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The Independence of Legal Persons Directly Controlled by the State or Local Governments in Hungarian Competition Law[1]

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[1] The study was prepared in the research project of the Comparative Private Law Research Workshop.

The Independence of Legal Persons Directly Controlled by the State or Local Governments in Hungarian Competition Law[2]

1. Introduction

Prohibitions in competition law do not regulate the market activity of a single entity in the corporate law sense,[3] but rather all undertakings directly or indirectly controlled by the ultimate controller. Put simply, a group of undertakings is subject to the competition rules.

The concept of a group of undertakings is defined in Article 15(2) of Act LVII of 1996 on the Prohibition of Unfair Market Practices and Restriction of Competition (hereinafter: the Act) as part of the definition of non-independent undertakings under the rules of cartel law. This concept does not differentiate between undertakings, but Article 15(3) also provides a special rule according to which undertakings "directly controlled by the State or local governments and with autonomous decision-making powers in determining their market conduct" are to be considered independent, that is, not belonging to a group of undertakings. In such cases, the general rule that direct control is a criterion for grouping without any further examination of the circumstances does not apply.

The text is based on the practical consideration that the state and municipal sectors should not be treated as a single group of undertakings, as neither the prohibition of cartels nor the notification requirements of merger control apply within the group; however, in the absence of the specific provision referred to above, a mapping of the system of control would typically lead to that result.[4] The legislator is therefore seeking to ensure that the competition rules can also be applied in relations between undertakings with a state or municipal background—the provisions of Article 15(3) of the Act essentially broaden the scope of Hungarian competition law.

However, the law does not specify which criteria the competition authority is obliged to assess when examining the existence of autonomous decision-making powers, so the case law is forced to provide some substance to the rule.[5] The same applies to the merger rule under Article 27(3) of the Act, which provides that "[i]n calculating the net turnover of undertakings directly controlled by the State or local governments, those undertakings constituting economic units shall be taken into account which have autonomous decision-making powers in determining their market conduct." In this case,

[2] The study was prepared in the research project of the Comparative Private Law Research Workshop.
[3] Tóth Tihamér: *Uniós és magyar versenyjog*, Wolters Kluwer Hungary Kft., Budapest, 2020, 103-104.
[4] Cf. Balogh Virág et al.: *Magyar versenyjog*, HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2012, 165-166.
[5] Bodócsi András et al. (2021a): A magyar fúziós eljárásjog 2010 óta tartó fejlesztése, in *Versenytükör*, 2021/1., 18.

not only the autonomous decision-making powers but also the definition of the economic unit that is omitted.

Our aim is to answer the questions of interpretation left open by the Act through the relevant Hungarian legal literature, as well as Hungarian and EU case law. We note that after 2010, the State increased its presence in the public services and banking sectors in particular by acquiring majority ownership, and the number of start-up investments by majority state-owned undertakings has also increased.[6] It is striking that while between 2006 and 2018, only 17 out of 250 transactions by Hungarian-based undertakings involved a state-owned undertaking,[7] 30% of the mergers examined by the Hungarian Competition Authority (hereinafter: HCA) in 2020 involved some form of state-involved acquisition of control.[8] All this shows that the comprehensive analysis of the autonomous decision-making powers and the concept of economic unit is also intended to meet practical needs.

The paper first introduces the general concept of a group of undertakings, and then discusses the differences that apply to undertakings directly controlled by the State or local governments, paying particular attention to national and EU case law on the subject.

2. The Concept of a Group of Undertakings

As indicated above, competition law can treat several persons as a single entity. In such cases, EU law also uses the term "undertaking," whereas Hungarian competition law uses the term "group of undertakings" [not synonymous with the term "group of companies" under Section 3:49 of Act V of 2013 on the Civil Code (hereinafter: Civil Code)],[9] that is, an undertaking under the Act does not refer to a group of undertakings, but typically to a legal entity in the sense of company law, exceptionally a natural person.[10]

