

Hungarian law and the Commission's proposal for a directive on antitrust damages actions

The Hungarian Competition Act¹ has recently been amended by the Hungarian Parliament in many respects.² The new provisions will enter into force as of July 1, 2014. However, it seems that further amendments will be required in order to implement the directive on antitrust damages action³ once it is adopted by the European Parliament.

(1) Disclosure of evidence

The Hungarian Competition Act itself currently does not allow third parties to access the case file. However, the Administrative Procedures Act⁴, which (except for certain paragraphs as set out in the Hungarian Competition Act) applies as a background regulation unless the Hungarian Competition Act provides differently, sets forth that third parties may access the case file if this is necessary to enforce their rights, or to perform their statutory obligations or their obligations imposed on them by an authority. Documents considered as business secrets can be accessed without the approval of the right holder if this is necessary to enforce rights or to perform obligations as set out above.⁵ Although it may be questionable whether these provisions of the Administrative Procedures Act apply, since the Hungarian Competition Act includes different rules in relation to accessing the case file, it seems that the HCA considers these rules to be applicable.⁶

In the course of the judicial review of the HCA's decision, a third party who has a legitimate interest in the conduct and the outcome of the proceedings – who is not involved in either the proceeding initiated by the HCA, nor the judicial review thereof – may request access to the case file with the exception of documents treated as a business

1 Act No LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition

2 Act No CCI of 2013 on the Amendment of Act No LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition and Certain Provisions in connection with the Procedures of the Hungarian Competition Authority (the “Amending Act”; most of the provisions to be entered into force as of July 1, 2014)

3 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the “Draft Directive”)

4 Act No CXL of 2004 on the General Rules of Administrative Procedures and Services (the “Administrative Procedures Act”)

5 Sections 68 (3) and 69 (1) of the Administrative Procedures Act

6 See the reference in the HCA's guidance on how to prepare redacted versions of documents not including business secrets

secret.⁷ It cannot be excluded that an injured party would be considered as a person who has a legitimate interest and thus would have the right to access the case file before the court.

In the civil procedure initiated by the injured party, as plaintiff, to claim damages, as a general rule the plaintiff must evidence its statements.⁸ As an exception to this general rule, as per the plaintiff's request, the court can order the defendant to submit documents to the court if those documents were to be presented pursuant to the rules of civil law.⁹

In the case of documents included in the case file of authorities or courts which cannot be obtained from the other party or third parties, upon the party's request the court may arrange for the acquisition of the documents. In case of such a request by the court, the HCA must provide the court with the documents requested, even if it is qualified as a business secret.¹⁰

The court is free to consider whether the documents/data received from the HCA as a business secret still qualifies as such. If this is the case, access to them may only be permitted with the permission of the holder of the business secret. If permission is not granted, the business secret may not be used as evidence in the court procedure.¹¹

To summarize the above, the access to documents is currently rather vague due to the following: (i) it is not clear whether the documents in the HCA's case file are accessible to third parties; (ii) it is uncertain whether the other party will be obliged by the court to provide the documents requested; and (iii) it is also uncertain which information qualifies as a business secret in the court procedure which prevents the use of such a document as evidence (in the lack of the secret holder's permit).

The provisions of the Amending Act in force as of July 1, 2014 bring a comprehensive amendment in respect of the disclosure of evidence at the level of the HCA.

The new rules clarify that third parties cannot access leniency corporate statements and settlement submissions.¹² These documents shall be treated similarly to documents qualifying as protected data (including all kinds of secrets, among others business secrets and private secrets). This means that they may only be accessed by other parties to the same procedure (i.e. alleged participants of the cartel) if this is required in order for them to be able to exercise their statutory rights, e.g. their right to a defence. As a general rule, access may be permitted only after the statement of objections or the investigation report

7 Section 119 (3) of Act No III of 1952 on the Civil Procedure (the "Civil Procedure Act")

8 Section 190 (1) of the Civil Procedure Act

9 Section 190 (2) of the Civil Procedure Act

10 Sections 192 (1) and 192 (2) of the Civil Procedure Act

11 Section 192 (3) of the Civil Procedure Act

12 The settlement procedure will be a new legal instrument, similar to the EU competition law settlement procedure, introduced in the Hungarian Competition Act by way of this amendment.

has been delivered to the party.

