares for non-competitors. The regulator's attempts to find a reasonable solution indicate a proactive and intelligent approach to enforcement, but its task would be much easier if the substantive rules of the EU *de minimis* regulations were transposed into Hungarian law.

For further information on this topic please contact Álmos Papp at Bán S Szabó & Partners by telephone (+36 1 266 3522), fax (+36 1 266 3523) or email (apapp@bansszabo.hu).

Endnotes

(1) Case Vj-64/2000.

(2) Cases Vj-31/2000 and Vj-12/2003.

(3) Case Vj-81/2003