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Regulatory framework

As a member of the European Union, Hungarian competition rules comprise both EC and domestic 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. Both the previous and the current European Community Merger Regulation (ECMR) provided the basis for the Act's provisions on domestic merger control, which became fully harmonised with the current ECMR with the amendment of the Act introducing the SIEC test into Hungarian law from 1 June 2009.

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', namely, legal instruments that are not binding on the courts, but that provide guidance on the HCA's interpretation of the Act. These include:

- the HCA's Principal Guidelines on the application of the Act, the latest actualised and compiled set of which was issued at the beginning of 2008 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 Notice and related Guidelines of the head of the HCA in relation to the differentiation of first- and second-phase cases in merger control procedures (which were reissued in line with the amended regulatory framework in 2009); the HCA's leniency policy (which remains applicable only with regard to applications filed by 31 May 2009, with the Act containing the relevant rules applicable from 1 June 2009);
- a Notice on remedies in merger control cases and a Notice 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 telecommunications rules, the rules regarding public utility services, etc. 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 a member 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 recent 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 any of the recent amendments 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, for example, 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.

- The original form of the recent amendment of the Act that was sent to the Constitutional Court by the Hungarian President for preliminary review in 2008 prescribed a special, objective sanction in respect of executive officers of companies found to have participated in hard-core cartels and fined for this: an executive officer – who was in such a position at the time of the infringement – would have been (basically on an automatic basis) barred from fulfilling the position of an executive officer in any company for two years, and an exemption from such sanction could have been granted only upon appeal. This type of regulation was found to be unconstitutional by the Constitutional Court and therefore the final, effective form of the amendment of the Act omitted this type of sanction.

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: namely, 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 recently 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 (see the following section).

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.

As of 1 June, 2009, the leniency policy rules were incorporated – with slight modifications – into the Act, and therefore became binding on the HCA and enforceable by the courts. This amendment was also in line with the model leniency programme of the European Competition Network (ECN), which requires a higher level of legal certainty. The new leniency rules in the Act contain the following principles (practically maintaining the principles that were already applied via the relevant Notice, as outlined above): there is a possibility for a full exemption from or a reduction of the fine, depending on the rank the reporting entity obtains via its report, with the caveat that only the first reporting entity providing unknown and conclusive evidence can avail itself of a full exemption. In addition, the size of the reduction may be: from 30 per cent up to 50 per cent; from 20 per cent up to 30 per cent; and up to 20 per cent, depending on the rank that the reporting entity obtains. It is also possible to submit either a preliminary or a non-final report.

The guidelines referred to above 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. These guidelines remain applicable after the recent amendment of 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, for example, 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, that is, 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 jointly 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.

Recent developments in the HCA's practice

The years 2007 and 2008 saw major cases in this field: the HCA levied aggregate fines of approximately 4 to 5 billion forints due to unravelled cartels. In the abuse of dominance field, the Municipal Court of Budapest in January 2008 upheld for the most part a recent decision by the HCA establishing an abuse of dominance by MÁV, the Hungarian state railways company, with the amount of the fine,

however, being reduced from 1 billion forints to 700 million forints. Otherwise, however, in the remainder of 2008 and the first half of 2009, the HCA did not levy any larger fines, but several cases are worth highlighting from other perspectives.

In a merger clearance case (VJ-40/2008) the HCA classified the merger as a notifiable concentration where the number of the undertakings jointly controlling another company was decreased by one, but sole control was not achieved. This decision seems to diverge from the general practice of the European Commission and paragraph 90 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (the Commission Notice). The HCA's decision is based on the part of paragraph 90 of the Commission Notice according to which in such a case 'the transaction will normally not lead to a notifiable concentration'. According to the HCA's evaluation, the merger resulted in a change in the quality of the (joint) control due to the specific details of the case, and therefore had to be classified as a concentration according to paragraphs 83-84 of the Commission Notice. The HCA went further in its reasoning and emphasised that, according to its construction, any decrease in the number of jointly controlling shareholders will be classified as a concentration and – provided that the merger clearance thresholds are exceeded – the HCA's procedure will decide whether such concentration results in any change in the market behaviour of the jointly controlling shareholders.