[6] Bodócsi (2021a) *op. cit.* (fn. 4.) 18; Bodócsi András et al. (2021b): Vállalati fúziók engedélyezése Magyarországon, in *Pénzügyi Szemle*, 2021/2., 259-261.
[7] Kucséber László Zoltán: A magyarországi fúziók és felvásárlások elemzési lehetőségeinek feltárása, in *Vezetéstudomány*, 2020/7-8., 49.
[8] Bodócsi (2021b) *op. cit.* (fn. 5.) 259-260.
[9] Section 3:49(1) of Civil Code states that *"[a]n acknowledged group of companies means cooperation based on an uniform business policy defined in a control contract between at least one controlling member obliged to prepare consolidated annual accounts and at least three members controlled by the controlling member."* By contrast, a group of undertakings within the meaning of competition law is sufficient if it includes two undertakings and does not require the conclusion of a control contract.
[10] Tóth (2020) *op. cit.* (fn. 2.) 103-104.

"Through common ownership and control relationships, firms serving a common economic interest ultimately form an economic unit."[11] A group of undertakings is therefore those undertakings over which the same undertaking has the power to exercise decisive influence, i.e., which are controlled by the same person.

While EU law makes no distinction between the two terms, in Hungary Article 15(2) of the Act states in a normative form that an undertaking belongs to the same group of undertakings together with the following undertakings that:[12]

- are under its sole control, directly or indirectly;
- exercise sole control over it, directly or indirectly;
- are under the direct or indirect and sole control of the undertakings which exercise direct or indirect and sole control over the undertaking concerned;
- are under the joint control of two or more of the undertakings listed above and the undertaking concerned.

Article 23(2)-(3) of the Act lists the cases of direct and indirect control, but we will not present them here in view of the subject of the study.

An undertaking in the EU legal sense and a group of undertakings within the meaning of the Act are therefore the real addressees of competition law. Even if the use of the term "group of undertakings" may not seem entirely consistent in the Act, it is present in all antitrust provisions; we will give examples of these, focusing exclusively on Hungarian law (since the concept of a group of undertakings is not applied in EU law).

1. The concept of a restrictive agreement requires that at least two undertakings restrict competition by object or effect by an agreement, concerted practice or decision. However, Article 11(1) of the Act also states that agreements between non-independent undertakings are not prohibited. The concept of a non-independent undertaking does not only cover undertakings belonging to a group of undertakings, but also undertakings controlled by the same undertakings, as provided for in Article 15(1). Agreements between such undertakings are therefore not subject to the prohibition of competition law, since, in the absence of independence, these economic operators are not in fact competing with each other.

[11] Ibid.
[12] We note that, in our view, neither solution is better than the other because the difference is one of form rather than substance.

Non-independent undertakings also appear in the *de minimis* rules. Article 13 of the Act provides an exception for infringements based on effects—that is, not constituting a restriction by object, i.e., a cartel—if, in the case of horizontal agreements, "the joint share of the participating undertakings and of undertakings which are not independent of them does not exceed ten per cent on any of the relevant markets," while in the case of vertical agreements, "the joint share of the participating undertakings and of undertakings which are not independent of them does not exceed fifteen percent on any of the relevant markets." The market position of the whole group is therefore relevant in the calculation of market share.

Although we have not found any literature to support the view we lay out below, we believe that the market share of undertakings should be calculated in the same way when applying each of the block exemption regulations, in particular Government Decree 306/2022 (VIII. 11.) on the exemption of certain categories of vertical agreements from the prohibition of restrictions of competition, Government Decree 456/2023 (X. 5.) on the exemption of certain categories of research and development agreements from the prohibition of restrictions on competition, and Government Decree 467/2023 (X. 12.) on the exemption of certain categories of specialization agreements from the prohibition of restrictions of competition—irrespective of whether the concept of undertaking is used in these regulations.

The difference between EU and Hungarian law is that while EU law does not consider intra-group cooperation as an agreement between two undertakings, Article 11(1) of the Act does, but it establishes an irrebuttable presumption that there is no anti-competitive object or effect.

2. In the context of the prohibition of abuse of dominant position, the Act does not use the concept of an undertaking or a group of undertakings either in the general clause or in the definition of dominant position, but Article 22(3) makes it clear that "[a] dominant position may be held by a single undertaking, a group of undertakings, jointly by more than one undertaking, or jointly by more than one group of undertakings." The assessment of the relevant market and market power therefore requires taking into account the data of the entire group of undertakings, as it is possible that the undertaking itself is not yet in a dominant position, but it may be in a dominant position through the group of undertakings it controls.

