

Hungary

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Regulatory framework

As of Hungary's accession to the European Union, Hungarian competition rules comprise both domestic and EC competition rules. The most important source of domestic competition rules is Act LVII of 1996 on the Prohibition of Unfair Market Behaviour and the Restriction of Competition (the Act).

The Act's rules regarding the restriction of competition regulate the prohibition of agreements restraining competition (both horizontal, ie, cartels, and vertical restraints), the prohibition of abuse of dominance and merger control. Regarding the prohibition of horizontal and vertical restraints, the domestic Hungarian rules are based on article 81 of the EC Treaty and the secondary EC legislation and practice in relation thereto, while article 82 has a Hungarian domestic counterpart in the Act's rules concerning the prohibition of abuse of dominance. The ECMR (both the previous and the current) provided the basis for the Act's provisions on domestic merger control.

In addition to the above, there are numerous governmental decrees in effect providing block exemptions regarding the prohibition of horizontal and vertical restraints in relation to certain types of agreement, such as the block exemptions in relation to certain insurance agreements, motor vehicle distribution agreements, technology transfer agreements, specialisation agreements, research and development agreements and vertical agreements.

Furthermore, the Hungarian Competition Authority (HCA), within the framework of its regulatory role and that of developing a competition culture in Hungary, has issued several pieces of 'soft law', ie, legal instruments that are not binding on the courts, but that provide guidance on the HCA's interpretation of the Act. These relevantly include:

- the HCA's Principal Guidelines on the application of the Act, the third actualised and compiled set of which was issued at the beginning of 2006 by the HCA, and which are based on the HCA's practice regarding particular cases, but are communicated as principles that are intended to be followed by the HCA in similar cases in the future (thus, the Principal Guidelines may provide grounds for the development of case law in the field of domestic competition law);
- the Notices and related Guidelines of the head of the HCA in relation to: (i) the differentiation of first- and second-phase cases in merger control procedures; (ii) the establishment of the amount of fines in antitrust (ie, cartel and vertical restraint) cases; and (iii) the HCA's leniency policy. The HCA intends to introduce a further notice on remedies in merger control cases, the draft of which is detailed below; in addition, a draft notice was published for public consultation regarding the assessment of fines in cases involving the undue influencing of the decision-making of consumers; and
- the HCA provides a general policy framework in relation to its activities, meaning its regulatory role as well as its role in the enhancement of competition and a competition culture, because of which two General Policy Guidelines were published in May 2007 by the HCA: one on ensuring freedom of competition and the other on ensuring freedom of consumer choice.

Besides the above core domestic competition legislation, further rules regarding the regulation of competition can be found in sectoral legislation such as the telecommunication rules, the rules regarding public utility services, etc. The latest development in this regard was the promulgation of the new Hungarian Act on Electricity (2007), which dedicates an entire chapter to ensuring competition on the electricity supply market. In addition, provisions regarding the prohibition of the abuse of buyer power by certain undertakings were introduced by the Act on Trade (2005), effective from 1 June 2006. Finally, since 1 September 2005, the Hungarian Criminal Code (1978) has also contained very important rules regarding competition, as certain cartels may induce the application of criminal penalties against both the natural and legal person participants.

In addition to the above, the HCA, as one of the members of the ECN, applies EC competition law in cases falling within the scope of articles 81 and 82 of the EC Treaty.

Horizontal and vertical restraints

The most important change in this field is the amendment of the Act, effective as of 1 November 2005. The following is a summary of the Act effective as of this date:

- The basic prohibition of horizontal and vertical restraints of competition was not altered by the amendment of the Act: briefly, agreements and concerted practices, and decisions of associations of undertakings that may have as their object or effect the prevention, restriction or distortion of competition are prohibited, with special regard to, eg, market sharing, price fixing, etc, and any agreement falling within the scope of this prohibition will be invalid.
- There may, however, be agreements that per se do not fall within the scope of the above restriction (eg, certain forms of franchise and selective distribution agreements, in line with the practice of the ECJ adopted by the HCA).
- Agreements between related parties, a similar notion to a single economic unit, per se fall outside the scope of the above restriction: as of 1 November 2005, 'related parties' are those undertakings that belong to the same group of undertakings as defined by the Act.
- Agreements of minor importance fall outside the scope of the general prohibition; however, the de minimis threshold both in relation to horizontal and vertical agreements is a 10 per cent market share, while the exceptions regarding the de minimis threshold are only concerned with hard-core horizontal restraints such as market sharing and price fixing (and network effects may also remove the agreement from the scope of minor importance).
- If the agreement concerned falls within the scope of the basic prohibition set forth above, it may still be exempted either via an available block exemption or an individual exemption. The system of notifying agreements for an individual exemption or for a negative clearance was abolished as of 14 July 2005, therefore the parties themselves, similarly to article 81(3) of the EC Treaty, should assess whether the four conjunctive conditions for the applicability of an individual exemption are met.

