



ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2014

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A practical cross-border insight into cartels and leniency

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Hungary

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The cartel prohibition is provided for in Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (“Competition Act”). The consequences of the breach of this provision may be threefold:

- regulatory sanctions (including the impositions of fines on the undertaking involved);
- civil law sanctions, i.e., damages actions; and/or
- criminal sanctions, if the cartel relates to public procurement or concession bidding procedures (including the prohibition for the company to participate in future public procurements).

Although the rules of the EU competition law apply in Hungary, as Hungary is an EU Member State, in this chapter we present exclusively Hungarian national rules.

1.2 What are the specific substantive provisions for the cartel prohibition?

Under Chapter IV of the Competition Act relating to restrictive agreements, any agreements or concerted practices between unrelated undertakings, as well as the decisions of social organisations of undertakings, public corporations, unions and other similar organisations, which are aimed at the prevention, restriction or distortion of economic competition, or which have or may have such an effect, are prohibited. This provision corresponds to Art. 101 of the TFEU.

The Competition Act gives a non-exhaustive list of behaviour to which the prohibition of restrictive agreements applies, in particular:

- Fixing the purchase or sale price and defining other business conditions directly or indirectly.
- Restricting or controlling manufacturing, distribution, technical development or investment.
- Sharing the sources of available goods or restricting the freedom to choose from them, as well as excluding certain consumers or business partners from the option to purchase certain goods.
- Sharing the market, excluding anyone from selling, or restricting the choice of sales opportunities.
- Preventing anyone from entering the market.

- Discriminating against certain business partners.
- Making the conclusion of an agreement dependent on the acceptance of obligations which, due to their nature or with regard to the usual contractual practice, do not relate to the subject of the agreement.

1.3 Who enforces the cartel prohibition?

It is the Hungarian Competition Office (HCO) which enforces the cartel prohibition. The HCO is an administrative authority having jurisdiction for the whole territory of Hungary.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The procedure when the HCO decides to investigate an agreement begins with an investigation phase. The HCO has the right to publish the opening of an investigation, and in practice it does so; nevertheless, the parties always obtain a notice on the opening of the investigation and the publication only takes place following the due notification of the parties. The investigation is carried out by an investigator. The investigator terminates the procedure if the investigation is found to be unjustified. If the procedure is justified, the investigator summarises his findings of fact. Those findings, as well as the investigator’s proposals for further actions (e.g. interim measures), are sent to the competition council in a report (investigation report).

On the basis of the investigation report, the competition council can:

- Terminate the procedure.
- Order a further investigation.
- Impose interim measures.

If interim measures are imposed, and neither termination nor a further investigation is ordered, the competition council:

- Prepares a preliminary opinion on the proposed remedies.
- Announces that a hearing will be held.

The competition council sends the investigation report, together with the preliminary opinion of the council, to the parties to enable them to prepare a defence and be able to respond before or at the hearing.

The HCO has six months to issue its final decision from the date the investigator ordered the investigation and this deadline can be extended twice (by up to six months per extension), where it is justifiable to do so.

1.5 Are there any sector-specific offences or exemptions?

Certain agreements in the following groups of restrictive agreements are exempted by government decrees from the general prohibition:

- Vertical agreements (Government Decree 205/2011. (X. 7.)).
- Insurance agreements (Government Decree 203/2011. (X. 7.)).
- Motor vehicle distribution and servicing agreements (Government Decree 204/2011. (X. 7.)).
- Research and development agreements (Government Decree 206/2011. (X. 7.)).
- Specialisation agreements (Government Decree 202/2011. (X. 7.)).
- Technology transfer agreements (Government Decree 86/1999. (VI. 11.)).

These exemptions reflect the respective EU Block Exemption Regulations. They do not apply where there is a cumulative effect of similar agreements at the relevant market.

A sector-specific exemption has been introduced by a new law that entered into force on November 28, 2012 in respect of agricultural products. According to Section 18/A of Act No CXXVIII of 2012 on Inter-Branch Organizations and Certain Issues of the Regulation of the Agricultural Market, in the case of agricultural products, the infringement of Section 11 of the Competition Act (prohibition of agreements and concerted practices restricting competition) may not be established if, as a result of such an agreement, the distortion, restriction or elimination of competition does not exceed the extent necessary to reach an economically justifiable and reasonable income and the market players on the relevant market are not excluded from reaching such an income, and if Article 101 of the TFEU is not applicable in the case.

