



SZEC SKAY  
Ügyvédi Iroda · Attorneys at Law

## NEWSLETTER NOVEMBER - DECEMBER 2006

**Szecskay - Attorneys at Law** is a progressive firm, recognized as one of the top legal advisers in Hungary. The Firm was founded in 1992 by Dr. András Szecskay who had a well established practice with over twenty years of experience in the legal profession at that time.

The Firm is comprised of 20 attorneys, including local counsel and foreign attorneys admitted to practice in Austria, Canada, England, France, Germany and the US.

Main practice areas:

- M&A, Privatization
- Project Finance
- Corporate Restructuring, Merger and Demerger
- General Corporate Practice
- Securities Transactions - Private Placements, IPOs, and Public Offerings
- Competition/Antitrust Law
- Labor
- Real Estate
- Intellectual Property Law and Media Law
- Telecommunications, Information Technology and E-Commerce
- Environment
- Energy
- Litigation  
Dispute Resolution / Arbitration

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### ***In Focus* - Subject of the Month: The European Commission's new Compliance Statement on cartel matters**

The European Commission (the “**Commission**”) has recently investigated the provisions of the 2002 Commission Statement (the “**Compliance Statement**”) regarding exemptions and a decrease in the amount of fines. The Commission also approved the amendment of the Compliance Statement in December, thus taking an important step in the identification of rock solid cartels. The amended Compliance Statement (the “**New Compliance Statement**”) precisely defines the types of information applicants must provide in order to qualify for an exemption from or decrease of fines.

In the four years that have passed since the Compliance Statement was issued, experience has shown that a number of businesses applying for exemptions did not supply the requisite amount or quality of information for exemption, due to the fact that the Compliance Statement did not provide sufficient guidance for applicants in this regard.

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## I. EXEMPTION FROM FINES

Based on the New Compliance Statement, the Commission will provide an exemption from fines that would otherwise be imposed for companies that are the first to provide information and evidence that will make it possible for the Commission to carry out purposive on-site investigations in connection with alleged cartels or that allow for exposures of violations of Article 81 of the EC Treaty.

Purposive on-site investigations appear as a new concept and are carried out by the Commission based on a declaration by a company applying for an exemption. The company declaration is a voluntary statement providing that the business has knowledge regarding the existence of a cartel and its role in that cartel. The Commission will also accept oral submissions of company declarations. The New Compliance Statement precisely stipulates the content of the declaration, thus a detailed account of the alleged cartel agreement must be provided; the names of all businesses participating in the cartel must be exposed along with the names of participating individuals as well as their addresses when necessary. By providing the evidence itemized on the list the applicant is exempted from the imposition of a fine. However, in the spirit of cooperation expected of applicants, in addition to the information itemized in the New Compliance Statement, applicants must furnish any other evidence in connection with the alleged cartel that is in their possession or is available to them.

The Commission evaluates prior to the investigation whether the information exposed pursuant to the purposive on-site investigation is

sufficient for an exemption. The evaluation takes place strictly on the basis of the type and quality of information provided by the applicant. The applicant receives a conditional exemption based on this.

Despite making a purposive on-site investigation possible, exemptions may not be granted if at the time of submission the Commission has sufficient evidence to issue an order regarding the conduct of the on-site investigation or if it has already carried out such an on-site investigation.

In addition to making a purposive on-site investigation possible, an applicant may be granted an exemption if he allows for the exposure of a violation of Article 81 of the EC Treaty. Such an exemption may be granted if at the time of submission the Commission does not have available sufficient evidence to expose a violation of Article 81 of the EC Treaty and no companies have received a conditional exemption from the imposition of a fine for making a purposive on-site investigation possible. The applicant must provide the information mentioned above in this case as well.

The New Compliance Statement introduces the so-called marker concept in an effort to render procedural rules more transparent. If a business wishes to resort to an exemption from a fine, it can either immediately ask for an exemption from the Commission's Directorate-General for Competition Policy or it can first ask for a marker, which identifies its rank in the list of those companies seeking an exemption/reduction. The information necessary for the issue of a marker is stipulated in the New Compliance Statement. The marker guards the position of the applicant for an



exemption for a limited period of time based on each case. During this time, the business may collect the information and evidence necessary for an exemption. If the applicant submits material that meets the exemption threshold by the specified time, the Commission considers the information and evidence as having been submitted on the date on which the marker was issued.

## II. A REDUCTION IN FINES

If a business does not qualify under the conditions for an exemption from fines, it may still be eligible for a reduction in the amount of the fine. The condition for this is that the information provided by it must provide considerable added value to the evidence is already available to the Commission. The notion of added value has also been clarified and thus evidence in writing dated at the time of the findings of fact to be made will be more valuable than other evidence, also in writing, but with a later date. Similarly, directly incriminating evidence will carry more weight than one that is indirectly incriminating. Another important aspect is the extent to which the evidence must be corroborated by other sources and based on this there is evidence that is convincing and one that requires corroboration. In addition to all of this, the business must still satisfy the normative conditions of eligibility for an exemption from fines.

A business that has taken steps to force other businesses to join or to remain in a cartel is not eligible for an exemption from fines. At most, it can ask for a reduction in the amount of the fine.

In other respects the rate of reduction provided to applicants has not changed. Having provided evidence with considerable added value,

the first business can receive a 30-50%, the second a 20-30% and the third a 20% reduction in the amount of the fine.

Business applying for a reduction in fines must submit an official application to the Directorate-General for Competition Policy. Sufficient evidence concerning the alleged cartel must be included in the application. In the event the Commission, in its preliminary evaluation, finds that the evidence represents considerable added value, it will notify the business that it will apply a reduction in the amount of the fee based on a certain provision. The Commission will also inform the business if, based on the preliminary evaluation, it is not eligible for a reduction in the fine.

