

Hungary

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Regulatory framework

As of 1 May 2004, the date 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), and 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, whereas 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 present) provide 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 agreements 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 Office (HCO), in the framework of its regulatory role and that of the development of a competition culture in Hungary, has issued several pieces of 'soft law', ie, legal instruments that are not binding on courts, but that provide guidance on the HCO's interpretation of the Act. These relevantly include:

- the HCO'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 HCO, and which are based on the HCO's practice regarding particular cases, but are communicated as principles which are intended to be followed by the HCO 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 HCO 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 HCO's leniency policy. The HCO intends to introduce a further notice on remedies in merger control cases, the draft of which was open for comments until 30 September, 2006.
- the HCO intends to provide 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 the drafts of two General Policy Guidelines were published in May 2006 by the HCO for public comment.

Besides the above core domestic competition legislation, further rules regarding the regulation of competition can be found in sectoral

legislation such as telecommunication rules, rules regarding public utility services etc. In particular, provisions regarding the prohibition of the abuse of buyer power of 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 HCO, 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 relevant parts of the Act effective as of this date:

- The basic prohibition of horizontal and vertical restraints of competition was not altered by the latest 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 is 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 HCO).
- 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, whereas 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 with imprisonment of up to five years for any person who, in order 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 from criminal liability, however, provided that he 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 HCO, the financial supervisory authority and the public procurement supervisory authority.

The wording of section 296/B appears to differ 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 who participates in the crime. Nevertheless, this does not mean that the participating undertakings cannot be punished under the 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 HCO's leniency policy and the possibility to grant an exemption from criminal law liability, which the HCO realised in 2006.

The HCO's leniency programme and its connection to the criminal law liability

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

Thus, on the basis of the principle of priority, an undertaking may be entitled to a full cancellation of fines if it is the first to provide the HCO with information and proofs about an undiscovered cartel that enables the HCO to commence an investigation, or which first provides conclusive evidence to the HCO in an existing investigation enabling the HCO to establish a violation of the Act, provided that the HCO would not have been able to do so otherwise at the time of the provision of such evidence. But if the HCO has already granted a conditional full cancellation to an undertaking, further undertakings, in the sequence of providing information, may avail themselves only of a reduction in the amount of fines depending on the value added to the already-available information. The size of the reduction in fines varies between 50 per cent and 20 per cent thereof, whereas there is a possibility to disregard aggravating circumstances if a cancellation or reduction of fines is not available. Neither cancellation nor reduction will be available, however, if the undertaking concerned forced other undertakings to take part in the cartel, or if it did not cooperate with the HCO in the course of the proceedings, or if it did not terminate its participation in the cartel until the disclosure of evidence.

An application to the HCO for a full cancellation may happen either on an anonymous basis or via an upfront full disclosure.

Applications are reviewed by the HCO sequentially, and if the conditions are met, a conditional cancellation or a reduction of fines will be granted. The same principles are applicable to a reduction.

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. Therefore, the 2006 Altered Notice 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 penalties 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 HCO, 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 HCO, 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 HCO may provide grounds for exemption from criminal liability, but the availability of leniency is unlikely since the HCO 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 HCO, 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 HCO's leniency policy is excluded, and the same situation may be applicable in the criminal procedure; and
- the HCO 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 involved in the cartel institute a parallel procedure requesting criminal exemption.

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

2005 and 2006 saw major cases in this field: the HCO levied aggregate fines of approximately 3 billion forints due to unravelled cartels. For example, a recent case concerned the unravelling of a cartel among IT companies, including Oracle and IBM, regarding a public procurement procedure.

Abuse of dominance

Section 21 of the Act states that abuse of dominance is prohibited. Dominance has to exist on the relevant market as established on the basis of interchangeability and substitutability, both on the supply and demand sides, whereas the Act defines dominance in accordance with the ECJ definition in the 'United Brands case'.

Abusive behaviour may either be anti-competitive or exploitative, similar 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 are no statutory developments in this area of competition law.

