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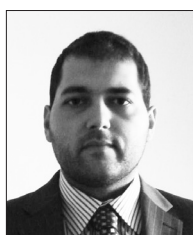
Progressive initiatives

Bálint Bassola and András Horváth of Salans examine recent trends and developments surrounding antitrust enforcement in Hungary



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PROGRESSIVE INITIATIVES

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In comparison with other European countries, Hungarian competition law has a relatively long tradition. The first act was adopted as early as 1923, followed by the second in 1931. This development halted in 1949, when the plan economy of the Communist regime was introduced, consequently leaving no room (and sense) for competition enforcement.

The renaissance of antitrust enforcement took place in 1990, after the fall of the Iron Curtain and the change of regimes in the Socialist bloc of countries. The legislation was principally modelled according to European and German competition rules and intended to satisfy the needs of a modern market economy. The Hungarian Competition Authority (hereinafter: GVH) has been given exclusive competence for the supervision of competition in all economic sectors in Hungary.

For several years after its foundation, the GVH was considered as a rather “quiet” agency, with few high-profile cases. The first “big bang” came in the summer of 2004, when the GVH imposed a fine in the amount of 7.043 billion forint (approx. 28 million euros) on five construction undertakings involved in a major bid rigging, concerning public procurement procedures of highway building. Since then, the GVH has been very active in antitrust enforcement,

and it may indeed be stated that it has established itself a notable reputation not only among the Hungarian public, but also within the European Competition Network. Hungarian antitrust enforcement is principally in line with European trends, however, it is worth emphasising some progressive features of it.

1 Ease on claiming damages – the “10% damage presumption”

Providing an impetus for damages claims based on antitrust infringements seems to be a priority for the Hungarian legislator. That was the reason why it was made substantially easier to bring actions for damages before civil courts. Accordingly, it is legally presumed that the hardcore cartel (i.e. price-fixing, market sharing, or the limitation of production or sales) has caused a price increase of 10%. Thus, if the GVH – or an administrative court, on appeal from the GVH’s decision – establishes the unlawfulness of the practice, the civil court with which the damages claim has been filed is bound by that part of the decision. Of course, when it comes to damages, the civil court retains its jurisdiction to decide whether or not such claims are appropriate.

Antitrust enforcement in Hungary was reborn in 1990, after the fall of the Iron Curtain and the change of regimes in the Socialist bloc

Nevertheless, despite this greater flexibility, the claimant will still face great difficulties when it comes to verification. He must demonstrate (i) what the competitive price would have been without the cartel; (ii) that there is a causal link between the damage and the unlawful conduct of the cartelists; and (iii) that he is the one incurring the damages (i.e. he has not passed the loss on to his buyers). Moreover, he must prove that he did everything to mitigate losses.

The 10% damages rule is a rebuttable presumption, as the defendant may show that the cartel has not caused a price increase of that degree.

Furthermore, in order to make the GVH's leniency policy more attractive, the current provisions stipulate that the firm making a leniency application will only have to pay damages if the claimant, who suffered a loss as a result of the cartel, cannot seek compensation from the other cartelists. The rationale of this provision is that, in almost all cases involving leniency, the firm filing the application does not file an appeal with the court against the GVH's decision, whereas the other cartelists do. Consequently, the door is open for claimants looking to claim damages from the leniency applicant, who (according to general civil law) bears joint and several liability for the unlawful conduct. Under the amendments the damages procedure against the leniency applicant would be suspended until final judgment has been pronounced in the case. However, this amendment only affects the leniency applicant that has been granted full immunity from fines in the case at hand.

Finally, it should be added that there are currently a few ongoing cases based on the "10% damage presumption" rule, but no judgment has been published yet.

2 Whistleblower award for individuals for reporting hardcore cartels

Since the GVH's leniency programme was introduced in 2003, undertakings have not submitted as many leniency applications as the GVH had expected. The most probable reasons are that the company filing an application for leniency cannot be sure that it will not be attacked with damages claims; there are still criminal penalties for cartelists in public procurement procedures; and the Hungarian market is a small one, so managers of a certain sector often know each other well.

In order to enhance the effectiveness of obtaining information

about cartels, a recent amendment to the Hungarian Competition Act stipulates that an individual who provides indispensable evidence to the Hungarian Competition Authority concerning hardcore cartels (under the Hungarian Competition Act or under EC Law), aiming at price-fixing, market allocation (including bid-rigging) or the fixing of production or sales quotas, is entitled to a whistleblower award. The award is also payable if the evidence provided serves as a basis for a successful dawn raid in the said cartel case. The amount of the whistleblower award is one percent of the amount of all fines imposed by the HCA at the end of the procedure, but not more than 50 million forint (approx. 185,000 euros). It should be added that the submission of a leniency application by a cartel participant company excludes the payment of a whistleblower award to the executives of that company.

