



**SZECSKAY
ÜGYVÉDI IRODA • ATTORNEYS AT LAW**

H-1055 BUDAPEST, KOSSUTH TÉR 16-17
(MAIL: H-1245 BUDAPEST PF/POB 1228)
HUNGARY

TEL: +36 (1) 472 3000 • FAX +36 (1) 472 3001 • INFO@SZECSKAY.COM • WWW.SZECSKAY.COM

NOVELTIES IN THE HUNGARIAN COMPETITION ACT

BY DR. JUDIT BUDAI AND DR. ANIKÓ KELLER

*As of November 1, 2005, several changes to Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (the "**Competition Act**") entered into force significantly affecting the Hungarian competition legislative regime. The amendments include new regulations with respect to restrictive agreements and practices, the introduction of the concept of the 'group of undertakings' and the new procedural rules with respect to 'dawn raids'. With regard to concentrations, the thresholds to be taken into account as well as the term of 'concentrative joint ventures' have also changed. In addition, the highest possible amount of the fine to be imposed by the Hungarian Competition Office (the "**HCO**") has increased.*

RESTRICTIVE AGREEMENTS AND PRACTICES

Mirroring the relevant EU competition regulation (Council Regulation No 1/2003), in case a conduct exclusively affects the Hungarian market, the amendment has abolished the practice under which individual exemptions were granted on a case-by-case basis maintaining at the same time the criteria for exempting agreements from the prohibition on restrictive agreements. Until October 31, 2005, companies were entitled to request a ruling from the HCO as to whether or not an agreement or practice complied with the Competition Act. If such ruling declared that a certain agreement or practice is not restrictive, the parties were granted a guarantee that later on, the same agreement or practice will not be ruled restrictive. As of November 1, 2005, companies will have to assess agreements to be concluded or practices to be carried out by them on the basis of the Competition Act, the block exemption regulations and the practice of the HCO (its *obiter dicta*) on their own and decide if same is restrictive or not. The HCO is now only entitled to perform post reviews and evaluations.

THE CONCEPT OF GROUP OF UNDERTAKINGS

The amendment has changed the definition of 'undertakings, which are not independent of each other' by introducing the concept of 'group of undertakings'. An undertaking is a member of a group of undertakings if it has direct or indirect control relations with other members of the group. In other words, an undertaking ("**Undertaking**") belongs to the same group of undertakings which: (i) are directly or indirectly controlled solely by the Undertaking; (ii) solely directly or indirectly

control the Undertaking; (iii) are solely directly or indirectly controlled by an undertaking which is solely directly or indirectly controlling the Undertaking; and (iv) are jointly controlled by two or more of the undertakings set out in points (i)-(iii) and the Undertaking.

The undertakings concerned in a concentration are undertakings which participate directly or indirectly. Direct participants are participants among which the concentration will come into existence, while indirect participants are the groups of undertakings to which the direct participants belong.

DAWN RAIDS

Under the Competition Act, "*in proceedings commenced ex officio, investigative measures may be carried out on any sites where evidence necessary to clarify the facts of the case is kept*". Under the new provisions relating to dawn raids, when carrying out an inspection, investigators have become entitled to make copies of, or seize, pieces of evidence, which do not relate to the subject of the investigation and are not covered by the authorization of the court, but which are indicative of an infringement of the provisions of the Competition Act or of Article 81 or 82 of the EC Treaty. In respect of such pieces of evidence, the authorization of the court must be obtained subsequently. Furthermore, as another novelty of dawn raid rules, the "client / attorney privilege" has also been introduced allowing documents which originally carry the "Privileged Attorney-Client Communication" to be exempted from investigation.

MERGER CONTROL

The thresholds applicable in merger control cases have been raised so that a transaction is only subject to merger control if both the previous financial year's total net turnover in Hungary of: (i) all the groups of undertakings concerned; (ii) the members of the groups of undertakings concerned; and (iii) undertakings that are jointly controlled by other undertakings together exceeds HUF 15 billion (approximately € 60 million).

Furthermore, among the groups of undertakings concerned, there must be at least two groups of undertakings whose financial year's net turnover in Hungary, together with the financial year's net turnover of (i) members of the group of undertakings; and (ii) undertakings that are jointly controlled by other undertakings together exceeds HUF 500 million (approximately € 2 million).

Prior to November 1, 2005, a HUF 10 billion threshold applied instead of the HUF 15 million and with respect to the HUF 500 million threshold, only the sales revenues of the company over which control was acquired mattered.

As of November 1, 2005, in assessing whether the HUF 500 million threshold is met, mergers not subject to authorization which took place due to the merger concerned within a two-year period preceding the merger concerned and effectuated by the group of undertakings acquiring control along with the undertakings formerly belonging to the group of undertakings losing control, will be taken into consideration. The rule pursuant to which with respect to foreign undertakings, only the turnover from the Hungarian market (through subsidiaries or direct sales) is usually relevant for calculating the above thresholds, has not changed.

Furthermore, a new rule provides that when calculating the net turnover of an undertaking jointly controlled by the undertakings concerned and other undertakings, such net turnover must be apportioned equally among the undertakings jointly controlling such undertaking in order to reflect the joint control. In such cases, however, joint control has to be demonstrated.

The amendment has also modified the definition of the concept of joint ventures by introducing the definition of "full function" joint ventures which are "able to perform on a lasting basis all the functions of an independent undertaking" replacing the former definition of the "joint venture where an undertaking is created, which takes over an activity previously performed independently by the founding undertakings".

FINES

The competition council bringing proceedings may impose a fine on undertakings infringing the provisions of the Competition Act. Prior to November 1, 2005, the maximum fine could not exceed 10% of the net turnover of the undertaking achieved in the business year preceding that in which the decision establishing the infringement is reached. Where the undertaking is member of a group of undertakings which is identified in the decision, the amendment enables the HCO to impose fines up to 10% of the net turnover of that group of undertakings. Groups of undertakings bear joint and several liability for the payment of fines.

The contents of this article are intended to provide only a general overview of the subject matter. Specialist advice should be sought for specific matters. Queries relating to this article should be addressed to the authors at:

JUDIT.BUDAI@SZECSKAY.COM OR ANIKO.KELLER@SZECSKAY.COM