Abuse of buyer power

Since the mid-1990s, shopping malls and hypermarkets have spread throughout Hungary, and companies such as Metro, Tesco and Auchan dominate the food retailing market. By contrast, the suppliers of these retail facilities are fragmented and relatively small. Therefore, the notion of buyer power and handling has become an issue, and 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. ‘Significant market power’ means a market situation where the trader is a reasonably inevitable contractual partner of the supplier in distributing its product to customers, and the trader is able, due to its turnover share, to influence regionally or country-wide the marketing of a product or a group of products. Moreover, the Trade Act provides irrebuttable presumptions in relation to the existence of significant market power, eg, annual net turnover of 100 billion forints stemming from commercial activity will be grounds for a finding of significant market power, and also a unilaterally favourable bargaining situation will lead to such a finding. The Trade Act lists some examples of ‘abuse’, such as unjustified differentiation among suppliers, tying, threatening to terminate an existing contract etc.

The Trade Act stipulates that the enforcement of the above prohibition falls within the competence of the HCO which, in its procedure, applies the Act’s provisions as applied in abuse of dominance cases.

As the Trade Act has created, however, a similar but distinct system from the law regarding abuse of dominance, the HCO introduced a separate form for notifications based on the Trade Act, which must be used from 1 June 2006.

Merger control

The amendment of the Act as of 1 November 2005, brought significant changes in the domestic merger regime as follows (but 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, eg, 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. In order for the public to obtain more clarity regarding the HCO’s standpoint on available remedies in merger cases, the HCO issued a draft notice thereon explaining the nature of the remedies, their applicability and implementation (eg, the way that the HCO deals with divestitures is detailed in the notice).

Recent developments in the HCO’s practice regarding mergers

Domestic merger activity has reduced to some extent due to the applicability of the ECMR in ‘Hungarian’ cases (eg, the *E.ON/MOL* case was dealt with by the Commission), and the vast majority of cases ended with an approval being granted, with conditions being imposed on the parties only in one case.

Public enforcement

The powers of the HCO, as the governmental authority assigned with the protection of competition for the public, were widened as of 1 November 2005, while parallel with this, the concept of legal professional privilege was introduced into Hungarian law (ie, documents containing communications between external counsel and a client may be privileged and unavailable for the HCO).

Furthermore, in order to provide more clarity on the public enforcement of competition law, the HCO issued draft General Policy Guidelines regarding its role and operations in May 2006, which in the future are likely to serve the purpose of providing a general conceptual framework for the HCO’s operations. The most important messages of these Guidelines are as follows:

- the HCO will operate and apply the provisions of the Act in 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 HCO’s enforcement activities, the following principles will be applied:
 - the most important aim of the HCO 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 HCO is balancing the benefits and detriments of market behaviour, ‘detriments’ will be interpreted as the restriction of competition, whereas ‘benefits’ means efficiencies, and whereas 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 HCO’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 HCO 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 HCO will vote for pro-competitiveness (except in cases concerning monopoly or ‘starting’ markets, ie, where a state monopoly was recently abolished);
 - the HCO will apply both behavioural and structural remedies, but structural remedies will be preferred;
 - the HCO will strive to apply economics to the largest 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 HCO’s resources is concerned, the HCO 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).

Private enforcement

In line with the endeavours of the European Commission to encourage private enforcement in competition law, the Hungarian legislature and the HCO also want to promote the possibility of relieving the HCO from the burden of dealing with less important cases. Therefore, the Act, as of 1 November 2005, expressly declares that the HCO's competence regarding cases concerning horizontal and vertical restraints and abuse of dominance does not limit private parties from enforcing their claims in relation to: (i) declaring a nullity regarding restraining agreements, and (ii) other civil law claims such as damages.

In the course of the above proceedings, however, the HCO may act as an *amicus curiae*: the competent court is obligated to apprise the HCO of the receipt of a writ grounded on sections 11 or 21 of the Act, and the HCO may comment on the case, or, when requested by the court, is obliged to state its point of view regarding the case. Furthermore, if the HCO opens an investigation in the case, due to the initiation of such by any of the litigants, the proceeding court has to suspend its own procedure until the HCO hands down its final decision concerning the results of the investigation.

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Szabó Kövári Tercsák & Partners Attorneys was established in 1996 and has worked in close cooperation with several international alliances. Since its establishment, the firm has developed an impressive portfolio of mainly international clients, and has expanded to a size that makes it an important player on the Hungarian legal services market.

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 firm's core practice areas are:

Antitrust/competition law, banking and securities, corporate and commercial, including company group financing and royalty payment structures, corporate restructuring, mergers and acquisitions, employment, insurance, litigation and arbitration, and real estate/commercial property.