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NEW LAW ON COMPETITION: WHAT HAS CHANGED FOR FOREIGN COMPANIES IN THE BELARUSIAN MARKET?

As part of comprehensive change in the Belarusian legal sphere, a new edition of law "On Contradiction of Monopolistic Activity and Development of Competition" (the "Competition Law") entered into force on August 3, 2018. New rules which are to ensure conditions for fair competition, to create new markets and to enable their development apply to Belarusian and foreign companies doing business in Belarus.

What are the most significant changes and opportunities which companies should be aware of?

Extended definition of economic concentration and criteria for obtaining the permit

Earlier, Belarusian legislation stipulated a limited number of cases when prior approval of the Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus (MART) was required (matters regarding shares and stocks transactions, mergers and acquisitions, the founding of companies in certain cases and the registration of holding companies). This approach, however, failed to correspond to foreign practice and contradicted regulations of other jurisdictions.

Under the Competition Law the rules for the merger clearance (in cases when the respective threshold criteria have been exceeded) have been amended with:

- acquisition of property located in Belarus which is related to main assets and/or intangible assets whose value exceeds 20 percent of the book value of all main assets and intangible assets of the company which is the owner;
- acquisition of the right to give mandatory directions to companies and individual entrepreneurs (for instance when a trust agreement regarding majority of voting shares is concluded);
- partnership agreement between companies or individual entrepreneurs which are competitors in Belarus;
- acquisition of the right to discharge the office of an executive body of a company (for example, hiring a management company instead of appointing a director)

We point to the change which has the most significant impact on business. It is the increase in the threshold criteria for deals recognized as economic concentration. These criteria have been doubled as follows: 1) the book value of assets and 2) the volume of proceeds from sales (following the result of the preceding year) from USD 1 million and USD 2 million to USD 2 million and USD 4 million, respectively. In practice it means the reduction in the number of corporate deals subject to prior approval of MART; under former legislation relatively small companies which had a small market share were also obliged to fulfill formal requirements and meet low threshold criteria.

Agreements restricting competition and concerted actions

Newly it is prohibited to conclude agreements between competitors (cartel) regardless their impact on competition if these agreements can result into: setting, maintaining, increasing and reducing prices, dividing the commodity market, reducing and terminating the production of goods and refusing to (at their own discretion, not under the law) enter into contracts with certain sellers and consumers.

The legal regulations regarding vertical agreements have also changed. Currently vertical agreements which can result into the setting of resale prices (with the exception of the maximum resale price) and prohibiting buyers from selling goods of competitors (with the exception of trading under a certain means of individualization of the seller) are forbidden. This prohibition does not apply to permissible vertical agreements. Other novelties under the Competition Law include: the level of permissibility has increased to 20 percent (earlier 15 percent) and the interested party has the right to provide evidence of permissibility to MART if this party disagree to the decision of this authority.

Simplifying the fight against unfair competitors

New restrictions and bans on unfair competition have been introduced, such as incorrect comparison to competitors and competitors' products (the prohibition to use the words "best", "first", "most", "only" unless they can be confirmed), unlawful receipt, use and disclosure of information which is commercial, official or other legally protected secret, imitation of competitors' corporate style and other elements individualizing products.

The Competition Law introduces **many other progressive and significant norms** (stricter control over procurement, the conception of the "monopsony", the limitation period of actions for violations, new powers of MART and etc.). In general, we may state that the Competition Law meets requirements of international regulations and currently is more oriented to real business practice.

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THE DUSK OF THE (ILLEGAL) DAWN RAIDS IN SLOVAKIA?

The competence of the Slovak Antimonopoly Office (the "PMU") to conduct dawn raids is governed by Article 22a of the Act No 136/2001 Coll. on Protection of the Competition (the "Act").

While the Act sets a general framework for the conduct of the dawn raids, its interpretation has in previous years been subject to the judicial review with some interesting outcomes.

Authorization to Conduct the Dawn Raid Must Be Specific

Besides stating certain formal requirements, the Act generally requires the dawn raid to be based on the authorization issued by PMU, containing also its subject and purpose.

Attending to the decision-making practice of the CJEU, the Supreme Court of the Slovak Republic addressed the issue of the subject-matter content of the authorization in its landmark decisions in relation to the bid-rigging case brought against the company *Datalan* (file no. 5 Sžnz/2/2015 and 5 Sžnz/1/2015).

In order to limit the "fishing expeditions", the Court has presented a more detailed account of the requirements put on the content of the authorization.

Accordingly, the authorization must contain a description of basic characteristic features of the alleged delict, designation of the affected market, nature of the alleged restrictions and explanations from which the serious indications as to the delict assessed, with general description of their type and nature, have arisen, as well as serious material indications on which the suspicion against the relevant undertaking is based.

The authorization should further contain the description of the manner in which the delict was allegedly perpetrated and, to the extent possible, a specific designation of what does the dawn raid seek to discover. The PMU was further asked to prove that carrying out the dawn raid is necessary for the collection of evidence attesting to the perpetration of the delict.

The Rights of the Undertakings (Their Employees) During the Dawn Raid

In its *Datalan* saga, the Court has also touched upon the requirements put on PMU during the execution of the dawn raid.

Firstly, PMU is obliged to make the maximum effort to use the legal time period for the conduct of the dawn raid in order to separate any irrelevant (personal) data and further collect and process only the data necessary for the conduct of the inspection. Since PMU decided to end the dawn raid 4 days before the deadline expected by the authorization, it could not invoke time pressure as an excuse to separate unnecessary data later on in its premises (as was the usual practice before the decision).

Secondly, the Court has also set out that as regards the entitlement of PMU to inspect private devices (used for professional purposes) of one of the employees of the undertaking inspected, this has to be

done within the limits of proportionality. In effect, the PMU must be able to clearly identify and communicate (both to the undertaking and the particular employee) the necessity of such inspection.
In addition, the Court has also dealt with number of other questions relevant for the due conduct of the dawn raid in the case of *AT Computer* (file no. 4Sžz/1/2013).

Firstly, while the Court did not find a specific obligation of PMU to inform the undertakings about its right to have its legal counsels present, it seemed to implicitly confirm its existence.

Secondly, while PMU is entitled to ask the employees of the inspected undertaking for various explanations, these have to be limited by the purpose of the inspections itself (e.g. how and where to find certain documents, etc.) and cannot relate to the (not yet initiated) administrative proceedings on the merits (e.g. questions about different business strategies). Moreover, the employees may not be interviewed at the same time as their personal computers are being inspected, being effectively deprived of the possibility to object to the private or irrelevant content of the communication being reviewed.

The Future of Dawn Raids in Slovakia

While we have seen a considerable improvement in delineating the boundaries of PMUs competence during the last decade, the legal terrain establishing its rights to conduct dawn raids is far from stable.

For instance, we still lack a compelling judicial authority on the common practice of PMU to prohibit the inspected undertaking from contacting its external legal counsels based on the fear of thwarting the inspection.

Nonetheless, recent developments in the case law on dawn raids provide the undertakings with more lines of defense and bring some legal certainty into the (still) young and vibrant practice.

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