In addition to the above, as of 1 September 2005, section 296/B of the Criminal Code (1978) establishes a crime punishable with imprisonment of up to five years for any person who, to influence the result either of an open or closed tender in relation either to a public procurement procedure or a concession activity, concludes an agreement regarding the fixing of prices (fees) and other contractual conditions, or regarding market sharing, or commits other concerted practices, and therefore restricts competition. In addition, the same provision is applicable regarding a person who commits the above crime as a member of an association of undertakings. A person may be exempted, however, from criminal liability provided that he or she reports the crime to the public authorities before they gain knowledge thereof, and divulges the circumstances of the crime. The notion of 'public authority' means not only criminal prosecutors, but also the HCA, the financial supervisory authority and the public procurement supervisory authority.

The wording of section 296/B apparently differs from that of section 11 of the Act and article 81 of the EC Treaty (ie, there is slight confusion regarding the notions of agreement and concerted practice in the wording of the Criminal Code). But, according to the reasoning of the bill in relation to section 296/B of the Criminal Code, the content of the section was provided by the substantive competition rules. Furthermore, a 'person' within the meaning of the section is any natural person representing the undertaking, which encompasses not only any executive thereof, but also any employee, etc, who participates in the crime. Nevertheless, this does not mean that the participating undertakings cannot be punished under criminal law via their executives, employees, etc: ie, Act CIV of 2001 on Sanctions Against Legal Persons seems to be applicable in relation to section 296/B of the Criminal Code.

The parallel applicability of the 'traditional' provisions of the Act and the newly enacted criminal penalty raises certain practical issues, mainly in respect of the HCA's leniency policy and the possibility to grant an exemption from criminal law liability, which the HCA realised in 2006.

The HCA's policies regarding certain cartels

Alongside the path the European Commission opened regarding the introduction of a leniency programme with respect to cartels, the HCA introduced its own leniency programme regarding cartels in 2003. The 2003 Notice on the HCA's whistleblower policy points out that in exchange for cooperation by an undertaking participating in a cartel regarding the discovery and termination thereof, the HCA may, depending on the level and nature of the cooperation, either grant a full cancellation of fines or a reduction thereof.

The 2003 Notice was amended in February 2006 due to the fact that, as noted above, certain types of cartels qualify as criminal offences, and the leniency policy had to be brought into line with this novelty. The 2006 Altered Notice therefore referred to the fact that separate guidelines would be issued regarding this matter.

The guidelines were published in February 2006, and aim at harmonising the application of the conditions for exempting criminal liability and the consequences imposed by the Act.

In brief, the guidelines make it clear that fines based on the Act are applicable only against an undertaking, but criminal sanctions may be applicable regarding both the persons participating in the cartel (meaning not only members of the management, but also employees) and the undertaking itself. Furthermore, it is also pointed out that an application for leniency has to be submitted to the HCA, whereas an exemption from criminal liability may be granted by the courts if the recipient of the report on the cartel is a public authority (including the HCA, but also meaning, eg, the criminal authorities, the public procurement supervisory authority, etc).

Based on the above, the guidelines point out that:

- the first reporting of a cartel to a public authority other than the HCA may provide grounds for exemption from criminal liability, but the availability of leniency is unlikely since the HCA is likely to learn about the existence of the cartel from the public authority to which the report was made earlier than the receipt of a report from the undertaking;
- as far as the reverse situation is concerned, ie, first reporting the cartel only to the HCA, this may provide grounds for a cancellation of fines, but it may not guarantee an exemption from criminal liability;
- multiple reporting (ie, made by more than one participant) in the HCA's leniency policy is excluded, and the same situation may be applicable in the criminal procedure; and
- the HCA will accept a report only from the representatives of the participating undertaking, whereas they will not necessarily be the same persons who actually bear criminal liability for the cartel, therefore, it is advisable that the persons who are affected by the cartel institute a parallel procedure requesting criminal exemption.

