

Competition - Hungary

Inconsistent rules expose leniency applicants to major damage claims

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Background

One of the predominant aims of the Hungarian competition policy of prosecuting high-profile cartel cases is to help to increase the number of leniency applications and private enforcement actions which, despite the efforts of the Competition Office, has remained unexpectedly low in recent years. Major amendments in 2009 introduced various incentives into the law in order to promote these efforts (for further details please see "[Revised Competition Act incorporates updated leniency policy](#)"). The most important of these incentives were the introduction of secondary liability of a leniency applicant and the legal presumption regarding the value of the damage caused by a cartel.

In relation to the first amendment, a leniency applicant now bears secondary liability for damage caused by a cartel. This means that any undertaking entitled to full immunity from fines under the leniency rules may refuse indemnity claims, provided that such claims can be collected from other undertakings in the same cartel.

With a view to promoting private enforcement claims, the second change created a legal presumption that horizontal price-fixing and/or market-sharing arrangements are deemed to result in a 10% increase in contract prices. This releases injured parties in civil lawsuits from the need to prove affirmatively the level of damages suffered by virtue of the cartel.

It is beyond the scope of this update to assess whether the new rules will promote the private enforcement of competition law infringement claims and increase the number of leniency applications. Rather, this update focuses on one important – and probably unintended – practical consequence of the amendments.

The amendments both entered into effect on June 1 2009. However, having the same effective date does not guarantee a uniform method of application. According to the amendments, the 10% price increase presumption can be invoked in all lawsuits initiated after June 1 2009, regardless of when the underlying cartel existed; while the option for a leniency applicant to refuse indemnity claims conditionally applies only to damage claims originating from cartel activities committed after June 1 2009.

The difference, which may at first seem irrelevant, could turn a successful leniency application into a major problem. This can be seen in a recent cartel case of the Hungarian Competition Office.

Flour cartel case

In the case the Competition Office imposed a total fine of Ft2.3 billion (approximately €8.3 million) on 16 Hungarian mills for market partitioning and horizontal price fixing. The case concerned a 'classic' hardcore cartel pattern, in which independent mills established a mechanism aimed at coordinating prices and partitioning the Hungarian wheat flour market between 2005 and 2008. The coordination scheme was a sequel to an earlier cartel prosecuted by the Competition Office in 2004. The earlier cartel, operated substantially by the same participants, related to fixing the prices and supplier quotas for fine ground wheat flour during 2001 and 2002. At that time, the Competition Office imposed no substantial fines on the cartel participants.

The majority of participants reorganised the cartel in 2005. The new cartel was structured on two levels. The major allocation principles and prices were coordinated between the 'heavyweight' market players at the national level. The results were then

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discussed at regional level with the participation of smaller local producers. In this way the major suppliers, which jointly accounted for approximately 70% to 80% of the Hungarian fine flour market, controlled the small local mills by ensuring that they observed and followed the decisions taken at the national level.

In light of the earlier cartel decision, for the second cartel the participants implemented sophisticated precautionary measures to avoid leaving any evidence. Therefore, it was a major boost for the Competition Office when one of the smaller players, Julia Malom, approached the Competition Office and applied for immunity from potential fines in exchange for supplying evidence on the cartel under the leniency rules. The Competition Office accepted the application and rewarded Malom with full immunity while imposing substantial fines on the other members of the cartel.

But this is not the end of the story. The parties fined by the Competition Office are likely to challenge the decision before the court. An important procedural rule is that no damages claim can be enforced against the parties challenging a cartel decision until the court confirms the findings of the Competition Office in a final and unchallengeable decision.

Malom will probably have to consider doing the same and asking the court to overturn the decision. Otherwise, the cartel decision will become final and enforceable against Malom, who will be liable for indemnifying the damaged parties alone. In that case, Malom will be unable to take advantage of secondary liability and refuse indemnity claims because the cartel was in operation before June 1 2009. However, since the follow-on damage claims were asserted after June 1 2010, unless proven otherwise Malom will remain automatically liable for indemnifying the injured parties for at least 10% of the contract prices affected by the alleged cartel. Malom will have the right to reclaim the indemnities from the members of the cartel in proportion to their involvement in the cartel – but only once the legal review of the cartel decision is over.

Comment

The decision illustrates that the regulations relating to the entry into force of the new measures missed the point. The different rules of application have created an awkward conflict between the principle of facilitating leniency applications and the promotion of the private enforcement of damages claims. This conflict can easily become a practical obstacle that will further hinder leniency applications.

However, if Malom elects to file a petition against the Competition Office decision, she will face the rather challenging task of putting together sound arguments against the findings of the Competition Office. The findings against which she will have to argue are based on its own admissions and the evidence that it delivered.

It seems to be an even more complex situation if the court overturns the cartel decision. If Malom files a petition and the decision is finally overturned, it will be released from a cartel accusation even if it has already admitted that it was party to the cartel. On the other hand, if Malom does not file a petition but the court overturns the cartel decision, it will remain liable for and will probably have to pay significant indemnities on the basis of a cartel activity that, according to the court ruling, did not even exist.

These scenarios show that the leniency regime and the practical implications of the private enforcement rules are not fully harmonised in the latest amendment to the law. This may prompt the question of whether any fine-tuning in the law is necessary to clarify further the core principles of the competition policy.

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