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newsletter

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COMPETITION LAW

Clarification on agreements of minor importance in the new "De Minimis Notice"

On 31 August 2014, the Commission published a revised version of its Notice on agreements of minor importance that do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") (the "**De Minimis Notice**") in the Official Journal. The revision of the De Minimis Notice was necessary to bring the content of the notice in line with the recent practice of the European Court of Justice ("**ECJ**").

As a matter of background, Article 101 of the TFEU prohibits agreements aimed at or resulting in appreciable restriction of competition. The original De Minimis Notice was established by the European Commission ("**EC**") in 2011, and its aim was to clarify the scope of agreements falling within that category. The De Minimis Notice created a "safe harbour" by setting a market threshold. According to the De Minimis Notice, the agreements between companies whose market share does not exceed 10% for agreements between competitors or 15% for agreements between non-competitors, have no appreciable restriction on competition and therefore are automatically excluded from the scope of Article 101 of the TFEU.

The revised version of the De Minimis Notice does not change the above thresholds, but it clarifies that, even if they exceed the said thresholds, agreements aimed at restricting competition, known as restriction by object, cannot be considered minor and constitute an appreciable restriction of competition under Article 101 of the TFEU, regardless their potential effects. This clarification reflects and complies with the ruling of the ECJ in the Expedia case (case C-226/11). It is also a broad interpretation of restriction by object, which - besides its benefits - may also have some negative effects, as from now on smaller market players with a negligible effect on competition may be caught out by EU competition law.

To help companies to comply with competition law, the EC has published a Staff Working Document alongside the De Minimis Notice, which lists several examples on breach of competition in light of the ECJ's recent case law. Both the Notice and the Staff Working Document may be downloaded from the website of EC.

CIVIL LAW

Strengthening of liens in the New Civil Code

One of the major changes introduced by the New Civil Code, which entered into force on 15 March 2014, concerns the regulations on liens. As developed in our previous newsletter, the New Civil Code declares null the practice of 'fiduciary collaterals', a security by which the right of ownership on pledged property is transferred to the creditor as a security, thereby eliminating an insecurity and imbalance between the parties. On the other hand, traditional securities (lien, suretyship or personal security) are planned to fill the role originally invested on fiduciary collaterals and also to balance the parties' interests by creating necessary legal guarantees.

Considering that the existence of an effective security regime is an important precondition for lending, and that as such it has an important role in the proper functioning of the economy, two basic principles were set out as guidelines during the codification: (i) providing an effective security for creditors and (ii) offering an adequate protection for the owner of the pledged properties. By its nature, the lien can easily achieve these objectives.

Firstly, the 'in rem' quality of the lien has been recognized, which is demonstrated by the fact that .the current structure of the Code regulates the lien among the in rem rights as opposed to the previous civil code which regulated it among the contractual rules. This implies that the parties cannot derogate from these provisions even by mutual consent. Besides that, remarkable guarantees were inserted in relation to the enforcement of liens. Such enforcement has generally become easier with fewer formalities, and the rules provide more options to lien holders to exercise their right to satisfaction either by way of judicial enforcement or by other means. At the same time, the prohibition of 'lex commissoria' remains unchanged, which means that any agreement concluded for transferring ownership of the pledged property to the lien holder at the time of opening the right to satisfaction shall be invalid.

With regard to the above, the lien maintains its initial function as a security since, upon the failure to perform of the secured claim's obligor, a lien holder is in a position to seek satisfaction before other claims against the property pledged as security for his claim. Additionally, this new regulation clarifies that collateral security is a possessory lien, and abolishes the lien on financial assets and the independent lien. The latter lien, which plays a significant role in refinancing financial institutions, will remain in force in a new form known as a "seceded lien". Finally, basic rules on collateral registers, lien holder agents, and the ranking of liens were also introduced in the New Civil Code, which thereby establishes a coherent and complex regime of the law of securities.

BANKING LAW

The story of foreign exchange loan agreements continues

As mentioned in the July 2014 issue of our newsletter, the Hungarian Supreme Court ("**Curia**") adopted a legal uniformity decision on 16 June 2014 regarding certain foreign currency loan agreement issues. In particular, it specified the conditions under which the exchange risk borne exclusively by the consumer is unfair. The Hungarian Parliament therefore adopted Act XXXVIII of 2014 on the settlement of certain issues in relation to the legal uniformity decision of the Curia on consumer loan agreements with financial institutions (the "**Act**"), which came into force in its entirety on 26 July 2014.

The Act sets out the nullity of certain provisions of foreign exchange or Hungarian Forint credit and loan agreements and financial lease agreements (together "**Consumer Loan Agreements**") concluded between 1 May 2004 and the entry into force of the Act.

Firstly, the Act renders invalid those provisions of the general terms and conditions (or any provision not negotiated individually) that are part of Consumer Loan Agreements and that state that different exchange rates apply to disbursements and repayments. These exchange rates are automatically replaced by the prevailing official exchange rate of the National Bank of Hungary. Secondly, provisions of the general terms and conditions (or any provision not negotiated individually) that are part of Consumer Loan Agreements and that allow the financial institution to unilaterally increase interest rates, costs or fees shall be deemed unfair and therefore invalid unless the financial institution successfully proves the contrary in a lawsuit brought against the Hungarian State.

The Act does not apply to agreements concluded after 1 May 2004 that (i) were terminated and the statute of limitations of 5 years elapsed before the entry into force of the Act or (ii) ceased to exist due to either their full early repayment at fixed rates or the purchase of the real property serving as cover for the loan by the Hungarian State, before 19 July 2014. It is important to note that according to the specific rules set out by the Act on the statute of limitations, the 5-year period commences in relation to claims arising from consumer loan agreements when the agreement concerned is terminated.