3. The Act uses the concept of an undertaking when designating the concentration situations (organizational merger, acquisition of control and creation of a full-function joint venture), but the

notification threshold numbers are related to the group of undertakings.[13] According to Article 24(1), a concentration shall be notified if

> *the aggregate net turnover of all the groups of undertakings concerned and the undertakings jointly controlled by undertakings that are members of the groups of undertakings concerned and by other undertakings exceeded twenty billion forints in the preceding business year, and net turnover of each of at least two of the groups of undertakings concerned in the preceding business year combined with the net turnover of the undertakings jointly controlled by undertakings that are members of the respective group of undertakings and other undertakings in the preceding year was more than one billion five hundred million forints.*

The so-called soft threshold under Article 24(4) is defined in a similar way.

This concept, like non-independent undertakings, covers more than just a group of undertakings, as it also includes undertakings jointly controlled by a member of the group and other undertakings not belonging to the group. However, Notice 2/2023 of the President of the Hungarian Competition Authority and of the President of the Competition Council of the Hungarian Competition Authority on certain procedural aspects of merger control proceedings (hereinafter: Notice 2/2023), point 2.1.2, emphasizes that the net turnover of undertakings jointly controlled by undertakings not belonging to the same group should be taken into account only in proportion to the share of joint control held by the undertaking (or group of undertakings) concerned.

4. It should be noted that the size of the group of undertakings plays an additional role in the imposition of fines, and the term is also used in NMHH Decree 19/2020 (XII. 18.) on the detailed rules for the provision of universal electronic communications services.[14]

To sum up, while EU law refers to undertakings and does not further define the concept, the Act makes a distinction between an undertaking and a group of undertakings, the latter being made up of several entities as an undertaking. It can be assumed that the Act uses several concepts in order to ensure a consistent application of domestic law, which is less case-centric than EU law, and to ensure at least partial identity between the concepts of undertaking used in the Act and the Civil

[13] According to the literature, the direct participants in a concentration are the undertakings between which the concentration has been implemented, while the indirect participants are the additional members of the groups of undertakings to which the direct participants belong; the combination of direct and indirect participants constitutes the group of undertakings concerned, with the exception of those undertakings whose control is lost [Cf. Boytha Györgyné (ed.): *Versenyjog*, Szent István Társulat, Budapest, 2009, 145; Boytha Györgyné: *Versenyjogi ismeretek*, Szent István Társulat, Budapest, 1998, 97; Miskolczi-Bodnár Péter: *A versenykorlátozások jogának magyar szabályai*, Patrocinium, Budapest, 2015, 136-138; Miskolczi-Bodnár Péter: *Versenyjog*, Novotni Kiadó, Miskolc, 2007, 179-181].

[14] Cf. Zavodnyik József: *Kompakt kommentár a versenytörvényhez*, Wolters Kluwer Hungary, Budapest, 2023, 114.

Code.[15] In addition to these two concepts, the Act also makes use of additional concepts on a case-by-case basis: non-independent undertakings are covered by the law on restrictive agreements, while merger control also assesses data on undertakings jointly controlled by members of a group and other undertakings when calculating thresholds.

3. Special Rules for Undertakings Directly Controlled by the State or Local Governments

In the following, we will examine the extent to which the concept of a group of undertakings differs from the general one in the case of undertakings with a state or municipal background, in the following order: first we will focus on the Hungarian rules, i.e., we will fill in the concept of autonomous decision-making powers under Article 15(3) of the Act and the concept of economic unit under Article 27(3), and then we will only touch upon the EU approach.

Although the analysis relies primarily on the results of case law due to the narrowness of the Act, it does not analyze the case law cited separately, but instead characterizes the categories and legal institutions according to their substantive content.