With regards to further documents in the files of the HCA, as a general rule third parties may request to have access to them only after the final and binding closure of the procedure. Access prior to this may only be requested if this is required in order to enforce statutory rights or to perform statutory obligations or obligations based on the decision of an authority.

However, access to the file by third parties may be refused if this would threaten the legal operations and functioning of the HCA without legitimate outer influence or the protection of public interest, in procedures based on Articles 101 or 102 of the TFEU, or the Hungarian equivalents thereof¹³, and in particular in the application of leniency.

Such further documents or parts of them may qualify as protected data, e.g. business secrets, if they meet the statutory conditions and if the party whom the business secret belongs to submits a justified request to the HCA to qualify such documents as a business secret. In the request, a detailed and specific justification must be included in respect of all data that, according to the applicant, qualifies as a business secret. As mentioned above, data or documents qualifying as a business secret cannot be accessed by third parties.

However, if access to documents is requested, the HCA may review whether documents that already qualify as a business secret still comply with the relevant criteria and, if not, the HCA will decide on the termination of the qualification of the document as a business secret and thus allow access to such a document. However, the beneficiary of the business secret may seek remedy against this decision before the court and third parties cannot access the document until a final and binding decision is made on the subject, or until the deadline to file the request for such a remedy has elapsed without its filing.

It is rather clear from the above that the rules relating to the disclosure of evidence will need to be clarified at the level of the courts in the first instance since, currently, the possibilities to oblige the defendant to provide evidence is rather vague. In addition to this, the rules relating to the disclosure may also need some change at the level of the HCA in light of the finalized Draft Directive.¹⁴

(2) Effect of national decisions

Pursuant to the current version of the Hungarian Competition Act, "[t]he statement on the existence or absence of an infringement, made in the decision of the Hungarian Competition Authority against which no action has been filed, or in the decision of the review court, shall be binding on the court hearing the lawsuit".¹⁵ However, a

13 Sections 11 and 21 of the Hungarian Competition Act

14 Based on the Draft Report of October 3, 2013 issued by the Committee of Economic and Monetary Affairs of the EU Parliament, it seems that the absolute protection of leniency corporate statements and settlement submissions will be deleted from the Draft Directive.

15 Article 88B (6) of the Hungarian Competition Act

recent decision by the Supreme Court¹⁶ found that a decision by the Hungarian Competition Authority is binding on a court only within the court proceeding that triggered the investigation of the Hungarian Competition Authority that gave rise to such decision.

However, the Amending Act makes it clear that the HCA's decision in respect of the existence of the infringement is in any case binding on courts.¹⁷

The amendment of the Hungarian legislation would be necessary as there is no regulation regarding the binding force of other NCA's decisions.¹⁸

(3) Limitation periods

Currently, general rules of the Hungarian Civil Code¹⁹ apply to the statute of limitation within which actions may be brought. Although Hungary will have a new Civil Code entering into force on March 15, 2014,²⁰ the rules relating to the below issues in connection with the statute of limitations will not change.

According to such rules, the general limitation period for damages claims is, in compliance with the Draft Directive, 5 years.

These 5 years, however, commence from the due date of the damages claim, which is the date when the damage occurred. This is irrespective of the fact whether the infringement is continuous or repeated. Although there is court practice in trademark infringement cases stating that, for the purposes of the trademark holder's right to have the infringer's unjustified enrichment reversed, the claim became due only when the infringer ceased the infringement,²¹ which might be used as analogy, it appears that the statutory rules need to be fine-tuned in this respect.

Also, since the statute of limitations commences from the due date of the damages claim, which is the date when the damage occurred, this is not in line with the Draft Directive's requirements regarding the commencement date.

Although the statute of limitation may be suspended if the obligee is unable to enforce a claim for an excusable reason (and, according to the court practice, an excusable reason may be if the party lacks information necessary to bring an action), or if there is an on-going administrative procedure relating to the establishment of the infringement, it seems that the relevant statutory rules need to be made more precise in order to be entirely compliant

16 Guiding decision of the business law panel of the Supreme Court no. 1/2012

17 New Section 88B (6a) of the Hungarian Competition Act as set out in Section 78 of the Amending Act

18 As for the binding force of the EU Commission's decisions, please see Article 16 (Uniform application of Community competition law) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

19 Act No IV of 1959 on the Civil Code

20 Act V of 2013 on the Civil Code

21 BDT 2008.1926

with the Draft Directive's criteria in respect of the commencement of the time frame for actions to be brought.

