

# CPI Antitrust Chronicle

## October 2012 (2)

### **Hungarian Competition Law & Policy: The Watermelon Omen**

Pál Szilágyi

Competition Law Research Centre  
Péter Pázmány Catholic University

# Hungarian Competition Law & Policy: The Watermelon Omen

Pál Szilágyi<sup>1</sup>

## I. BUSINESS AS USUAL...

Looking at recent developments in Hungarian competition law and policy first gives us the impression that nothing exciting is happening. Most developments are business as usual at the national competition authority. (In Hungarian the proper name of the authority is the Gazdasági Versenyhivatal, but for English speakers we refer to it by its initials, “GVH.”) The GVH has amended some notices (e.g. on simplified procedures in merger control or on fines) and brought them into line with recent developments on the European level. There have been few antitrust decisions by the authority, but several are in the pipeline. A few of them are related to the abuse of a dominant position (e.g. a case initiated against MasterCard Europe Sprl) and some more investigations focus on suspected cartels (e.g. one on a suspected cartel in the residential mortgage sector). There was even a case where the courts annulled the decision of the GVH in a merger case because of insufficient reasoning and evidence.

One interesting event, however, could have a general impact on the application of national competition law provisions on all the Member States of the European Union. In 2006 the GVH imposed one of the largest fines in Hungarian competition law (about 7 billion HUF); the case was appealed and finally, just recently, the highest court in Hungary has made a preliminary rulings request. The value of the request to existing European case law is that the Hungarian court had asked for a preliminary ruling in a case where Article 101 TFEU was not applicable. However, the national court was of the opinion that, since the national equivalent of the article was based on Article 101 TFEU, the notions originating in EU laws must have a direct influence on the interpretation of the relevant provisions. The European Commission supported this argument and was also of the opinion that the special relationship of national and EU law makes the question posed by the national court eligible. As of October 25, 2012, Advocate General Cruz Villalón was of a different opinion, so it will be interesting to see the judgment of the ECJ.

The other very interesting issue, in the opinion of the AG, is the interpretation of the notion of object or effect types of anticompetitive agreements in cases of vertical agreements that resemble hub-and-spoke cartels.

But, more ominously, if we look at recent developments from a wider perspective, we can see some radical changes in the attitudes of the Hungarian legislature and the society.

---

<sup>1</sup> Pál Szilágyi is an Assistant Adjunct Professor at Péter Pázmány Catholic University where he is the Director of the Competition Law Research Centre. This article is published under the Competition Law Research Centre’s supervision within the framework of Project No. TÁMOP-4.2.1.B-11/2/KMR-2011-0002 of Péter Pázmány Catholic University (Development of Scientific Research at PKKE).

## II. BUT THEN ALL THE TROUBLE STARTED WITH A NEW CONSTITUTION

In April 2011 the Hungarian Parliament voted for a new constitution, called The Fundamental Law of Hungary. The constitution includes many (indirect) references to the values of economic competition and it even stipulates, “Hungary shall ensure the conditions of fair economic competition.” (Article M (2)). And the same article and paragraph also refers to the most serious competition law infringement when it states, “Hungary shall act against any abuse of a dominant position and protect the rights of consumers.” Make no mistake, the Hungarian constitution requires that any abuse of a dominant position shall be investigated, thereby ensuring the rights of consumers shall be protected, and this is prioritized on a constitutional level.

However, there is nothing, not a single word, on cartels.

If one might think that this was unintentional, it would be a mistake. Those legislators who had been actively involved in the drafting of the constitution expressly took the position that actions against abuses of a dominant position should be prioritized. Even if this is a welcomed approach by some, the lack of reference to fighting cartels could be a clear sign regarding the Government’s priorities. This is contrary to the common, and one could say unified, approach of contemporary academics, practitioners, and public officials of competition authorities that the most evil one could possibly imagine in competition law is a cartel. Indeed, final decisions on abuses of dominant positions are a rare species nowadays, even though the technological sector is giving some headaches to the competition authorities.

## III. SO LET THERE BE CARTELS

In July 2012 the Hungarian Ministry of Rural Development summoned the larger retailers (Aldi, Auchan, TESCO, Spar, etc.) and got them to agree that they would not charge less than 99 Hungarian forints for a kilogram of watermelon. After the agreement was concluded—with the support of the Ministry—the Ministry went public and announced that this common understanding was a “fair deal for producers and consumers.” This was instantly followed by great media attention and the State Secretary for Parliamentary Affairs of Rural Development even consulted the GVH. After a month the GVH initiated a formal investigation against the undertakings involved, but not against the Ministry.