3.1. Autonomous Decision-Making Powers

It is worth mentioning that Article 15(3) of the Act did not originally refer to a direct control relationship, but to majority ownership by the State or local governments. The text was amended, as in the case of Article 27(3), by Article 46 of Act CXXII of 2021 amending certain acts on justice and related matters—Article 129(2) specifies 1 January 2022 as the date of entry into force. According to the detailed explanatory memorandum,

> *[t]he amendment is necessary because, on the basis of the provisions of Article 23(2) of the Act, it cannot be excluded that majority ownership does not give rise to control or that control may exist in the absence of majority ownership. However, from a competition law point of view, control is of decisive importance.*

Since the Act does not define the concept of autonomous decision-making powers, it can only be decided whether the undertakings are independent of each other on the basis of an analysis of their actual operation.[16] The known demarcation criteria are presented in a bullet point format, based on

[15] Section 8:1(1)(4) of Civil Code states that *"undertaking means a person acting within its profession, independent occupation or business activity."*
[16] Boytha Györgyné et al.: *Versenyjog*, HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2001, 122.

Notice 2/2023 and the practice of the HCA (although the former is not referred to because it is essentially an excerpt from the case-law that has already been dealt with). We could not find any relevant judicial decisions, which may be due to the fact that at the end of the merger proceedings we examined, the HCA either cleared the merger[17] or found that the transaction did not constitute a concentration situation;[18] and judicial review of competition authority decisions is not a typical feature of merger control. We note that a decision of censure was taken on the basis of restrictive agreements.[19]

1. A case of independence based on autonomous decision-making powers is when the State permanently does not exercise its right of control.[20] In assessing this, three aspects need to be considered:

- *decisions relating to the way in which the undertaking operates, its fundamental rules (e.g., amendment of the statutes, increase or reduction of capital), liquidation, sale;*
- *decisions of a strategic nature relating to the business policy of the undertaking (business plan);*
- *decisions relating to the day-to-day running of the undertaking*.[21]

The relevant decisions for the assessment of independence are those which are directly related to the competitive (market) behavior of the undertaking; which is confirmed by both case law[22] and the literature.[23] Consequently, of the decisions listed above, those related to business policy, in particular the adoption of a business plan, are of decisive importance. If the latter decision is subject to State approval, the undertaking does not, as a general rule, have autonomous decision-making powers.[24]

[17] Vj-62/2001.; Vj-3/2012.; Vj-17/2012.; Vj-23/2012.; Vj-109/2012.; Vj-31/2013.; Vj-87/2013.; Vj-88/2013.; Vj-122/2015.
[18] Vj-55/2009.; Vj-51/2012.
[19] Vj-3/2008.
[20] Juhász Miklós, Ruszthiné Juhász Dorina, Tóth András (ed.): *Kommentár a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról szóló 1996. évi LVII. törvényhez*, Gazdasági Versenyhivatal, Budapest, 2014, 259; Vj-55/2009., 12) point; Vj-17/2012., 25) point; Vj-51/2012., 18) point.
[21] Vj-17/2012., 25) point.
[22] Vj-17/2012., 26) point; Vj-23/2012., 23) point.
[23] Tóth András: A nemzeti versenyhatóságok szerepe a gazdasági válság kezelésében, in *Versenytükör*, 2012/2., 34; Tóth András: Fúziós eljárásjogunk fejlődése a Versenytanács elmúlt háromévi gyakorlata alapján, in *Versenytükör*, 2013/2., 22; Tóth András: *Versenyjog és határterületei. A versenyszabályozás jogági kapcsolatai*, HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2016, 184.
[24] Cf. Tóth (2012) *op. cit.* (fn. 22.) 34; Tóth (2013) *op. cit.* (fn. 22.) 22; Tóth (2016) *op. cit.* (fn. 22.) 184; Tóth (2020) *op. cit.* (fn. 2.) 729-730; Vj-17/2012., 27) point; Vj-23/2012., 23) point; Vj-51/2012., 15) point; Vj-87/2013., 21) point; Vj-88/2013., 18) point; Vj-122/2015., 20) point.