The Minister of Rural Development shall determine whether the above conditions are fulfilled. As a result of this, the HCO shall obtain the opinion of the Minister if it investigates a case relating to the infringement of Section 11 of the Competition Act in connection with agricultural products and shall act in accordance with such an opinion.

In addition to this, the HCO shall suspend the imposition of fines in the case of an agreement infringing Section 11 of the Competition Act, and in the case of an agreement or concerted practice between competitors infringing Art. 101 TFEU which concerns agricultural products. In such a case, the HCA shall set a deadline for the parties to comply with the statutory rules. Should the deadline unsuccessfully expire, the HCA shall impose a fine.

1.6 Is cartel conduct outside Hungary covered by the prohibition?

The Competition Act applies to the market conduct of undertakings carried out in the territory of the Republic of Hungary. The market conduct of undertakings carried out abroad shall also fall under the scope of the Competition Act, if the effect of such conduct may manifest itself within the Republic of Hungary.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes	Yes
Carry out an unannounced search of business premises	Yes*	Yes*
Carry out an unannounced search of residential premises	Yes*	Yes*
■ Right to 'image' computer hard drives using forensic IT tools	Yes	Yes
■ Right to retain original documents	Yes	Yes
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	Yes	Yes

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

The HCO is authorised to use the documents, data and other information or means of evidence it has legitimately obtained in any other competition control proceedings as well.

2.3 Are there general surveillance powers (e.g. bugging)?

As far as the administrative proceedings carried out by the HCO are concerned, the HCO does not have such powers.

As to the criminal proceedings initiated on the grounds of an alleged crime (Agreement in Restraint of Competition in Public Procurement and Concession Procedures, see questions 1.1 and 3.2), the investigating authority (police, prosecutor) may exercise surveillance powers after receiving an authorisation from the competent court.

2.4 Are there any other significant powers of investigation?

In case the HCO is carrying out an investigation in the course of a dawn raid in business or residential premises, the investigator shall be empowered to make copies of or seize any means of evidence suggesting any conduct in violation of the cartel prohibition, even if such evidence is not directly related to the subject of the investigation and even if it is not covered by the court order ("fishing"). In the case of such means of evidence, the court order shall be obtained subsequently, for which the request shall be submitted within 30 days following the date when the investigative measure was carried out. In the absence of a subsequent court order, the means of evidence shall be inadmissible.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

In case of an administrative proceeding carried out by the HCO, it is the investigator (being a representative of the HCO) who will carry out the search. The investigator may request police assistance when carrying out the search, in the course of which the police are entitled to take measures and use force in a manner permissible in accordance with the legal regulations governing the police.

The person carrying out the search is not obliged to wait for the legal representative to arrive. It is the matter of the individual situation how an investigator reacts and what tolerance may be bargained.

In case of criminal proceedings, the investigation is carried out by the police. However, the public prosecutor may be present at any search; moreover, it is entitled to carry out investigations itself, instead of the police.

2.6 Is in-house legal advice protected by the rules of privilege?

No. Only advice given by the attorney-at-law mandated by the undertaking enjoys privilege. According to the Act on Attorneys, in-house lawyers do not qualify as attorneys.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Searches in a residential premise (including cars) may be carried out only if it is in the use of any former or current executive officer, employee or representative of the undertaking which has allegedly participated in the cartel, or any other person who effectively exercises control or who used to exercise control over this undertaking.

The documents considered as legal privilege are not admissible, as they may not be examined. Legal privilege covers any document created in the interest or in the process of the client exercising his fundamental right to defence, during or for the purpose of communications between the client and his external attorney, or that is a record of the contents of such communications, provided in all cases that the nature of these documents is readily apparent from the document itself. In practical terms, it means that the document has to indicate the following: "Privileged client-attorney communication".