3 Criminalisation of certain collusions in public procurement procedures

The Hungarian Criminal Code stipulates, since 2005, that a person who participates in a cartel (i.e. price-fixing, fixing of other contractual terms, other market-sharing agreements and concerted practices), which results in a restriction of competition, may be penalised with imprisonment of up to five years. However, the persons committing these crimes will not be punished if they report these activities to the relevant authorities (e.g. to the Hungarian Competition Authority, to the financial supervising authority).

It should be noted that the criminal provision, by requiring the agreement to result in a restriction of competition, sets a difficult burden of proof on the prosecutor. This may be the reason why no such penal procedures have been launched so far.

4 Exclusion from future public procurement procedures

The exclusion from future public procurement procedures may indeed be a severe sanction for cartelists. Pursuant to the Hungarian Public Procurement Act, the entity publishing the tender may prescribe in the tender notice that any tenderer or subcontractor proposed to be contracted for a value in excess of 10 percent of the value of the contract or any supplier of resources, who has been found guilty and fined within the preceding five years of a legal offence committed in a public procurement procedure by final and enforceable decision of the GVH or a court, may be excluded from participating in future public procurement procedure.

The Hungarian Criminal Code stipulates that a cartel participant may be penalised with imprisonment of up to five years

It may be noted that the severeness of the Public Procurement Act's provision at stake is substantially softened by the great margin of appreciation of the entity publishing the tender, whether to exclude a former cartel member or not.

5 Administrative decisions that impede competition

The GVH has a role not only in supervising competition among undertakings, but also in observing that resolutions of public administrative bodies do not impede competition. Where the GVH finds that a public administrative resolution violates the freedom of economic competition, it can request the public administrative body to amend or revoke the resolution in question. It may also bring court action to have the anticompetitive resolution modified or revoked.

The GVH has not often used this tool, however, a recent example concerning Microsoft is worth mentioning. A Hungarian state entity announced an open public procurement procedure, in the value of 100 million euros, for the extension and upgrade of software licences procured earlier to public administration and educational institutions, and for the purchase of new licences. According to the conditions defined in the tender notice, only traders of "Microsoft or equivalent" software could take part in the procedure. In the view of the GVH, featuring the name of Microsoft products was unnecessary for the unambiguous and clear definition of the subject of the procurement. The GVH launched action with the court, since it was of the opinion that the stipulation of the tender notice is a distortion of competition in the software market. Surprisingly, the court did not agree with the GVH and thus rejected the claim.

6 Representative action

The GVH is entitled to file a lawsuit for civil law claims (e.g. damages), on behalf of consumers with the court. It may do so if it has pursued the given infringement (follow-on claim), if the infringement affects a number of unidentifiable consumers, if the consumers determined in the action, the legal title of their claim and the level of damages are identical. The representative action of the GVH does not affect the claims of individuals. Although the GVH has principally been authorised to do so since 1997, there have been no cases to date on the basis of a representative action, which might be explained by the short preclusive deadline, namely one year after the infringement itself for filing the lawsuit.

7 More economic approach in the application of competition law

From a very early stage, the GVH has been committed to the advanced use of economics in the assessment of competition cases, especially mergers and abuse of dominance cases. This commitment to the "more economic approach" was also heralded by the appointment of a chief economist in 2005 in order to increase the role of economic analysis in competition assessment. Apart from participating in the case work requiring economic expertise, the chief economist also plays an important role in competition advocacy and competition culture.

8 Strong consumer protection competences

The GVH, unlike several other European competition authorities, plays a very important role in (direct) consumer protection as well. The consumer protection powers of the GVH include proceedings against unfair commercial practices towards consumers, unfair manipulation of business choice of business partners and misleading advertisements. It should be noted that the GVH only intervenes in such cases if the competition process may be affected by the conduct at stake.

It may be observed that the consumer protection powers of the GVH increase the "legitimacy" of the institution by providing direct benefits to the consumer, but also by a more intensive presence in the media.

9 Competition culture as a priority

The importance that Hungary attaches to promoting a competition culture is well demonstrated by the fact that the GVH currently receives from the state budget a certain proportion of the fines imposed for antitrust infringements. According to the rules in force, this sum amounts to 10% of the annual average of the fines of the two previous years. The GVH may, on a competitive basis, donate this sum to research institutes, consumer associations, educational programmes and other projects relating to competition and consumer law, competition policy and competition economics. ■

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