## III. GENERAL CONDITIONS

In the event an exemption from or a reduction in fines is given, the New Compliance Statement also identifies three additional cumulative conditions that must be met for an exemption. Above all, the business must co-operate with the Commission in an honest, comprehensive, continuous and rapid manner. The term "honest", as derived by the use of the term in legal practice, implies that the applicant is obliged to provide accurate and complete information that is not misleading. Based on honest co-operation, the applicant is not to destroy, falsify or conceal information relating to the alleged cartel and it is also obliged not to reveal his application before the Commission has issued a Statement of Objections in the case.

As a second general condition of being granted an exemption, the applicant must cease its participation in the alleged cartel directly after



having submitted an application unless the Commission believes that participation is reasonably necessary in order to ensure a successful on-site investigation.

In addition, when a business considers submitting an application to the Commission, it must not possess any destroyed, falsified or concealed evidence of the alleged cartel and it must also not reveal the existence or contents of the intended application, except to other competition authorities.

The Statement is operative as of December 8, 2006 and replaces the 2002 Compliance Statement in cases where no businesses have contacted the Commission in order to take advantage of the favorable treatment made available under the 2002 Compliance Statement.

The legal background of the compliance policy in Hungary is based on Section 78 of Act LVII of 1996 on the prohibition of unfair trading practices and unfair competition, which provides that any cooperation of the person under investigation shall be taken into account as a factor decreasing the amount of the fine. Statement no. 3/2003 of the president of the Hungarian Competition Office and the president of the Competition Council, as amended in 2006, is based on the above Section.

The compliance policy of the Hungarian Competition Office is similar to that of the Commission's but contrary to the New Compliance Statement, it does not apply the marker system.

The complete text of the New Compliance Statement and the statement of the Hungarian Competition Office can be found at the following addresses: [http://ec.europa.eu/comm/competition/cartels/legislation/leniency\\_legislation.html](http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html) and [www.gvh.hu](http://www.gvh.hu).

### ***Capital Markets Law: A presentation at the Budapest Stock Exchange on practical legal matters relating to going public***

On November 28, 2006, the Club of Quotables (the "CoQ"), affiliated with the Budapest Stock Exchange (the "BSE"), organized presentations with the themes of going public and the practical application of rules relating to listing on the regulated market. On behalf of Szecskey Attorneys at Law, Dr. Judit Budai and Dr. László Pók made the first presentation, entitled practical legal matters relating to public listing. Following that presentation, Attila Varga-Balázs, Chairman of the BSE's Listings and Member Committee, spoke about the steps and rules applicable to listing shares on the stock exchange.

The primary goal of the presentations was to familiarize participants with the format of information issued in connection with European Parliament and Council Directive 2003/71/EC; the installation of information with references; 809/2004/EC Regulation (the "**Regulation**") regarding publication of notifications and proceedings in connection with the dissemination of advertisements and notifications that must be issued when securities are listed or introduced in the market. The presentations also covered practical legal matters arising from applications of the rules under Act CXX of 2001 on capital markets (the "CMA") as amended and in operation July 1, 2005 pursuant to the transplant of Directive 2001/34/EC as amended by Directive 2003/71/EC. The presentations provided a good opportunity for companies participating on the BSE and those contemplating listing on the exchange for shorter or longer intervals to direct their attention to the possible pitfalls of listing on the exchange and



going public, and also to provide support in the preparation for the transaction.

Throughout the presentations covering practical matters relating to going public participants were given insight into (i) the requisite legal steps for an initial public offering; (ii) the list decisions necessary for the transaction; (iii) the timeframe of the transaction (iv) the most important regulations concerning liability (v) the content and format requirements of the prospectus as well as (vi) those transaction structures with which it is possible and practical to go public independently or in addition to other marketing transactions. In proceeding with the steps required to go public, in addition to the indispensable company law steps, it is vital that the internal structure of the company is prepared for the requirements arising out of functioning as a public company. Effective information dissemination and regular and extraordinary notification requirements can be better met if the company designates an investment contact person who is available to investors, the authorities and the media throughout the entire transaction and after the initial public offering.

Among the steps and rules required for going public, special attention must be paid to adhering to the requirements of the Regulation and the CMA regarding advertisements as well as to obtaining the necessary permits for advertisements in time.

In preparing each step and structure of the transaction, the time requirement of each step must be borne in mind, as well as the deadlines for proceedings by the authorities applicable for those steps where permits must be obtained. The course of the transaction may be interrupted and the

success of the entire transaction may be put at risk if a structure is not defined properly.

It is worth highlighting with regards to the regulations on liability for the prospectus, that the following classes of individuals are liable to the owner of securities for damages resulting from misleading content and concealment of information in the prospectus: the issuer, the distributor (in the case of a distributing consortium, the head distributor), the person who has assumed liability for the rights in the security and the offeror or the person responsible for the promotion of the listing of the security on the regulated market. In the prospectus, the name, designation, role in the listing and address (seat) of the person/entity responsible for the content of any part of the prospectus must be stated in an accurate and unambiguous manner. The liability of any one of the above-mentioned people must extend to all information included in the prospectus as well as for any omitted information.

As a general rule, the issuer, the offeror or the person responsible for the promotion of the listing of the security on the regulated market are jointly liable. In the event that liability is not joint based on an agreement among the parties, i.e. the distributor is not liable for damages caused to investors, then the security is qualified as being subject to non-ordinary risk. The fact that the security is subject to non-ordinary risk must be prominently featured at the front of the prospectus and in advertisements.

For its conclusion, the presentation elaborated on the fact that during trading, the rules of the CMA on inside trading must also be employed.



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