

Hungary

NULLITY SANCTIONS AND FOLLOW-UP ACTIONS IN THE CASE OF BID RIGGING CARTELS UNDER HUNGARIAN LAW

☞ Cartels; Collusive tendering; Competition agreements; Competition law claims; Contracting authorities; Hungary; Private enforcement; Public contracts; Tortious liability; Void contracts

It is one of the most basic provisions of EU and Hungarian competition law that agreements in breach of competition law shall be void and unenforceable. However, it is sometimes by no means clear how far this sanction goes or which civil law contracts it applies to. In one of the recent follow-on damages actions, the Metropolitan Court of Appeals was faced, for the first time in Hungary, with the same question.

The case itself (*Fővárosi Ítéltábla* (Metropolitan Court of Appeals) 14.Gf.40.137/2010/5; published: ÍH 2011.37) concerned the motorway construction cartel of 2002, for which the Hungarian Competition Office (the HCO) imposed considerable fines on five undertakings due to bid rigging in public procurement procedures. Challenges against the HCO's decision remained unsuccessful because the Supreme Court upheld the HCO's decision. According to court practice (which, in the meantime, was incorporated in the Hungarian Competition Act), the statement on the existence or absence of an infringement, made in the decision of the HCO against which no action has been filed or made in the decision of the review court, shall be binding on the court hearing the lawsuit.

In the follow-on damages case, the question arose under what legal title the plaintiff may successfully claim the damages resulting as a consequence of the cartel agreement.

Primarily, the plaintiff requested the court to establish the partial nullity of the entrepreneurial agreement entered into between the plaintiff (the contracting entity) and the defendant (i.e. one of the cartelling undertakings that won the tender) due to the fact that the contractual fee was established in violation of competition law (i.e. the contractual fee was established as a result of the cartel agreement). Since, in the plaintiff's view, the partial nullity may be cured by way of the reduction of the contractual fee, the plaintiff requested the court to declare the contract to be valid until the date of the final judgment and to oblige the defendant to refund the extra profits and interest thereof realised as a result of the cartel agreement.

Secondarily, the plaintiff requested the court to oblige the defendant to pay damages on the basis of its delictual liability.

The defendant's statement of defence contested the nullity of the entrepreneurial agreement. In its view, only agreements which directly restrict competition and thus directly violate the relevant provision of the Hungarian Competition Act may be declared null and void on the basis of competition law.

In addition, the defendant claimed that the plaintiff does not have the standing which would allow him to claim that the entrepreneurial agreement is null and void, due to a lack of legal interest. The lack of legal interest can be explained, according to the defendant, by the fact that although the plaintiff was the one who concluded the entrepreneurial agreement with the defendant, it used financing provided by the Hungarian State to comply with its payment obligations under the contract.

Finally, the Metropolitan Court of Appeals, i.e. the court of second instance, gave the following ruling: the plaintiff has standing to claim that the entrepreneurial agreement is null and void, since it is party to the relevant agreement and this is the most direct legal interest on which a standing can be based.

However, the Metropolitan Court of Appeals rejected the plaintiff's claim relating to the nullity of the entrepreneurial agreement on the basis of the following grounds: the legal consequence of nullity on the grounds of the violation of the Hungarian Competition Act can be applied to the agreement which violates the prohibition on the restriction of competition, but not to the agreements that are connected to that agreement but do not in themselves

violate competition law. The nullity of the latter agreements must be assessed on the basis of general civil law principles. However, on that basis, no nullity can be established in the instant case.

Therefore, the Metropolitan Court of Appeals came to the conclusion that in the case of damages caused by the violation of competition law, compensation may be claimed based on the general rules of delictual liability, even if there is a contract between the party causing and the party suffering the damages. The reason for this is that the legal basis for the compensation of damages is not the contract between them, but the competition law provisions which were violated by the party causing the damages.

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Israel

CIVIL CASE 13427-02 -10 (CENTRAL DISTRICT) AUTO LINE LTD V UNIVERSAL MOTORS ISRAEL LTD

☞ Anti-competitive practices;
Exclusive dealership
agreements; Israel; Motor
vehicles

In June 2012, the District Court denied a 20 million Shekels lawsuit submitted by Auto Line Ltd—an importer and marketer of automotive spare parts to vehicles manufactured by General Motors and Isuzu—versus Universal Motors Israel Ltd (UMI)—a General Motors' importer and Auto Line's main competitor in Israel—on the grounds of alleged restrictive arrangements and violation of a consent decree that was signed with the IAA back in 2003.

As part of its business, UMI has several kinds of maintenance agreements with automobile fleets, according to which UMI is responsible for any repair needed. The repairs service is given by garages that are UMI's sub-contractors and are obliged under their contract with UMI to use only UMI's original spare parts.

Auto Line argued that this obligation of the sub-contractor garages is a forbidden exclusive arrangement, a market allocation of automotive spare parts supply to vehicles' garages, and that it causes market foreclosure. Furthermore, it was argued that according to a 2003 consent decree with the IAA, vehicles' importers agreed to refrain from limitation of vehicles' garages in any way, and that the obligation UMI imposed on the garages violates the consent decree. The District Court declined Auto Line's arguments and stated that the agreements with the garages did not amount to restrictive arrangements nor to market allocation according to s.2(b)(3) of the Antitrust Law, which determines a conclusive presumption of forbidden restrictive arrangement in case of an agreement that involves limitation on the sort of people one can deal with.

Additionally, the Court determined that s.2(b) should be interpreted according to its purpose rather than its simple wording, so a vertical exclusive agreement that is based on legitimate reasons and rationales should not be considered as a forbidden market allocation. It should be noted, however, that according to previous case law, s.2(b) usually applies to vertical agreements of this kind (i.e. unless the agreements are exempt or approved by the law, the Antitrust Tribunal or the IAA, they are considered to be illegal restrictive arrangements). Furthermore, the Court denied Auto Line's argument in respect of the alleged violation of the consent decree, stating that Auto Line itself had admitted that the consent decree violation was not an independent cause. In an obiter dictum the Court stated that since Auto Line is not a party to the said decree it cannot sue by its virtue and in any case, the IAA references to the maintenance agreements in the consent decree were not conclusive.

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