

Regional Developments

Hungary

CONSTITUTIONAL REQUIREMENTS IN COMPETITION LITIGATION

☞ Burden of proof; Cartels; Constitutional rights; Enforcement; Hungary; Judicial review; No punishment without law; Right of defence; Standard of proof

It is a trend in Hungary that in cartel cases, undertakings almost always invoke the quasi-criminal nature of the proceedings to defend against the cartel allegation. On May 26, 2015 the Hungarian Constitutional Court rendered an important decision in which it investigated how certain procedural guarantees should apply in cartel proceedings.¹ Previously both the Hungarian Constitutional Court and the Hungarian Supreme Court acknowledged that cartel proceedings are quasi-criminal proceedings which require special guarantees.² Decisions of the Hungarian Competition Office (HCO) are subject to judicial review, the final instance of which is the Hungarian Supreme Court, and ultimately the parties may file a constitutional complaint with the Hungarian Constitutional Court. The recent decisions show that both the Supreme Court and the Constitutional Court are prepared to apply human rights standards in order to review the legality of the HCO's decisions. This article summarises the constitutional and human right requirements which apply in cartel cases in Hungary. These requirements are partially based on the European Convention on Human Rights (ECHR), the Hungarian Constitution and the EU Charter of Fundamental Rights.

Full judicial review

It follows from the *Menarini*³ judgment of the European Court of Human Rights that decisions of the HCO must be subject to subsequent review by a judicial body that has full jurisdiction to review that decision. Under the relevant Hungarian procedural provision, if an administrative decision was made within the scope of the authority's deliberations, that decision is lawful if the administrative authority established the facts of the case, complied with the procedural rules, if the factors considered during the deliberation are apparent and if, based on the reasoning of the decision, the assessment of the evidence is reasonable. According to the Hungarian Supreme Court, this provision is not applicable in the case of cartel proceedings because its application would be contrary to the ECHR. In other words: Hungarian Courts have full authority to review the HCO's cartel decisions and to substitute the HCO's deliberations with their own (e.g. to reduce the fines imposed by the HCO).

Burden and standard of proof

The presumption of innocence is applicable in cartel cases: the HCO bears the burden to prove the infringement of the cartel prohibition and all the relevant facts based on which it imposes fines. The HCO is required to prove these facts beyond any doubt, and the Constitutional Court emphasises that any doubt should benefit the undertaking accused of having participated in a cartel. The HCO may base its decisions on indirect evidence, however such evidence has to be consistent, and the finding of liability cannot be

¹ Decision no. 3100/2015.

² Constitutional Court decision no. 30/2014 and Supreme Court decision no. Kfv.III.37.690/2013/29.

³ *Menarini Diagnostics v Italy* (App. No.43509/08) judgment of September 27 2011.

based on mere assumptions. If there is another interpretation of the evidence which is more reasonable than the one adopted by the HCO, the HCO's decision is in breach of the law.

Right to a defence

Undertakings have the right to a defence both in the HCO proceedings and in the subsequent court procedure aimed at the review of the HCO's decision. Undertakings must be informed of the facts brought against them, and about the legal qualification of these facts, by the HCO or the court. Only this enables them to effectively exercise their right to a defence. Undertakings must be given the opportunity to reply to the HCO's allegations and provide counterevidence.

According to the Constitutional Court, the right to a fair trial encompasses the principle of equality of arms. This principle means that the "prosecution" (i.e. the HCO) and the defence should have an equal chance and possibility to present its views on questions of both facts and law. The HCO and the defence must have the possibility to review the relevant documents of the case to the same extent and in the same detail.

Nullum crimen, nulla poena sine lege

The Constitutional Court declared that, generally, the principles of *nullum crimen sine lege* and *nulla poena sine lege* are also applicable in cartel cases. These principles are not necessarily violated if the legislator creates general prohibitions (such as in art.101 of the TFEU and the corresponding Hungarian law provision) and the subsequent case law makes it clear how the general prohibitions apply in certain situations. However, the fundamental principles of the rule of law and legal security require that undertakings are able to reasonably foresee that their conduct is prohibited and what sanctions it may involve. The Constitutional Court also held that if there is ECJ case law predating the undertaking's conduct and the HCO adopts the same interpretation when applying Hungarian competition law, the requirement of reasonable foreseeability will have been complied with.

To conclude, the Hungarian Supreme Court and the Constitutional Court declared important requirements which apply in cartel proceedings. Due to the recent court decisions, undertakings subject to cartel investigation are now able to, and most probably will frequently, refer to Hungarian case law both in the HCO proceedings and in the subsequent judicial review procedure. It remains to be seen how effective the constitutional protection of the undertaking's constitutional rights will be in practice.

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