One exception to the general rule is where the business plan sets out only general objectives;[25] in such cases, a decision on independence requires an assessment of the operation of the undertaking as a whole.[26] The other exception is where the power to adopt the business plan is only formal,[27] that is, the State is not in a position to influence the competitive strategy of the undertaking on a lasting basis.[28] If the public undertaking adopts the business plan independently of the "owner" (for example, a minister), the fact that the members of the management body (for example, the board of directors) are chosen by the minister does not call into question the independence of the undertaking.[29] The reason for this is that, compared with control based on the right to appoint, Article 15(3) of the Act is to be assessed as a special rule.[30]

> *In other words, by the very nature of merger clearance, it is necessary to take a long-term, forward-looking view of how the circumstances surrounding the adoption of the business plan will evolve. This is particularly relevant where there is a change in the identity of the person who is authorised to adopt the business plan shortly before the date on which clearance is required.*[31]

2. Another case of independence based on autonomous decision-making powers is when two undertakings belong to different economic units (decision centers)[32] with autonomous decision-making powers, for example, two different ministries.[33] Note that in this case, the decision center should, in our view, be understood as part of the State and not as a controlled undertaking.

3. The case law presumes that an undertaking that is 100% owned by the owner has no autonomous decision-making powers, that is, it is not independent of the owner but the presumption can be rebutted in external circumstances.[34] We believe that this rule has been overridden, or results in the rebuttal of the presumption, if the State does not exercise its right of control on a lasting basis

[25] Tóth (2020) *op. cit.* (fn. 2.) 729-730; Vj-17/2012., 27) point; Vj-51/2012., 15) point.
[26] Vj-17/2012., 27) point.
[27] Tóth (2020) *op. cit.* (fn. 2.) 729-730; Vj-51/2012., 18) point.
[28] Vj-51/2012., 18) point.
[29] Tóth (2020) *op. cit.* (fn. 2.) 729-730; Vj-17/2012., 32) point; Vj-23/2012., 23) point.
[30] Vj-17/2012., 32) point; Vj-23/2012., 23) point; Vj-51/2012., 14) point.
[31] Vj-51/2012., 18) point.
[32] Juhász, Ruszthiné Juhász, Tóth *op. cit.* (fn. 19.) 259; Vj-55/2009., 13) point; Vj-17/2012., 29)-30) point; Vj-109/2012., 21) point.
[33] Tóth (2016) *op. cit.* (fn. 22.) 184; Tóth (2020) *op. cit.* (fn. 2.) 729-730; Vj-109/2012., 21) point.
[34] Vj-55/2009., 14) point.

(*point 1*). The same result is obtained if two undertakings belong to different decision centers (*point 2*).[35]

4. Article 15(3) of the Act is a special rule compared to Article 15(1), therefore it is unnecessary to examine the applicability of Article 15(3) if the undertakings are considered independent under the general rules.[36] In other words, Article 15(3) is only relevant if the undertakings are not independent of each other within the meaning of Article 15(1).

5. Article 15(3) of the Act applies only in the case of direct control by the State or local governments; if the control is indirect, the question of independence is to be assessed according to the general rules.[37] In such cases, the relevant question will be whether the undertaking concerned is independent of an undertaking directly controlled by the State or local governments and does not have autonomous decision-making powers, in accordance with Article 15(1), and if the latter undertaking has autonomous decision-making powers, there is no reason to apply Article 15(3) anyway.

6. Article 23(4) of the Act states that "activities of the office-holder relating to the winding up and dissolution of undertakings shall not qualify as the exercise of control;" an undertaking in liquidation is controlled by the undertaking which has the right of control pursuant to Article 23, irrespective of the fact that the right of control may be exercised only to a limited extent during the liquidation proceedings.[38] The HCA considers this approach to be applicable in the context of Article 15(3),[39] in contrast to the general rule of control based on the right to appoint (*point 1).*

7. The HCA does not examine whether it is necessary to apply Article 15(3) of the Act if the question of independence is irrelevant to the outcome of the competition supervision proceeding.[40] Such a situation arises, for example, where a concentration situation exists both with and without autonomous decision-making powers,[41] where there is a notification obligation[42] and where there are no competitive effects.[43]