The most recent development in this area is that the HCA, to increase the competition law awareness of the administrative organs that deal with public procurements, on 2 July 2007 issued a Notice regarding the circumstances that suggest the existence of a cartel between bidders in a public procurement procedure. The HCA dedicated this Notice to the relevant administrative organs, encouraging them to cooperate with the HCA in this type of case by asking them to report suspicious cases to the HCA.

According to this Notice, public procurements and other tender procedures are subject to article 81 of the EC Treaty and section 11 of the Act, and they therefore require the utmost scrutiny as to their compliance with the relevant competition laws. The Notice emphasises that information exchanges between bidders, which may take various forms, are necessary for cartels to exist between them. Furthermore, there are market circumstances that may enhance the existence of information exchanges and cartels, eg, oligopoly, product homogeneity, the low probability of new market entrants, etc. In addition, sectors that are typically prone to attract cartels in procurement procedures are those concerned with basic food products (eg, sugar, coffee) and infrastructural investments, mainly regarding public utilities. The Notice, by way of example, lists the most characteristic cartels in this field such as: (i) information exchange systems; (ii) a system of 'fake bids' (ie, when some of the bidders do not issue a genuine, but only a fake or deliberately invalid, bid); (iii) selection by the bidders from among themselves of who should be the successful bidder; (iv) price fixing; and (v) bid rigging. The Notice also enumerates the circumstances that may suggest the existence of a cartel as set forth in the foregoing.

Recent developments in the HCA's practice regarding horizontal and vertical restraints

2006 and 2007 saw major cases in this field: the HCA levied aggregate fines of approximately 4–5 billion forints due to unravelling cartels. For example, the HCA levied substantial fines on major insurance companies for encouraging cartels among car dealers dealing with car repairs (ie, in a neighbouring market), and the association of egg traders was also heavily fined due to the maintenance of a price-fixing and information-exchange system.

Abuse of dominance and abuse of buyer power

Section 21 of the Act states that the abuse of dominance is prohibited. Dominance has to exist on the relevant market as established on the basis of interchangeability or substitutability, both on the supply and demand sides, while the Act defines dominance in accordance

with the ECJ definition in the United Brands case.

Abusive behaviour may either be anti-competitive or exploitative, similarly to the law regarding article 82 of the EC Treaty.

The law regarding section 21 of the Act, despite some minor and rather technical amendments effective from 1 November 2005, has not changed in substance, but this does not mean that there have been no statutory developments in this field of competition law.

The Hungarian legislature, in Act CLXIV of 2005 on Trade (the Trade Act), introduced a concept akin to abuse of dominance – the ‘abuse of significant market power’ – which in fact tries to catch an abuse of buyer power in certain cases, but by means of different and standalone legislation separate from the Act regarding abuse of dominance. The legislation on abuse of buyer power came into force on 1 June 2006.

The Trade Act prohibits the abuse of significant market power against suppliers. The Trade Act stipulates that the enforcement of the above prohibition falls within the competence of the HCA which, in its procedure, applies the Act’s provisions as applied in abuse of dominance cases.

As the Trade Act created a similar but distinct system from the law regarding abuse of dominance, the HCA introduced a separate form for notifications based on the Trade Act, which must be used from 1 June 2006. As of June 2007, however, the HCA had not handed down any decisions based on the Trade Act and had received only one notification.

Merger control

The amendment of the Act as of 1 November 2005 brought significant changes in the domestic merger regime as follows (but, for example, the dominance test remained concerning the substance of merger cases, and the SIEC test was not introduced):

- regarding the concept of a concentration, the Act already applied the notion of full-function joint ventures as one form of concentration;
- the thresholds were changed so that the aggregate annual turnover of the participating undertakings was increased from 10 billion forints to 15 billion forints, and the rules regarding a ‘staggered’ concentration were brought into line with EC law; moreover, the method of calculating the thresholds was changed, for example, in the case of financial institutions;
- the notion of participating undertakings was slightly altered;
- there is a clear distinction now between one- and two-phase investigations in merger cases (as fleshed out in the relevant notice as amended in 2006); and
- most important, the possibility to undertake commitments was introduced. For the public to obtain more clarity regarding the HCA’s standpoint on available remedies in merger cases, the HCA issued a draft notice thereon explaining the nature of the remedies, their applicability and implementation.