If the investigator makes an attempt to compel the client to present a document under legal privilege, or if the investigator wishes to inspect, take possession or make copies of such document in the course of an inspection or the dawn raid, the client has the right to refuse. However, the investigator – in due respect of the rights relating to the legal privilege – is entitled to inspect the document to ascertain whether relying upon the protection afforded by legal privilege is manifestly unfounded or not. If, contrary to the assertion of the person concerned, the investigator is of the opinion that the document in question should not enjoy the protection, the document (or the hard mirror image made on the data medium) shall be deposited in a container that is capable of preventing access to the document. The sealing of the container shall be witnessed and signed by the person concerned and the investigator, where the seal shall be affixed to prevent the opening of the container without tampering with the seal. As to whether a document should enjoy the

protection under legal privilege, this shall be decided upon the request of the HCO by the court.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

In the course of the proceedings, and at any stage, the HCO can impose a procedural fine on the undertaking and any other natural or legal person that is required to cooperate in the HCO's proceedings, if that person:

- engages in conduct aimed at or resulting in:
 - the delay of the proceedings; or
 - making it impossible to reveal the relevant facts;
- disturbs the hearing seriously or repeatedly; or
- fails to meet deadlines.

The penalty is at least HUF50,000 (about US\$230), and can be up to a maximum of:

- for natural persons:
 - HUF500,000 (about US\$2,300); and
 - HUF50,000, in the case of failures to meet deadlines, for each day of delay; and
- for legal persons:
 - 1% of its net sales revenue for the previous financial year; and
 - 1% of its net sales revenue for the previous financial year, in the case of failure to meet deadlines, for each day of delay.

There are no available published statistics from the HCO on whether, or how frequently, such sanctions may have been used.

As far as we are aware, the HCO's approach has not changed recently.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

In its decision, the competition council can:

- declare that a conduct is illegal;
- determine that a block exemption (see question 1.5) will not apply to an agreement;
- order the termination of illegal conduct;
- prohibit the continuation of an illegal conduct;
- order certain conditions or commitments in connection with an illegal conduct; or
- impose a fine.

In its decision, the competition council can impose a fine of up to 10% of the undertaking's annual net turnover. The method of setting fines in antitrust cases is set out in Notice 1/2012 of the President of the HCO and the President of the competition council (Antitrust Fine Setting Guidelines). According to the Antitrust Fine Setting Guidelines, the HCO first determines the basic amount of the fine and then makes certain adjustments, if necessary.

When determining the basic amount, the HCO starts from 10% of the relevant turnover (i.e. 10% of the turnover realised on the relevant market). Then the HCO adjusts this amount with regard to:

- the gravity of the infringement (the threat to competition and the impact of the infringement on the market); and

- the attitude of the offender towards the infringement.

Once this basic amount is determined, the HCO adjusts this amount with regard to the following factors:

- repetition of the infringement;
- gains derived from the infringement;
- deterring effect of the fine to be imposed;
- maximum amount of the fine as set out in the Competition Act;
- application of the leniency policy; and
- financial difficulties.

3.2 What are the sanctions for individuals?

Individuals can be liable for a procedural fine (see question 2.8). In addition, a person (including any person in a decision making position) commits a crime which can be punishable by imprisonment for up to five years, when he:

- influences public procurement or concession bidding procedures by way of:
 - price-fixing;
 - fixing other contractual terms;
 - market sharing;
 - engaging in other conduct in concert with other competitors; or
 - participating in making a decision of an association of undertakings, public body, society or other similar organisation in order to influence the result of the public procurement or concession bidding procedure; and
- as a result of this conduct, actually restricts market competition.

The punishment is up to two years, if the value of the public procurement or concession bidding procedures is not more than HUF50 million (US\$230,000). Finally, under Act IV of 2006 on business associations (Company Act), executive officers are liable to an undertaking under the general rules of civil law for damage caused to the undertaking by violating the law (e.g. the cartel prohibition). This means that, theoretically, the company which was held liable for participating in a cartel may bring a damages action against its management and claim the damage caused by the management (e.g. fines, depreciation of goodwill, defamation).

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Under the Antitrust Fine Setting Guidelines, the HCO may, under exceptional circumstances, reduce the fines if the fines would deteriorate the market structure by forcing the undertaking being fined ("failing firm") to exit the market. The amount of a possible reduction is not set out in the Antitrust Fine Setting Guidelines. It is therefore within the HCO's discretion to determine it.

