Regional Developments

Hungary

THE BINDING FORCE OF DECISIONS OF THE HCA IN PRIVATE ENFORCEMENT CASES

Binding force; Decisions; Hungary; National competition authorities; Private enforcement

In recent years, the role of private enforcement in competition law has become more and more significant. Legislators have been encouraged to take the necessary measures in order to create an appropriate legal background which enables an aggrieved party to exercise the right relating to private enforcement effectively.

As stated by the reasoning of the amending act, this was the purpose of the amendment of the Hungarian Competition Act which is effective from November 1, 2005. This amendment, among others, provided that the statement on the existence or absence of an infringement, made in the decision of the Hungarian Competition Authority (HCA) 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 connection with damages claims. In other words, in the course of private enforcement, the aggrieved party has to prove only the causal link between the infringement established in the HCA's decision and the existence and amount of the damages, and not the infringement itself.

A recent guiding decision of the business law panel of the Supreme Court no.1/2012, however, interpreted—in a significantly restricting manner—the applicability of the above provision. According to this interpretation, the HCA's decision has binding force only in cases where the decision of the HCA was passed in a procedure initiated during the court procedure where the aggrieved party claimed damages, and where the court procedure was suspended until the HCA's procedure was finished and the (non-)existence of the infringement established.

The guiding decision justifies the restrictive interpretation of the provision with the provision's placing in the Competition Act. Namely, this provision was placed as a second (final) sentence in s.88/B (6) of the Competition Act. The preceding sentence reads as follows:

> "Where at any phase of the lawsuit, the HCA notifies the court hearing the lawsuit of a competition supervision proceeding, which it has initiated in the case concerned, the court shall stay its proceeding until the expiry of the time limit for filing an action in the court against the decision reached in the competition supervision proceeding or, in cases where an action is filed against that decision, until the date on which the decision of the review court becomes legally binding."

Then follows the pertinent provision: "The statement on the existence or absence of an infringement, made in the decision of the HCA—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 other words, since the provision in question follows after a provision relating to HCA proceedings initiated during court procedures, only HCA decisions passed during such proceedings have binding force.

Based on the structure of the Competition Act, from a strict legal point of view the interpretation of the guiding decision seems to be correct. The legislator could have made its intention with this provision unambiguously clear by creating a separate clause for it or by explicitly declaring that this provision shall be applicable generally in the case of HCA decisions.

However, it seems that the interpretation does not take into account the legislator's intention as declared in the reasoning of the amending act. Also, it makes a distinction between aggrieved parties as to whether or not they claim on the basis of a HCA decision passed prior to or during the court procedure where damages are claimed, which does not seem to be objectively justifiable and reasonable. In addition, this interpretation makes the position of most of the aggrieved parties difficult, since, as a general rule, private enforcement is initiated when in possession of HCA decisions that establish the infringement of competition law (follow-on actions) and not prior to the HCA initiating competition supervision proceedings.

Hopefully the legislator will cure this problem as soon as possible so that private enforcement cases can be effectively initiated by the aggrieved parties.

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Israel

CIVIL CASE (BEER -SHEVA) 3249-04 S. OFIR INVESTMENTS LTD V CENTRAL BOTTLING COMPANY LTD

Abuse of dominant position; Competition law claims; Israel; Pricing; Private enforcement; Settlement; Soft drinks; Vending machines

In October 2012 the district court in Beer-Sheva approved a settlement agreement between the Central Bottling Company (Coca Cola Israel) and 300 individuals and soft drink companies, in the framework of a class action brought against Coca Cola Israel in 2004, for the amount of NIS 260 million (approximately USD 67 million).

According to the application to approve the action as a class action, Coca Cola Israel has allegedly abused its dominant position by charging excessive, unfair, prices to vending machine operators for carbonated drinks, thus discriminating them against Coca Cola Israel's subsidiary, Mashkar, and enabling Mashkar to take over the vending machines business.

According to the settlement agreement Coca Cola Israel will give the vending machines operators a 2 per cent discount for the next three years for soft drinks cans purchased from it. Coca Cola Israel also committed not to give higher discounts to its subsidiary, Mashkar. In addition, those operators which have exited the market until 2007, as a result of Coca Cola Israel's alleged abusive behavior, and will re-enter the market, will receive a 10 per cent discount for up to 5,200 cans of soft drinks per year.

The Court approved the settlement agreement, upholding Coca Cola Israel's expert's opinion and rejecting the opinion of the objective expert appointed by the Court.

The examiner determined that during the years 1998–2007, the vending machines operators paid an extra amount of 34 million Shekels, which reflects overcharging of 8–30 per cent compared to the prices charged to Mashkar.

The examiner objected to the said settlement agreement, arguing that it was unreasonable, inter alia, since it does not compensate for the overcharging during a whole decade, does not compensate dozens of operators that have exited the market as a result of Coca Cola Israel's behaviour and does not compensate for the competitive advantage gained by the respondents as a result of the abusive price and discounts policy.

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