What followed seemed to be on the right track, since there was an official investigation and the supposed cartel agreement was busted instantly, thanks to the media attention and probably also due to the intervention of the authority.

However, on October 8, 2012 an MP of the governing party handed in a bill which included the following: The Act excludes the application of Article 11 of the Hungarian competition act (prohibition of anticompetitive agreements) to all agreements concerning agricultural products if the restriction of competition due to the agreement does not exceed an economically justified and legitimate income. The Minister for Rural Development will determine whether these conditions apply, and the outcome of the consideration is binding on the national competition authority. Finally, the draft also includes that the GVH shall not adopt fines for any infringements of Article 11 of the Hungarian competition act or Article 101 of the Treaty on the Functioning of the European Union (“TFEU”), if the infringement concerns agricultural products.

Apart from the obvious problems with the bill, one very interesting issue is that one of the official justifications of the bill stated that if all the members of a market are involved in an agreement, than that group cannot be classified as a traditional cartel, since none of the undertakings have an economic advantage due to the agreement and the agreement affects only undertakings or consumers on different levels of the vertical chain.

One would have thought that the bill would be squashed by the Committee for Agriculture at the Parliament, but the Committee supported the bill and accepted only one amendment, namely that the exclusion of the application of competition rules shall only be possible if Article 101 TFEU is not applicable. One should note that the provision that fines cannot be imposed for infringements of Article 101 TFEU is still in the bill.

It is really difficult to see how one could have an agreement in the sector where most of the undertakings are involved (*cf.* official explanation of the bill) but Article 101 TFEU is not applicable. That is, however, the smallest problem with the bill. After the support of the Committee of Agriculture, the bill is before the plenary session for adoption. I have to note that the European Commission faces the same problem, since the European Parliament wants to exclude to a large extent the application of Article 101 for the agricultural sector.

Actually, I do not think it is necessary to comment further on the content of the bill. It is obviously wrong and mistaken. Nevertheless, one can see a clear path in the change of the economic policies of the Hungarian government. Many decisions and bills try to go over the limits and protect the interests of some producers or sectors, and many of these will certainly draw the attention of the European Commission. If the bill on the exclusion of agricultural products is adopted, most probably we will see action by the European Commission. Luckily the national competition authority is an independent authority and has a good reputation, so hopefully it will apply both Hungarian and European Union law when necessary and come to a justified conclusion.

#### IV. SURPRISE “ATTACK” ON PRIVATE ENFORCEMENT

The Hungarian Parliament has adopted many good initiatives in order to promote private enforcement. For example, the Hungarian competition act includes a provision that creates a rebuttable presumption that a cartel increases the price of products by 10 percent. However, recently there was a remarkable decision of the Curia, the highest court in Hungary. The Hungarian competition act states that, if there is a claim relating to anticompetitive agreements or abuse of a dominant position before any court in Hungary, the court shall notify the GVH without delay. The GVH may launch an investigation and the court has to stay its proceeding and await the outcome of the investigation and the final decision in the case. This final decision on the existence or absence of an infringement is binding on the court.

Most practitioners and academics in Hungary were previously of the view that the final decision of the GVH on an infringement subsequently binds all the courts, even if the procedure of the authority was not initiated because of the court’s notification. The Curia judgment, however, clarified that the decision of the authority was only binding if the court had to stay its proceedings and await the final decision of the GVH in that particular case.

The judgment of the Curia is clearly correct, and is based on the wording of the Act, but the ruling may have an unintended effect on follow-on private enforcement claims.

## V. AND THE WAY FORWARD SHALL BE...

As already mentioned, the national competition authority in Hungary has an excellent reputation and is regarded widely as a very good authority. The recently appointed president of the authority and the Competition Council—the decision making commission of the authority—are very committed to quality work and strong enforcement of the provisions. However, both the economic policy of the current government, and the society in general, are siding with those who favor protectionism and government intervention. One of the most important tasks of the authority will be to promote a competition culture. While in many countries the values of competition are self-evident, in the Central- and Eastern European region the sentiment for heavy regulation of the markets is often winning ground.

Otherwise, in the work of the competition authority I expect business as usual.