3.4 What are the applicable limitation periods?

The limitation period relating to the cartel prohibition is five years. In case of the criminal liability, the limitation period is the upper limit of the term of imprisonment (two or five years, depending on the value of the public procurement or concession bidding procedures). In both cases, the limitation period shall commence at the time the infringement is terminated.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

There is no specific rule which would prohibit such payment.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Yes. Generally, employees are liable for the damages caused by the breach of their obligations flowing from the employment relationship if they did not act in a manner that could be generally expected in the given situation. Participating in an anti-competitive agreement is illegal conduct that endangers the company's interests, and is therefore also a violation of the employment relationship. Rules differ depending on the position of the employee as a "regular" employee or an "executive employee".

In case of "regular" employees, the employer has to prove that the employee did not act in a manner that could be generally expected in the given situation (intent or negligence), the fact and amount of the damage, and the causation. If only slight negligence (and not intent or gross negligence) can be proven, the employee's liability is limited to a four months' absence fee, or to an eight months' absence fee if the collective agreement provides so. Damages that were not foreseeable at the time of the causing of the damage shall not be compensated.

Executive employees are the executives of the employer and their deputies directly controlled by them. The employment agreement may provide that employees in a position of outstanding importance or high confidence are quasi-executive employees, if their base wage reaches seven times the minimum wage. Executive employees are also fully liable for slightly negligent breaches. In the case of executives and quasi-executives, the employment agreement may deviate from the general employment rules on damages and compensation (e.g. state that the employer shall not prove intent or negligence, but the employee may exculpate him/herself).

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The basic rules of leniency are contained in the Competition Act and in the HCO's Leniency Notice.

An undertaking that participates in a cartel does not pay a fine if it is the first to submit a leniency request and to provide evidence to the HCO that enables the HCO to:

- obtain a judicial authorisation in advance to carry out targeted inspections ("dawn raid") in connection with the infringement, provided that the HCO did not, at the time of the application, already have sufficient information giving grounds for authorised targeted inspections or had not already carried out such investigative measures; or
- prove the infringement, provided that it did not, at the time of the application, already have sufficient evidence to prove the infringement and none of the undertakings meets the conditions set out in point a).

If the conditions for the exemption from paying a fine are not met, but the undertaking provides evidence that adds significant value to the evidence already available to the HCO, the fine will be reduced. The possible fine may also be reduced if the

application for immunity from fines is reclassified *ex officio* as an application for a reduced fine.

Another situation where a fine may be reduced is if the undertaking provides evidence (relating to facts in connection with the infringement) that the HCO previously had no knowledge of and which is of direct importance on the circumstances to be taken into account when determining the amount of the fine. In such case, the HCO shall not increase this undertaking's fine for providing the aggravating evidence.

The level of the reduction in the amount of the fine for the first undertaking may be 30-50%, for the second undertaking 20-30%, and for the third or subsequent undertakings up to 20%.

A request for a reduced fine can be filed at the latest by the delivery of the statement of objections or by the day preceding the initial date of access to documents for inspection provided to either of the parties, whichever date is earlier.

In order to obtain immunity from fines, three further conditions must be met:

- The undertaking must end its involvement in the infringement immediately following its application. (However, if the HCO believes the undertaking's continued involvement in the infringement would be necessary for preserving the integrity of the targeted inspections, the HCO in some exceptional cases allows the continued involvement to the extent, of the nature, and until the time limit specified in its order. The HCO takes such measures exclusively to preserve the integrity of the targeted inspections; the undertaking cannot be obliged to continue infringement in order to collect further evidence.)
- The applicant shall cooperate genuinely, fully and on a continuous basis with the HCO until the competition supervision proceedings are concluded.
- An undertaking that took steps to coerce other undertakings to participate in the infringement shall not be eligible for immunity from fines.

From the above three conditions, the first two must also be met in order to receive a fine reduction. Therefore, an undertaking that took steps to coerce other undertakings to participate in the infringement is not excluded from benefiting from the reduction of a fine.

The Competition Act also sets forth rules on the preliminary ('marker') application for immunity from fines (see question 4.2 below) and the provisional application for immunity from fines filed simultaneously with the leniency application submitted to the European Commission.

In cases where the European Commission is particularly well placed to conduct a proceeding in accordance with its Notice on Cooperation within the Network of Competition Authorities, the undertaking may file a provisional application with the HCO where the undertaking considers the HCO might be well placed to proceed in the case under the Notice. The provisional application is not a complete application, it must only contain certain information as specified in the application form; there is no need to submit physical evidence.