(4) Joint and several liability

The Civil Code follows the principle of full compensation. Furthermore, pursuant to the general rules of civil law, if the damage is caused by several persons, these persons shall be held liable jointly and severally.

In cases of claims for damages based on competition law infringements, the Hungarian Competition Act provides that, if an undertaking has been granted immunity from fines based on leniency, it may refuse to reimburse the damages as long as the claim can be collected from other undertakings being 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. The lawsuit commenced to enforce the liability of the undertaking that has been granted immunity from fines shall be suspended until the final closing of the administrative lawsuit commenced to review the decision of the Hungarian Competition Authority which established the infringement.²²

Although the Hungarian legislation does not depart from the principles of joint and several liability and full compensation, the leniency applicant is, however, obliged to pay compensation to the injured parties if they are unable to collect their claims from the other parties of the cartel. Thus, the court would order that the plaintiff may request judicial enforcement proceedings against the leniency applicant only if the judicial enforcement proceedings against the other cartel members were unsuccessful.

The above provision of the substantive law is implemented in the procedural law in that the lawsuit brought against the leniency applicant shall be suspended until the competition law infringement is established in a final court judgment against the other parties of the cartel.²³

The Hungarian legislation is different from the approach proposed in the Draft Directive, according to which the leniency applicant's civil liability should be limited to claims by his or her direct and indirect contractual partners. Under the Hungarian provisions, the leniency applicant is in principle still liable for all damages resulting from the anti-competitive behaviour, irrespective of contractual relationships. However, as mentioned above, the claim for compensation can be enforced against the leniency applicant only if remedies cannot be obtained from the other cartel members.

Thus, the civil liability of the leniency applicant is limited as compared to the liability of the other members of the cartel. At the same time, in order to protect the interest of the injured parties, the Hungarian rules are also in compliance with the requirement of full compensation for the victims as set forth in the Draft Directive. This legislation is applicable to damages caused after the entering into force of this provision (September 1, 2008).

22 Section 88/D of the Hungarian Competition Act

23 Ibid.

Based on the above, it seems that current Hungarian regime does not necessarily need to be amended to be in line with the Draft Directive.

(5) Passing-on of overcharges

In Hungary, there are no statutory rules or 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 to whom the damage (e.g. higher prices) was passed may be entitled to enforce claims against the cartel members.

Thus, it seems that the Hungarian legislation will need to be amended as regards the presumption that is foreseen in the Draft Directive.

(6) Quantification of harm

Even if there is a final and enforceable decision of the HCA for the prohibited restrictive agreement or practice, the party claiming compensation for damages must prove both the (i) amount of damage suffered and the (ii) causal link between the damages suffered and the prohibited restrictive agreement or practice.

It must be noted that the Hungarian Competition Act provides that, in the course of evidencing, the effect of the infringement on the level of price applied by the infringer - in lawsuits to enforce any civil law claim against a party of an agreement among competitors which violates Section 11 of this Act or Article 81 of the EC Treaty, or restricts the competition, or which is aimed at fixing the selling prices directly or indirectly, or at sharing markets, or at fixing production or sales quotas - shall be deemed to have affected the price by 10% unless the contrary is evidenced.²⁴

The above rule applies in litigations commenced after September 1, 2008 (even if the damages were caused before). Although the wording refers to a reversible presumption on price increase and not to a presumption on the amount of damages, this is favourable to the plaintiff and facilitates the calculation of damages. It cannot be excluded that, as a result of this provision, the plaintiff does not have to provide evidence for the actual loss, unless the overcharged price exceeds 10 per cent. It is up to the defendant to prove that if there had been no cartel, the price would not have been lower.

In order to comply with the Draft Directive, the scope of the conducts in respect of which this provision applies, will need to be amended.

(7) Consensual dispute resolution

There are currently no rules relating to consensual dispute resolution in the field of competition law, thus, the system should be developed based on the Draft Directive.

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²⁴ Section 88/C of the Hungarian Competition Act

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