[35] There is also a view in the literature that the presumption does not apply to state-owned undertakings [Tóth (2020) *op. cit.* (fn. 2.) 145].
[36] Vj-3/2008., 221)-222) point.
[37] Vj-51/2012., 17) point.
[38] Vj-62/2001., 59) point.
[39] Vj-51/2012., 17) point.
[40] Vj-3/2012., 17) point; Vj-17/2012., 33)-34) point; Vj-23/2012., 24) point; Vj-31/2013., 62) point; Vj-87/2013., 23) point; Vj-88/2013., 20) point.
[41] Vj-3/2012., 18) point.
[42] Vj-3/2012., 22) point; Vj-31/2013., 62)-63) point; Vj-87/2013., 23)-24) point; Vj-88/2013., 20)-21) point.
[43] Vj-3/2012., 27)-32) point; Vj-17/2012., 34) point; Vj-23/2012., 24) point; Vj-31/2013., 62) point; Vj-87/2013., 23) point; Vj-88/2013., 20) point.

3.2. Economic Unit

An economic unit can be placed within the concept of a group of undertakings: all undertakings majority-owned by the State form a group of undertakings, but within this group the undertakings with autonomous decision-making powers—with the other undertakings they control—appear as a separate economic unit.[44] It also follows that undertakings that are directly controlled by the State but which do not have autonomous decision-making powers form an economic unit together with the person exercising the right of control.[45] The concept of an economic unit therefore covers undertakings belonging to the same state holding company or other center of control.[46]

3.3. Concentrations Involving State-Owned Undertakings in EU law

While EU law views the undertakings under examination in a similar way to Hungarian law, the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (2008/C 95/01) (hereinafter: Notice 2008/C 95/01) focuses on different aspects compared to Notice 2/2023.

According to paragraph 52 of Notice 2008/C 95/01, a transaction between undertakings owned by the same State or municipality may be subject to merger control rules if "the undertakings were formerly part of different economic units having an independent power of decision." The role of independent power of decision and autonomous decision-making powers are therefore the same in EU law and in Hungarian law, but they have—apparently—different approaches to the concept of an economic unit.

While in Hungarian law an economic unit is the sum of the undertaking with autonomous decision-making powers and the other undertakings controlled by it, the Hungarian translation of Notice 2008/C 95/01 states that an undertaking belonging to an economic unit (different from another) has autonomous decision-making powers in any case—it does not refer to other controlled undertakings within the economic unit. However, the English standard text uses the following wording: "[w]here the undertakings were formerly part of different economic units having an

[44] Juhász, Ruszthiné Juhász, Tóth *op. cit.* (fn. 19.) 258-259; Tóth (2020) *op. cit.* (fn. 2.) 729-730; Zavodnyik *op. cit.* (fn. 13.) 116; Vj-17/2012., 28) point; Vj-23/2012., 22)-23) point; Vj-87/2013., 20) point; Vj-88/2013., 17) point; Vj-122/2015., 20) point.
[45] Juhász, Ruszthiné Juhász, Tóth *op. cit.* (fn. 19.) 258-259; Zavodnyik *op. cit.* (fn. 13.) 116; Vj-87/2013., 20) point; Vj-88/2013., 17) point; Vj-122/2015., 20) point.
[46] Tóth (2020) *op. cit.* (fn. 2.) 729-730; Vj-55/2009., 13) point.

independent power of decision." This implies that the independent power of decision is a characteristic of the economic unit, which does not preclude several undertakings being part of the same economic unit. Moreover, recital 22 of the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (hereinafter: Regulation (EC) No. 139/2004) confirms this approach: "[i]n the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision."

From all this, it seems to us that the concept of an economic unit is identical in EU law and Hungarian law, but appears at a different level: while Hungarian law understands it within the group of undertakings, EU law treats the group of undertakings as part of the undertaking, and places the economic unit above the undertakings. In other words: in Hungary, the economic unit is part of the group of undertakings, and undertakings are part of the economic unit, whereas the interpretation of EU law considers the economic unit to be the broadest category in which undertakings, including the group of undertakings, are placed.

Paragraph 52 of Notice 2008/C 95/01 also states that if, following the transaction, the economic units continue to have independent power of decision then there is no concentration but rather an internal restructuring, even if the shares of the undertakings concerned are acquired, for example, by a pure holding company. Paragraph 53 makes it clear that the prerogatives exercised by the State acting as a public authority, limited to the protection of the public interest, do not constitute the basis of a concentration, provided that they have neither the aim nor the effect of enabling the State to exercise a decisive influence over the activity of the undertaking. We feel that it is unnecessary to state these things, since it is clear that if there is no change in the control relationships, i.e., in the market structure, there can be no application of merger control.