Although the HCO might request information from the undertaking relating to the provisional application, no resolution can be passed on conditional immunity from fines on the basis of this kind of application. If the HCO later initiates competition supervision proceedings in the given case, it shall request the undertaking to submit, by a certain deadline, the complete application, including the evidence qualifying it for immunity from fines. If the undertaking submits the required evidence, in terms of eligibility for immunity from fines, its application shall be deemed as submitted on the date when the provisional application was made.

It is important to note that it is not possible for several undertakings together, nor one undertaking on behalf of other undertakings, to apply for immunity from or the reduction of a fine. This restriction does not, however, prevent members of a group of undertakings that participated in the infringement from applying for immunity from fines.

As concerns complete applications, the proceeding competition council decides on the application on the basis of the proposal of the investigator. While the Competition Act provides no deadline, the proceeding competition council should adopt its order immediately, taking only the time necessary for carrying out its assessment.

The proceeding competition council shall grant conditional immunity from or the reduction of fines if the application of the undertaking meets the conditions set out above. In other words, an applicant is granted immunity from or the reduction of fines at the time of the decision on the merits of the case, provided that the applicant meets, at that time, all the necessary conditions set out above. The conditional order will be delivered to the applicant only.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

It is possible to file a preliminary or 'marker' application with the HCO. According to the Competition Act, if an undertaking decides to submit an application for immunity from fines but does not yet have the necessary evidence/information to file a complete application, it may instead file a so-called marker application with the minimum information specified in the application form. In such case, the HCO sets a deadline to complete the application. However, only a complete application may be submitted when applying for a reduced fine.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

While applications must generally be filed using a standard form issued by the HCO, applications can also be made orally. The undertaking may present its oral application on the date agreed in advance with the HCO investigator. The investigator records it in writing, makes an audio recording of the oral application, or writes a memorandum of it. Audio recordings must subsequently be transcribed into a memorandum, which the applicant must sign.

What is more, according to the new Leniency Notice, the leniency applicant may request the HCO to communicate its decision on leniency orally.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The parties to the proceedings can only access the case file once the investigation phase is completed (see question 1.4) at the time specified by the HCO. However, the competition council may rule that a party and its representative can inspect certain specific documents before the conclusion of the investigation phase if this is unlikely to adversely influence the outcome of the proceedings.

In the course of the HCO's proceedings, the following are always confidential if not used as evidence when establishing the facts of the case:

- the internal documents of the HCO, the European Commission (Commission) and the competition

authorities of the EU Member States (including documents specified in Articles 11 and 14 of Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty); and

- correspondence between the HCO and other authorities.

The parties to the proceedings can, in order to protect business secrets, request restrictions on access to, and the making of copies or notes on, documents that they have submitted (either voluntarily or on the basis of an order) to the HCO. The HCO (or its investigator) can order the parties to submit a redacted version of the documents where the confidential information is deleted.

Before the proceeding competition council makes its resolution on the application for immunity, the HCO may use the application and the documents attached exclusively for assessing the application or in applying for a judicial authorisation for targeted inspections; only the investigator appointed to deal with the case, the proceeding competition council and the court may have access to them. If an application is rejected or withdrawn, the HCO shall return, upon request of the undertaking, the application and the documents attached to it, together with the possible copies, to the undertaking that submitted the application, concurrently with the conveyance of the order rejecting the application.

As there are no further specific rules on separate treatment of leniency documents from the investigation file, in case of a follow-on private enforcement case, it may not be excluded that at least the redacted version of the leniency application is handed over to the court, in case the plaintiff submits motions for requesting the court to obtain the competition office files in the course of the fact finding procedure.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The requirement of continuous cooperation applies in the course of the whole proceeding, i.e., until the final decision is made by the HCO. According to the new Leniency Notice, the HCO requires cooperation to a limited extent also prior to filing the leniency application, e.g. an applicant must not destroy evidence immediately before filing its leniency application.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

No, there are no such policies.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

According to the Competition Act, a person or persons who provide indispensable information on hardcore cartels may be entitled to receive a reward (a system of informant reward). The informant is entitled to request the confidential treatment of his or her personal identification data. The reward will only be granted if the decision on the merits of the case establishes the infringement and imposes a fine. The amount of the reward shall be 1% of the fine imposed in the case, but maximum HUF50 million (US\$230,000).

