The GVH terminated the proceedings against Borsodi following commitments

In early 2007 the Gazdasági Versenyhivatal (competition authority of Hungary, GVH) initiated proceedings against Borsodi Sörgyár Zrt. (Borsodi) concerning its beer supply agreements concluded with various HoReCa units all over the territory of Hungary. The HoReCa partners of Borsodi undertook for 6 years that they would not buy and sell other products than the ones produced or distributed by Borsodi. They also committed themselves to sell a certain quantity of Borsodi's beer and keep a certain amount on stock. The GVH assumed that these agreements might infringe Article 81 of the EC Treaty, the relevant provisions of the Hungarian Competition Act and the Implementing Rules of the Europe Agreement. The GVH adopted commitments offered by Borsodi and terminated the proceedings.

Undertakings involved

The undertaking party to the procedure is Borsodi, which is one of the three leading beer factories in Hungary with approximately 30 per cent of the market. Borsodi is owned by the well-known international beer company Inbev. Borsodi produces several traditional Hungarian beer products and produces also international beer brands under licence agreements. In 2006, Borsodi's turnover was 2.3 million hectolitre or HUF 44.3 billion.

Facts

Borsodi distributes its products both through the HoReCa sector and the retail businesses, while latter segment represents the bigger proportion in Borsodi's sales. In the period 2002-2007 Borsodi concluded with HoReCa units a large number of "Beer Equipment Agreements" and connected to them "Subsidiary Beer Agreements". In 2007, there were approximately [6500-8000] agreements of that kind in force. The particular agreements can be grouped in different categories, however they have the following common features:

- Borsodi lets for a determined period of time (5 or 6 years) the HoReCa units equipment used for draught beer and it installs the equipment and provides all the necessary maintenance services for free.
- The HoReCa partner undertakes to sell a minimum amount of beer of certain Borsodi products, which is fixed in the agreements.
- Borsodi has the right to terminate the agreement with immediate effect whenever a HoReCa partner sells products other than Borsodi products in its premises or on the beer installation equipment of Borsodi. In this case Borsodi is entitled to

dismantle the installed beer equipment on the HoReCa partners cost, and in addition the partner has pay compensation as well.

The Hungarian beer market consists of three major player with similar market shares (Borsodi, Dreher and Heineken around 30 per cent each) and further fringe players, from whom Pécsi Serfőzde is the strongest with 5 per cent. The role of import on the market is decreasing, while export is also insignificant. In the period under investigation Borsodi's market share on the HoReCa market never exceeded 30 per cent. Prices in the HoReCa sector are appreciably higher than the prices in the retail sector, moreover the sale conditions also differ. Beer can be sold in bottles (51 per cent) in cans (37 per cent) or in kegs (12 per cent).

Based on the investigation, the GVH knows that the other beer factories Dreher, Heineken and Pécsi have also concluded numerous beer supply agreements on the market. On the other hand according to their statements these agreements cover mostly only draught beer sold in kegs by using the beer installation equipments. They allow in most of the cases "foreign" bottled and canned beers in the HoReCa partners premises. The percentage of tied outlets are shown in the following table:

Beer factories	Tied outlets concerning draught beer		Tied outlets concerning all products	
	Number	Percentage	Number	Percentage
Borsodi	approx. [6500-8000]	approx. [17-23 %]	approx. [6500-8000]	approx. [17-23%]
Dreher	…	…	…	…
Heineken	…	…	…	…
Pécsi	…	…	…	…
Total	23892	68 %	approx. 12000	34 %

Legal assessment

Applicable law

Time period	Hungarian Law	EU law
01.01.2002-31.03.2003	Chapter IV of the Competition Act, Government decree 53/1997	-
01.04.2003-04.09.2003	Chapter IV of the Competition Act, Government decree 53/1997	Implementing Rules of the Europe Agreement, Reg. 2790/1999/EC
10.04.2003-31.04.2004	Chapter IV of the Competition Act, Government decree 55/2002	Implementing Rules of the Europe Agreement, Reg. 2790/1999/EC
01.05.2004-13.06.2005	Chapter IV of the Competition Act, Government decree 55/2002	Article 81 EC, Reg. 2790/1999/EC
14.06.2005-	Chapter IV of the Competition Act (modified), Government decree 55/2002	Article 81 EC, Reg. 2790/1999/EC

The investigation came to the following conclusions. The beer supply agreements are agreements, which have an effect on trade between Member States and they appreciably restrict competition on the market of beer sale in HoReCa units. The investigatory part of the procedure identified two concerns with regard these agreements. Firstly, there are agreements which contain non compete (exclusivity) clauses for longer than, by the block exemption regulation allowed, 5 years. This should result the inapplicability of the block exemption. Secondly, Borsodi's beer supply agreements taken together with the similar agreements of Heineken and Dreher produce a cumulative effect, which justifies the withdrawal of the block exemption on its own.

The Competition Council offered Borsodi that it would terminate the procedure, provided they adopt a commitment to decrease the length of all agreements to 5 years and make it clear with the wording of these agreements that the non-compete (exclusivity) clause relates only to draught beer, excluding bottled and canned products.

In its reply, Borsodi undertook to change all agreements at present longer than 5 years to the maximum allowed length. In addition, as to the future it will conclude only agreements not longer than 5 years. With regard to the cumulative effect, Borsodi refused to modify its agreements unilaterally.

According to the Competition Council, Borsodi's agreements do not satisfy Article 5(a) of the vertical block exemption regulation, since the majority is longer than 5 years. Pursuant to Article 75 of the Hungarian Competition Act where, in the course of proceedings started ex officio, parties undertake commitments to ensure, in a specified manner, compliance of their practices with the provisions of the Competition Act or of Article 81 or 82 of the EC Treaty and if effective safeguarding of public interest can be ensured in this manner, the Competition Council bringing proceedings in the case may by injunction make those commitments binding on the parties, terminating at the same time the proceedings, without concluding in the injunction whether or not there has been or still is an infringement of the Act.

In the Competition Council's opinion by reducing the length of the agreements to 5 years, Borsodi will ensure compliance with Article 81 EC. The Competition Council established also that given the fact that the procedure was not initiated for the potential withdrawal of the block exemption regulation, there was no possibility to deal with that issue.

The Competition Council found it unnecessary to evaluate the agreements of Borsodi under the Hungarian Competition Act and the Implementing rules of the Europe Agreement.