One may ask why we do not find a specific interpretation governing state-owned undertakings in the field of cartel law (at least we did not). We believe that the answer lies in the different approaches to the concept of (independent) undertakings in the EU and Hungary. In Hungarian competition law, the dependency of undertakings is mainly captured through abstract categories of control (ability and possibility to exercise decisive influence); Article 15(3) of the Act—as a kind of exception rule—is interpreted in practice precisely in the sense that the HCA examines the person of the controller *in concreto* in the case of direct control by the State or local government. Although Regulation (EC) No. 139/2004—like the Hungarian merger control regime—defines control *in*

abstracto, the size of an undertaking is assessed *in concreto* by EU law, taking into account the criteria developed by case law.

EU law thus focuses on the actual autonomy, rather than the lack of control, when assessing independence, while looking at, among other things, the parent company's shareholding in the subsidiary, the extent of its influence on its business policy, the composition of the management and the instructions given by the parent company.[47] Even so, there is a presumption that the parent company is deemed to control the affairs of the subsidiary if the subsidiary is wholly or substantially owned by the parent company; the presumption can be rebutted by showing that the parent company was not in a position to exercise decisive influence over the subsidiary's commercial policy or that the subsidiary was autonomous.[48]

This is also confirmed by the case law,[49] among which the Akzo case is worth mentioning: in which the Court of First Instance examined 14 issues (strategy, operational plan, investments, acquisition and divestment, restructuring plans, general policies on functional issues, finance, control and accounting, human resources, legal affairs, risk and insurance Management, technology and environment, IT, and Miscellaneous)[50] in order to establish the autonomy, or lack thereof, of the

[47] Whish, Richard: *Versenyjog. Richard Whish Competition Law* [Hungarian translation of the sixth ed.], HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2010, 90-91.
[48] Ibid.
[49] Judgment of the Court of 25 October 1983. Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities. Selective distribution system. Case 107/82., ECLI identifier: ECLI:EU:C:1983:293, CELEX number: 61982CJ0107, 47-53. point; Judgment of the Court of First Instance (Second Chamber) of 1 April 1993. BPB Industries Plc and British Gypsum Ltd v Commission of the European Communities. Competition – Abuse of a dominant position – Exclusive purchase contract – Loyalty payments – Effect on trade between Member States – Attributability of the infringement. Case T-65/89., ECLI identifier: ECLI:EU:T:1993:31, CELEX number: 61989TJ0065, 149. point; Judgment of the Court of First Instance (Third Chamber, extended composition) of 14 May 1998. Stora Kopparbergs Bergslags AB v Commission of the European Communities. Competition – Article 85(1) of the EC Treaty – Admission of matters of fact or of law during the administrative procedure – Consequences – Liability for unlawful conduct – Information exchange – Order to desist – Fine – Statement of reasons – Mitigating circumstances. Case T-354/94., ECLI identifier: ECLI:EU:T:1998:104, CELEX number: 61994TJ0354, 80. point; Judgment of the Court of First Instance (Second Chamber) of 15 June 2005. Tokai Carbon Co. Ltd (T-71/03), Intech EDM BV (T-74/03), Intech EDM AG (T-87/03) and SGL Carbon AG (T-91/03) v Commission of the European Communities. Competition – Cartels – Specialty graphite market – Price fixing – Liability – Calculation of fines – Cumulation of penalties – Duty to state reasons – Rights of the defense – Guidelines on the method of setting fines – Applicability – Gravity and duration of the infringement – Attenuating circumstances – Aggravating circumstances – Ability to pay – Co-operation during the administrative procedure – Methods of payment. Joined cases T-71/03, T-74/03, T-87/03 and T-91/03., ECLI identifier: ECLI:EU:T:2005:220, CELEX number: 62003TJ0071, 59-60. point; Judgment of the Court of First Instance (Second Chamber) of 12 December 2007. Akzo Nobel NV and Others v Commission of the European Communities. Competition – Cartels in the vitamin products sector – Choline chloride (Vitamin B4) – Decision finding an infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area – Attributability of the infringement. Case T-112/05., ECLI identifier: ECLI:EU:T:2007:381, CELEX number: 62005TJ0112, 57-85. point.
[50] Judgment of the Court of First Instance (Second Chamber) of 12 December 2007. Akzo Nobel NV and Others v Commission of the European Communities. Competition – Cartels in the vitamin products sector – Choline chloride (Vitamin B4) – Decision finding an infringement of Article 81 EC and Article 53 of the Agreement on the European