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

When the HCO makes an *ex officio* investigation of a restrictive agreement or practice, the parties may undertake to proceed in a specific way to comply with the Competition Act and with Articles 101 and 102 of the TFEU, the competition council can decide to terminate the proceedings, to protect the public interest. The HCO can, through this decision, make the commitments binding on the undertaking, without reaching an infringement decision.

The HCO can, however, reopen the proceedings if there is any material change in the circumstances or if its decision was based on misleading information.

The investigators conduct a follow-up investigation to establish whether the parties have satisfied their commitments. Based on the investigator's follow-up report, the competition council adopts a decision to impose a penalty if the undertaking failed to carry out the commitment, unless it was not fulfilled because of changes in the relevant circumstances. The investigation is terminated if there were changes in the relevant circumstances or the undertaking fulfilled the commitment.

One of the HCO's recent decisions excluded the application of commitments in a cartel case where the cartel resulted in higher prices. In the HCO's view, the fines were a more appropriate sanction than the undertakings' commitment (Vj-18/2008). Based on the HCO's practice, we see less room for commitments in antitrust cases than in unfair competition cases.

7 Appeal Process

7.1 What is the appeal process?

The decision of the competition council on the merits of the case can be challenged by way of judicial review before the Metropolitan Court. The parties must file a statement of claim within 30 days of the decision being delivered. The Metropolitan Court of Appeals hears appeals from the Metropolitan Court. The party who has filed an appeal against the final judgment of the Metropolitan Court of Appeals may ask for a review of this judgment by the Supreme Court.

No separate request for judicial review may be filed against the conditional order on the leniency application, thus this decision may be contested in the request for judicial review filed against the decision on the merits of the case.

7.2 Does an appeal suspend a company's requirement to pay the fine?

The request for the judicial review of the HCO's decision does not in itself suspend the obligation to pay the fine. However, the company can request a suspension of the fines. If this request is rejected by the first instance court, a separate appeal is possible. When deciding on the suspension the court is required to assess whether the payment of the fine or the suspension would have more negative consequences.

7.3 Does the appeal process allow for the cross-examination of witnesses?

As a general rule, it is the court that hears witnesses and questions them. Under Hungarian law, the litigating parties can propose certain questions to be asked of the witness. The court can also, on request, allow the parties to directly ask the witness questions. According to court practice, leading questions are not admitted and no cross-examination is allowed. Ultimately though, it is the court that decides on the permissibility of questions proposed or asked.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

The HCO's public enforcement powers do not preclude courts from directly applying the cartel prohibition contained in the Competition Act.

Individuals can therefore bring damages actions before the Hungarian civil courts for losses resulting from breaches of the Competition Act, even if the HCO has not reached a prior infringement decision. In such litigation, the court shall notify the HCO which may present its opinion ("*amicus curiae*"). The argument presented by the HCO may be used as evidence.

If the HCO notifies a civil court addressing a civil law claim that it has started competition law proceedings in the same matter, then the court must stay the proceedings until the HCO makes a decision and that decision becomes final and binding (either with or without judicial review).

If there is a final and enforceable decision of the HCO for the prohibited restrictive agreement or practice, the party claiming compensation for damages must prove both the:

- Amount of damage suffered.
- Causal link between the damages suffered and the prohibited restrictive agreement or practice.

It must be noted that in private damages actions against a participant of an alleged agreement or concerted practice aiming, directly or indirectly, at the fixing of prices, market sharing, or at establishing production or sales quotas, for the purpose of determining the impact of the infringement on the price charged by the infringer, it shall be presumed (until proven otherwise) that the infringement distorted the price to the extent of 10%.

If a follow-on claim is brought, the aggrieved party is generally not required to prove the unlawful behaviour and wilfulness/negligence of the defendant because these may be derived directly from the HCO's decision (or the judgment of the court reviewing that decision).

In order to ensure that undertakings are not prevented from revealing unknown cartels, as of June 1, 2009 the Competition Act provides that an undertaking that has been granted immunity from fines may refuse to reimburse the damages caused by the cartel as long as the claim can be collected from other undertakings held liable for the same infringement. This provision does not prevent the claimant from commencing a lawsuit jointly against the infringing undertakings causing the damages, although the proceedings shall be suspended until the

final closing of the administrative lawsuit commenced to review the HCO's decision establishing the infringement.