The Act prescribes special rules to these court actions. Relatively short deadlines are set for filing and appeals, and the courts must also deliver their decisions within 30 days. In addition, there is no room for counter-suits or additional submissions.

According to media reports, 77 financial institutions have submitted their actions. On first instance, most of them have lost and so far only 3 could achieve partial victory against the Hungarian State. Many financial institutions argued in their submissions that the Act is anti-constitutional and contradicts EU law and, therefore, requested that the court turn to the Constitutional Court and the European Court of Justice.

The court has partly accepted such arguments on 3 occasions and asked the Constitutional Court to annul the Act or certain provisions thereof. In the court's opinion, the Act violates not only the Hungarian Constitution but also the Roman Convention. The reasoning of the court includes the following arguments, among others: (i) as the Act must be applied to agreements concluded prior to its entry into force, which goes against the prohibition of retroactive effect; (ii) the Act did not give neither financial institutions nor courts enough time to prepare; (iii) due to the short deadlines, only limited evidence can be examined, which hinders the thorough analysis of the cases; (iv) financial institutions cannot know the exact consequences of the Act since the method of settling claims with consumers will be regulated by a separate law. The government has submitted a bill to Parliament, which shall handle this latter matter.

EU LAW

A single logo for the online sale of medicinal drugs in the European Union

On 24 June 2014, the European Commission adopted the Implementing Regulation 699/2014/EU (the "**Regulation**") which launches a single common logo for online pharmacies in the European Union. The establishment of this logo was introduced earlier by the new Directive 2011/62/EU (the "**Directive**") on falsified medicines amending the Directive 2001/83/EC on the community code relating to medicinal products for human use.

In response to the increasing illegal sale of medicinal products over the Internet, the new logo aims to enable consumers to identify legally operating online pharmacies offering authentic medicines in the Member States. According to the Directive, the identity, history or source (composition, packaging, country of origin, etc.) of medicinal products are the most likely to be falsified. In order to prevent fraudulent use of the logo, the Regulation not only determines the design of the logo, but also includes technical, electronic and cryptographic requirements to verify the logo's authenticity.

The new logo will appear on the websites of authorized online pharmacies with the subtext "Click to verify if this website is operating legally". The National flag in the centre-left of the logo will correspond to the Member State in which the pharmacy is registered or authorized. The logo will link to the website of the national competent authority hosting the list of legally operating online pharmacies and other legally authorized medicine retailers. The lists may also be accessed from the European Medicines Agency's website. The above-mentioned authority, in Hungary the Office of the Chief Medical Officer (*Országos Tisztifőorvosi Hivatal* - "**OTH**"), must secure and update its website, and indicate the time of the list's latest update.

In Hungary, the strong regulatory system in force gives exclusive rights to local pharmacies for the online sale of medicines. At the start of online selling, they must notify the OTH of their website addresses, which are then published by the OTH on its website. In addition, only non-prescription medicines may be purchased on the websites of online pharmacies.

The Member States have one year to ensure the application of the provisions established by the Regulation. The common logo will hopefully be one of the new measures introduced by the Directive which will strengthen the existing controls in the Member States.

The European Parliament approves the next President of the European Commission

On 15 July 2014, the European Parliament ("**EP**") approved Mr Jean-Claude Juncker - the choice of the European Council - to be the next President of the European Commission. The ex-prime minister of Luxembourg announced his Commissioners on 10 September. The team awaits the approval of the EP and is expected to take office on 1 November 2014.

The Commission elected for the period of 2014-2019 has a challenging cycle ahead given the current economic, political and social situation of Europe. The goals of the Commission reflect well this situation, and include the enhancement of growth, the creation of new jobs, changes to competition law, especially in the field of telecommunications, and democratic change.

The Agenda contains ten main priorities which summarise the vision of a future EU. These ten goals are:

1. A New Boost for Jobs, Growth and Investment
2. A Connected Digital Single Market
3. A Resilient Energy Union with a Forward-Looking Climate Change Policy
4. A Deeper and Fairer Internal Market with a Strengthened Industrial Base
5. A Deeper and Fairer Economic and Monetary Union
6. A Reasonable and Balanced Free Trade Agreement with the U.S.
7. An Area of Justice and Fundamental Rights Based on Mutual Trust
8. Towards a New Policy Migration
9. A Stronger Global Actor
10. A Union of Democratic Change

The programme's success will depend on the Commission's concrete law-making steps.

Recent judgments of the European Court of Human Rights concerning Hungary

Fines for members of Parliament for protesting against controversial bills are disproportionate

On 16 September 2014, the European Court of Human Rights (the "**Court**") rendered its judgments in the cases of Karácsony and Others (no. 42461/13) and Szél and Others v. Hungary (no. 44357/13). The applicants, members of two opposition parties (PM and LMP) of the Hungarian Parliament, had been fined for gravely disrupting the plenary proceedings. Proposed by the Speaker of Parliament, the decisions were adopted by the plenary without debate. The applicants complained that the decisions to fine them for making protests against two legislative proposals at Parliament had violated their right to freedom of expression under Article 10 of the European Convention on Human Rights (the "**Convention**"). They further claimed that Hungarian law did not provide any remedy regarding their complaint. Therefore, their right to an effective remedy under Article 13 of the Convention had been violated as well. The Hungarian Government submitted that the sanctions had been necessary for the sake of the authority, the dignity and the proper functioning of Parliament, in application of Act no. XXXVI/2012.

The Court unanimously considered the sanctions disproportionate, as the interference with the applicants' right to freedom of expression, without consideration of less intrusive measures, had not been necessary in a democratic society. In addition, there had been a violation not only of Article 10, but of Article 13 as well, since no effective remedy was available for the applicants under Hungarian law.

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