According to the latest draft of the notice on remedies (as issued on 31 May 2007), the HCA will always take into account the Act as a statutory background, but it will leave the door open for the adoption of methods applied by other competition law enforcers, for example, the concept of a divestiture trustee is expressly indicated in this regard despite the fact that trusts are not recognised under Hungarian civil law.

According to the notice, remedies may entail either conditions (precedent or subsequent) or undertakings (commitments) regardless of the fact that, in their effects, these remedies do not differ significantly. In the case of a condition precedent, the HCA’s approval will not come into effect until the condition is met, whereas in the case of a condition subsequent, the approval will lose its effect in case the condition is not met. In the case of a commitment, if it is not

carried out, the HCA may withdraw it. As far as the application of the various remedies is concerned, the HCA is likely to apply commitments if they relate to behaviour that should be implemented on a long-term basis, whereas a condition precedent is likely to be applied if there are serious doubts as to the feasibility of the condition precedent. In addition, the following principles will be applicable in the course of determining the most suitable remedy in the given case: (i) the remedy has to be capable of solving the competition concern; (ii) the HCA is bound by the undertakings of the applicants; (iii) the condition must be effective, executable and monitorable; and (iv) the applicant has to cooperate with the HCA in implementing the remedy.

Remedies may be either structural or behavioural, but the HCA will strive to apply structural remedies (eg, divestiture) rather than behavioural remedies (eg, provision of access to an essential facility). The subject matter of any divestiture should be a separate and viable economic unit, and the purchaser thereof must be able to operate it, ie, there has to be a viable purchaser. Finally, divestitures should be completed within six months, unless special circumstances justify a longer period.

Public enforcement

In May 2007 the HCA, to provide more clarity on the public enforcement of competition law, issued its General Policy Guidelines regarding its role and operations, which are to serve the purpose of providing a general conceptual framework for the HCA’s operations. The most important messages of these Guidelines are as follows:

- the HCA will operate and apply the provisions of the Act within the framework of general principles in each field of its activity, such as the enforcement of the Act as a governmental authority, the promotion of competition and the promotion of a competition culture;
- in relation to the HCA’s enforcement activities, the following principles will be applied:
 - the most important aim of the HCA as a public enforcement authority is to increase long-term consumer welfare by increasing efficiencies, and when applying EC law, the integration of Europe;
 - when the HCA is balancing the benefits and detriments of market behaviour, ‘detriments’ will be interpreted as the restriction of competition, whereas ‘benefits’ means efficiencies, and although the aggregate of the efficiencies may counterbalance the detriments, it is unlikely that in the case of hard-core cartels this will happen;
 - in the course of the HCA’s market reviews, a dynamic approach will be applied, ie, the possibility of market entry and import threats will be taken into account as well as that of innovation;
 - the HCA will interfere with the operation of the markets to the least extent possible: if there are doubts that market behaviour is pro- or anti-competitive, the HCA will vote for pro-competitiveness (except in cases involving monopoly or ‘starting’ markets, ie, where a state monopoly was recently abolished);
 - the HCA will apply both behavioural and structural remedies; however, structural remedies will be preferred (see, for example, the draft notice on remedies above);
 - the HCA will strive to apply economics to the greatest extent possible in the course of making its decisions, and will also attempt to apply empirical methods and international competition practice; and
 - as far as the allocation of the HCA’s resources is concerned, the HCA acknowledges that private enforcement is already available regarding cartel and abuse of dominance cases,

therefore it wishes to concentrate and focus its resources on cases that are important from the public's perspective (eg, because of the effects on the relevant market, the effect on the development of competition law, etc).

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Szabó Kelemen & Partners Attorneys is a full-service law firm that traces its origins back to Szabó & Partners Attorneys, which was established in 1996. The firm was the Hungarian member of the Ernst & Young Law Alliance from 1996 to 2003, and from 2004 worked in cooperation with Salans for two and a half years. The firm's impressive client base consists of multinationals, as well as large and medium-sized Hungarian companies.

The firm is particularly strong in tax, competition and merger and acquisition work, as well as in various industry sectors, including financial services and real estate. Many of the firm's Hungarian lawyers have worked in law offices or barristers' chambers abroad, and many hold postgraduate qualifications from foreign institutions. The working languages of the firm are Hungarian, English and German.

The firm's core practice areas are:

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- Corporate restructuring, mergers and acquisitions
- Employment
- Insurance
- Litigation and arbitration
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- Real estate/commercial property

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