subsidiary. It is clear from the above that, although the presumption leaves room for abstract jurisdiction, the size of the undertaking is a question of substance in all other cases; for this reason, a cartel agreement between public undertakings with autonomous decision-making powers may be prohibited even in the absence of a written rule of the Act.

4. Summary

To conclude the study, we summarize what has been said so far, and formulate our own observations and *de lege ferenda* proposals, stating that the latter concern only Hungarian law, since EU law, because of its case-centered nature, does not require classical legislative intervention, at least in the subject under consideration.

Our aim was to illustrate how the independence of undertakings with a state or municipal background differs from the general situation. The specific rule applicable to them, as well as the concept of a group of undertakings, is included in the rules on cartel agreements in the Act, but its scope of application covers all antitrust situations. At this point, we feel that the Act has a different codification quality than, for example, the Civil Code, and in view of this, we would advocate—in the event of a possible recodification—that the concepts of undertaking, group of undertakings and economic unit, as well as other provisions relating to them, be placed in a separate chapter, thus making the doctrinal system of competition law more transparent.

This idea is also supported by the fact that Article 15(3) of the Act overrides certain provisions of the Act, not only in relation to independence, but also in relation to control: it is clear from the case-by-case decisions that the rules of control based on the right to appoint do not apply (presumably the same is true for other cases of direct control), while the activities of the office-holder relating to the winding up and dissolution of undertakings do not result in a change in the person of the controller. These can be deduced from the text with due care, but legal certainty would be enhanced by a more consistent regulation of the content of the Act.

The Act makes the independence of undertakings directly controlled by the State or local governments subject to the right of autonomous decision-making powers. According to the case law, autonomous decision-making powers can be said to exist when an undertaking adopts its business plan autonomously, not subject to state approval, or when undertakings belong to different decision

Economic Area – Attributability of the infringement. Case T-112/05., ECLI identifier: ECLI:EU:T:2007:381, CELEX number: 62005TJ0112, 68-69. point.

centers (e.g., ministries). This solution, in our view, requires a substantive approach: while under the general rules the question of independence depends on the abstract categories of control, the autonomous decision-making powers focus primarily on who exercises *de facto* control. This is particularly true in the context of the adoption of the business plan, while the separation of decision centers can be placed between the substantive and formal approaches (although it is closer to the latter, since the center does not necessarily exercise control). The background to all this is the legislator's intention to extend the applicability of competition rules to agreements and transactions within a group of undertakings.

The formal approach is strengthened by the fact that if the owner owns 100% of the undertaking, there is a presumption in favor of the absence of autonomous decision-making powers. Nevertheless, it is difficult to argue that the presence of the State or of a local government may require an *in concreto* test of control. This pragmatic, reality-based approach is also a feature of competition law thinking—for example, the competition authority will not disclose all the elements of the situation if the competition supervision proceeding does not require it.

Article 27(3) of the Act applies the concept of an economic unit in relation to the subject. An economic unit is an intermediate category that can be placed within the group of undertakings; it is made up of undertakings with autonomous decision-making powers and other undertakings controlled by them.

There are two differences in EU law compared to what has been described so far. On the one hand, the economic unit—as in Hungarian law—appears outside the concept of an undertaking, but EU law treats an undertaking with the same content as a group of undertakings under the Act, and therefore the group of undertakings is also essentially considered as part of the economic unit. On the other hand, the special interpretation applicable to public undertakings is only found in the field of merger control, the reason being that EU law approaches the concept of an undertaking from a substantive point of view, although the above-mentioned presumption is also applicable in this case. It follows that restrictive agreements between undertakings with autonomous decision-making powers may be prohibited even in the absence of a specific rule.

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