

**EXTRATERRITORIAL EFFECT OF THE ACT
ON PROHIBITION OF UNFAIR AND RESTRICTIVE MARKET PRACTICES**

Competition Law Hungary - Euromoney Publication - April, 1999

BBLP Central European Practice Group Newsletter 2000

Author: Dr. Judit Budai

Promulgated in 1996 to reflect EU competition law principles, Hungary's Act on the Prohibition of Unfair and Restrictive Market Practices ("Competition Act") covers five distinct areas:

- the prohibition of unfair competition;
- the prohibition of unfair influence of consumer decisions;
- the prohibition of agreements restricting economic competition;
- the prohibition of abuse of dominant position; and
- the regulation and control of the concentration of enterprises.

The jurisdiction of the Competition Act extends to market activities within Hungary and market activities carried out exclusively abroad, provided such activities "*may manifest themselves*" in Hungary.

Significantly, the Competition Act's provisions prohibiting unfair competition (i.e., trade libel, unauthorized use of business secrets, interference with business relations, etc.), and the unfair influencing of consumer decisions (i.e., false or deceptive representations regarding price, quality or capabilities of goods/services, etc.) are expressly excluded from the law's extraterritorial effect, as such matters are typically addressed on a national level and harmonization with EU standards cannot be anticipated.

In line with the EU norms (European Treaty, Article 85), unless otherwise exempted by law or decision of the Competition Office in a particular case, both horizontal cartel arrangements, e.g., agreements between competitors, and vertical cartel arrangements, e.g., agreements between manufacturers and dealers/retailers, are generally prohibited. Agreements exempted from this prohibition, subject to meeting certain criteria, include exclusive purchase and trading contracts, franchise agreements, insurance agreements and certain vehicle trading and service agreements. The prohibitions also are not applicable to agreements among related undertakings and to so-called "bagatelle cartels", i.e., agreements between undertakings whose collective share of the concerned market does not exceed 10%. The extraterritorial effect of such provisions may arise in the case of a cartel arrangement between a foreign (non-Hungarian) company and a Hungarian company, irrespective of where the agreement was concluded or which law the agreement specifies shall apply. However, this area of the law is undeveloped, with only 14 cases decided in Hungary in 1997 and 1998, all involving activities within Hungary.

**REGULATION AND CONTROL OF THE CONCENTRATION OF ENTERPRISES
IN THE ACT ON PROHIBITION OF UNFAIR AND RESTRICTIVE MARKET PRACTICES**

Perhaps the most important and developing aspect of the Competition Law, from both a domestic and extra-territorial standpoint, is the regulation and control of concentrations.

Unlike agreements restricting economic competition or abuses of a dominant position, both of which may be effected privately and in confidence, thereby possibly escaping regulatory scrutiny, a merger or acquisition involving a publicly traded company will eventually become public knowledge. Moreover, mergers or acquisitions involving prominent multi-national companies, or even rumours of such transactions, can be the subject of worldwide media attention. As a result, it is virtually impossible for a merger or acquisition to take place without the risk of scrutiny by interested authorities. This is significant because the Hungarian Competition Office is empowered to examine a transaction *ex officio*, even without a permit application or complaints by consumers or competitors.

The Competition Act's merger control rules apply to (i) the merger of two or more previously independent undertakings, or of one undertaking into another, or of part of an undertaking into part of another independent undertaking, (ii) the acquisition of control by one undertaking, or by multiple undertakings jointly, over the whole or part of one or several undertakings, and (iii) the establishment of an undertaking by and under the control of several undertakings through which they unite similar activities, provided such arrangement does not restrict competition.

The permission of the Competition Office is required for such concentrations where the undertakings concerned generated total net sales revenues in Hungary in excess of 10 billion HUF (approximately 45 million USD) in the previous year, provided the net sales revenues in Hungary of the merging undertaking, the undertaking to be transferred under control or those of at least two undertakings involved in such concentrations, are in excess of 500 million HUF (approximately 2.3 million USD). However, even if the 500 million HUF threshold is not met, the Competition Office's permission must still be obtained if, together with these sales revenues, the same undertaking realized a concentration exceeding 500 million HUF in total net sales revenues within the two years preceding the concentration. For concentrations involving financial institutions, 10% of the total assets rather than the net sales figure shall be used; for concentrations involving insurance companies, gross insurance premium values shall be considered.

Direct participants are those undertakings between whom the concentration takes place, except that direct participants, whose right of control expires with the concentration, are disregarded. Indirect participants are those controlled by a direct participant, controlled by an indirect participant in addition to a direct participant, or controlled by two or more participants jointly, regardless of whether they are direct or indirect participants.

In the case of concentrations involving direct participants domiciled outside of Hungary, the legal commentary and interpretations from the Competition Office suggest that, in order for the

Competition Act to validly assert extraterritorial jurisdiction, each of the direct participants must have a nexus to Hungary, either in the form of (i) direct or indirect control over a company located in Hungary, or (ii) export sales to Hungary. If such a nexus exists, the Competition Act shall apply, and the previous year's net sales revenues must then be examined to determine whether the merger control thresholds are met. The sales revenues of direct participants located outside of Hungary are calculated on the basis of all goods sold in Hungary, whether directly or through companies located within or outside of Hungary controlled by the direct participant. However, sales generated between companies controlling or controlled by another company shall be disregarded for purposes of such calculation.

For further information on this topic, please contact Dr. Judit Budai at Szecskay Law Firm - Moquet Borde & Associés by telephone (+36 (1) 353 1255) or by fax (+36 (1) 353 1229) or by e-mail (mba@szecskay.hu).