In two procedures in 2008, the HCA established that social organisations had engaged in competitively restrictive practices. In one case the Association of Hungarian Journalists published an 'Honorarium Chart' containing the recommended fees that should be requested for different types of journalistic products, such as articles, caricatures, photos, etc, which was fined as a clearly restrictive practice. The levied fine amounted to 3 per cent of the Association's annual revenues. In the other case the Hungarian Real Estate Association – the largest organisation of real estate agents in Hungary – was found to be in breach for its practice of publishing fee charts for real estate agency services and for real estate valuation services. Fines were not levied, because the Association declared that it would undertake certain commitments that were accepted by the HCA as a satisfactory remedy for the committed infringements.

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 stand-alone 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.

Merger control

The amendment of the Act as of 1 June, 2009, brought significant changes in the domestic merger regime by introducing the SIEC test to replace the dominance test as the substantive test in merger cases. However, most of the former rules remain applicable in their earlier effective form. The thresholds for a notifiable concentration remained unchanged by the amendment, that is, the aggregate annual turnover of the participating undertakings must exceed 15 billion forints. The maximum amount of the daily fine imposed for a failure to submit an application for authorisation was increased from 50,000 to 200,000 forints.

As a result of the introduction of the SIEC test, the Notice and the related Guidelines of the head of the HCA in relation to the differentiation of first- and second-phase cases in merger control procedures had to be adapted to the new rules. The re-issued Notice provides a clear distinction now between one- and two-phase investigations in merger cases under the new regime.

With an earlier amendment of the Act, 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 notice thereon explaining the nature of the remedies, their applicability and implementation.

According to the Notice on remedies, 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: the remedy has to be capable of solving the competition concern; the HCA is bound by the undertakings of the applicants; the condition must be effective, executable and monitorable; and 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, that is, there has to be a viable purchaser. 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; and
- 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, that is, 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, that is, 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 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).

Private enforcement

The purpose of a cartel is often the manipulation of either purchase or sale prices, which can cause damage to the clients of the cartel's participants. Due to the nature of cartels it is very difficult to prove the extent of such damage. Before 1 June 2009, legal and natural persons that suffered damage in connection with hard-core cartels were only able to initiate civil law proceedings on the basis of the general civil law regulations. As of the commencement of the recent amendment, that is, 1 June 2009, the Act contains provisions applicable in such a case. The new rules set up a rebuttable presumption according to which it is presumed that the hard-core cartel had an effect of 10 per cent on the price and 10 per cent of the price will be awarded by the court as lump sum damages, and the claimant will only have to prove its or his damage exceeding this lump sum amount.

The participants in a cartel will bear joint and several liability in a private civil law procedure initiated against them by legal or natural persons suffering damage as a result of the cartel, or both. Until the recent amendment of the Act, any participant in the cartel that was exempted from sanctions under the leniency rules shared the position of other participants in a civil law procedure and the judgement was executable against it or him in the same way, namely, the entire amount of damages awarded by the court was enforceable. The new private enforcement rules provide that the judgment will be executable against such an exempted participant in the cartel only if enforcement was unsuccessful against the other participants.

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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 is the Hungarian member of the International Alliance of Law Firms, and was the Hungarian member of the Ernst & Young Law Alliance from 1996 to 2003. The firm's impressive client base consists of multinationals, as well as large and medium-sized Hungarian companies.

The firm is particularly strong in competition, employment, tax, and corporate and commercial work, including corporate restructuring and insolvency, 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:

- Antitrust/competition law
- Banking and securities
- Corporate and commercial, including company group financing and royalty payment structures
- Corporate restructuring and insolvency
- Employment
- Insurance
- Litigation and arbitration
- Mergers and acquisitions
- Public procurement
- Real estate/commercial property
- Tax.

László Kelemen
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László Kelemen leads the antitrust/competition law practice group of Szabó Kelemen & Partners Attorneys. He regularly represents international and domestic firms before the Hungarian Competition Authority, and has advised clients on a diverse range of matters, including abuse of a dominant position, cartels, distribution and merger clearance. He also maintained the Hungarian desk of Ernst & Young LLP in New York in 1999 and 2000, where he focused on investment and tax-related issues.

In addition to his Juris Doctorate (1995) from Eötvös Loránd University, Budapest, he holds a Postgraduate Diploma in EC Competition Law (2000) from King's College, London, and a Diploma in International Business Law (1998) from TMC Asser Instituut, Asser College Europe, the Hague. László speaks Hungarian and English.

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In addition to his Juris Doctorate (2006) from Pázmány Péter Catholic University, Budapest, he pursued studies in European and public procurement law at the Universitetet i Bergen, Norway. Gergely speaks Hungarian and English, and has a good understanding of French.