8.2 Do your procedural rules allow for class-action or representative claims?

There is a so-called public interest action that can be used, among other things, in connection with the breach of competition laws. The HCO can bring a civil law claim on behalf of consumers against anyone who harms a large number of (individually unknown) consumers as a result of an activity that breaches the Competition Act. As of January 1, 2011 the statute of limitation for such claims has been increased from one year to three years. What is more, according to the new rules, the HCO may also request the court to declare that the undertaking breached competition law rules. In this case, individual consumers only have to prove their loss (but may rely on the 10% presumption – see question 8.1 above) and its causal link to the infringement in order to enforce a damages claim against the undertaking.

In addition, a joint action is the only collective action that allows an award of damages in an antitrust case. Two or more claimants can initiate a joint action if any of the following apply:

- The subject matter of the claim is a joint right or obligation that can only be judged uniformly, or the judgment will affect the claimants jointly, irrespective of one of the claimants' absence from the procedure.
- The claimants' claims are based on the same legal relationship.
- The claimants' claims have similar legal and factual bases and the same court has jurisdiction for all defendants.

8.3 What are the applicable limitation periods?

The general limitation period for damages actions is five years. However, if the damage results from a criminal offence, the limitation period does not expire as long as the limitation period for the crime does not expire. If the HCO brings a civil law claim on behalf of the consumers, the statutory limitation period is three years from the date of the infringement, excluding the period for the competition control procedure.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

There is no court practice to answer whether "passing-on" is admissible. Hungarian law recognises the principle of full compensation which means, *inter alia*, that the aggrieved party is generally not entitled to realise profits as a result of the damages it is awarded. This principle is probably the strongest argument in favour of the passing-on defence. It is also important to point out that Hungarian law does not require a direct causal link between the unlawful act and the loss. Therefore, indirect purchasers on whom the damage (e.g. higher prices) was passed may be entitled to enforce claims against the cartel members.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

There are no special rules for bearing costs in civil damages follow-on claims in cartel cases.

According to the general procedural rules, the unsuccessful party pays the successful party's costs, including its lawyers' fees. However, the court can decide to take into account only part of the successful party's legal expenses, if it considers those expenses excessive. The courts usually set these fees at about 5% of the amount of the claim.

The court can also deny the successful party's costs if, for example, there was no reason to initiate the proceedings or if the other party acknowledged the claim at the first hearing. Similarly, costs incurred unnecessarily cannot be recovered. If one party is partially successful, the court usually splits the costs among the parties.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

We are not aware of any published judgment in cartel damages actions. According to publicly available information, some procedures are underway but have not yet been closed. There is one published judgment which rejected the plaintiff's claim in a follow-on damages action. We are not aware of any substantial out of court settlement.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

In September 2013 a draft amendment (still subject to discussions) of the Competition Act was published. Once finalised and adopted by the Hungarian Parliament, the majority of the rules should enter into force on July 1, 2014. The draft amendment would, among other things, introduce the settlement procedure in cartel proceedings (similarly to EU competition law) and would introduce new rules regarding the access to the case file which would clarify the rights of third parties (e.g. claimants in damages actions) in this regard.

9.2 Please mention any other issues of particular interest in Hungary not covered by the above.

There are no issues other than those already mentioned above.

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Szecskay Attorneys at Law is a member of a number of local and international organisations including Ligue Internationale du Droit de la Concurrence (LIDC) and Competition Law Commission of Union Internationale des Avocats (UIA). Our attorneys regularly lecture at local and international conferences and participate in international research projects. This active participation ensures our colleagues have the most up-to-date information and knowledge on the most accurate stage of the development of competition laws and enables them to liaise with fellow colleagues globally on various aspects of competition laws and practices.

Our Firm's involvement in domestic and cross-border transactions has allowed us to develop wide-ranging experience in competition and antitrust law matters, merger control procedures, and negotiations with the Hungarian competition authorities. Our Firm is recognised for its expertise and practice in competition and antitrust (cartel and abuse of dominance). We also frequently represent or advise clients in merger control proceedings.

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