

Competition - Hungary

New antitrust fine guidelines: Competition Office targets foreign turnover

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[Initial guidelines](#)
[Supreme Court rulings](#)
[New guidelines](#)
[Comment](#)

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On January 25 2012 the Competition Office issued new guidelines on determining fines in cartel and abuse of dominance cases. The guidelines are the result of a long dispute between the Competition Office and various courts.

Initial guidelines

The dispute goes back to December 2003, when the Competition Office introduced its first guidelines on the calculation of antitrust fines. These were based on a relatively complex method which involved setting a basic amount and then applying a number of adjustments on the basis of individual aggravating and mitigating circumstances. The Competition Office applied these guidelines in antitrust cases for nearly two years without negative feedback from the courts. However, in 2005 the Appellate Court advanced a number of objections - most fundamentally, it maintained that Hungarian competition law did not allow for the use of mathematical formulae to determine antitrust fines. The court held that the law required the Competition Office to consider all individual features of the case in question when determining the fine; in the court's view, general mathematical calculations based on predefined rules did not meet this requirement.

The first guidelines were also challenged before the Constitutional Court on the basis that they restricted the freedom and independence of the Competition Office in determining fines. The court rejected the claim in 2007, but the Competition Office withdrew the guidelines in 2009 in the aftermath of repeated criticism.

Supreme Court rulings

A few months after the guidelines were withdrawn, the Supreme Court held in a competition case that nothing prevented the Competition Office from setting antitrust fines by way of mathematical calculation, provided that the individual circumstances of the given case were adequately reflected in the level of the fine. In 2011 it went further and explicitly ruled that the Competition Office may issue guidelines on determining antitrust fines. However, the court ruled that once the Competition Office does so, it remains bound by its guidelines. The court also made clear that if a fine is imposed on the basis of the guidelines, the court is limited in its review of the size of the fine - it may evaluate only whether the method used to determine the amount corresponds to the applicable principles in the guidelines.

New guidelines

In light of the 2011 Supreme Court judgment, the Competition Office began to prepare new guidelines and issued its final version in January 2012.

The new guidelines apply to cartel and abuse of dominance cases. Although the Competition Office is expected to follow the rules, it remains free to deviate from them if it can provide comprehensive reasoning to show that such deviation is justified by the particular characteristics of the case.

According to the general principles set out in the guidelines, a fine must be an effective and material deterrent, but should also be proportionate to the infringement committed. Proportionality is to be assessed against the gravity of the infringement, rather than against the fines imposed on other undertakings involved in the same infringement.

Base amount

In determining a fine, the first step is to calculate the theoretical maximum level of the base amount. This is equal to 10% of the value of the undertaking's sales of goods and services to which the infringement directly relates in the year of the infringement (or, if the infringement lasted for more than one year, throughout the period of the infringement). However, if the infringement relates to a public procurement tender process, the base amount is the value of the tender in question (which normally equates to the value of the winning bid in the given tender). If reliable market data is unavailable, the Competition Office is free to estimate the base amount.

Adjustments

Once the maximum base amount is set, it is subject to adjustment based on the gravity of the infringement, its effect on the market and the undertaking's role in the infringement and subsequent proceedings. Among other factors to be considered, the base amount may be increased if:

- the infringement is deliberate (although lack of intent is not a mitigating factor); or
- the undertaking played a significant role in the infringement.

The base amount may be reduced if:

- the undertaking voluntarily remedied (or attempted to remedy) the negative consequences of the infringement; or
- the infringement was facilitated by an action or other measure of the state.

The base amount is subject to further adjustments on the basis of the following principles:

- A fine is doubled in the event of repeat infringement. For the purposes of the guidelines, 'repeat infringement' occurs where the infringement at issue is substantially equivalent - in its actual or intended results - to a previous infringement by the same undertaking. Repeat infringement also occurs where the previous infringement was committed by a legal predecessor or another member of the corporate group to which the undertaking belongs.
- If the Competition Office has adequate data on the proceeds realised by the undertaking as a result of the infringement, the fine may be increased by an amount equal to three times the illegal proceeds.
- In order to provide a significant deterrent, the Competition Office may increase the fine imposed on an undertaking where the fine calculated by the normal method would have no material effect (eg, because of the size of the undertaking's turnover).

Once these adjustments are applied, the Competition Office must verify that the fine is below the legal maximum, which is set at 10% of the previous year's net turnover of the corporate group to which the undertaking belongs. In setting this ceiling, the Competition Office may take into consideration the group's foreign turnover in addition to its turnover in Hungary, especially if the proceeds from the infringement were realised predominantly by foreign members of the corporate group. If the fine exceeds the threshold, it must be reduced to the legal maximum.

If the conditions for leniency are met, the fine must be waived or reduced accordingly.

Inability to pay

Normally, the fine imposed on an infringer is equal to the amount calculated under the rules and is deemed to be a 'public debt', which means that it is enforceable in the same way as an outstanding tax debt. However, the Competition Office may further adjust the amount or required payment method in some cases:

- In exceptional circumstances the Competition Office may reduce the fine at the undertaking's request if the undertaking can show that it is unable to pay. It is insufficient for the undertaking to claim or even prove that it is in financial difficulty; rather, it must present conclusive evidence that its inability to pay is the result of special economic or social circumstances which would not be alleviated by being allowed to pay in instalments.
- The Competition Office accepts the 'failing firm' argument for a reduced fine if the underlying conditions are met. In particular, the undertaking must prove that payment of the fine would result in its exit from the market and the disappearance of its market-specific investments, assets and output - that is, it must show that these would not be taken over or substituted by a competitor. Moreover, the undertaking must show that its exit would result in material adverse effects to other undertakings that operate in the same business or would contribute to a significant increase in unemployment.

Although undertakings may apply to pay a fine in instalments, the conditions are scarcely less onerous - the Competition Office allows payment in instalments only if immediate payment in full would create an "extremely disproportional burden".

Comment

Despite the official declaration that the Competition Office intends to follow the guidelines, their non-binding nature - and the inherent uncertainty over their use - arguably detracts from their practical value. It remains to be seen how frequently and to what extent the Competition Office will set aside its own guidelines in calculating fines.

A number of vaguely defined terms could also lead to unpredictable application of the guidelines. For example, the term 'repeat infringement', considered as an aggravating factor, may be interpreted to include infringements committed by predecessors, thereby increasing the liability of a successor entity. However, 'predecessor' and 'successor' are not defined in this context. The definition might include infringements that are committed by undertakings or parts of undertakings before their acquisition by the corporate group to which they belong at the time of the proceedings.

The Competition Office's right to include a corporate group's foreign turnover in calculating the base amount could lead to a sharp rise in fines. The ultimate purpose of the measure is to take action against a corporate group that, by the time the Competition Office's decision is implemented, has little or no Hungarian turnover. However, the unconditional right to take account of a group's entire foreign and Hungarian turnover as the basis of the fine could facilitate an artificial increase in the level of fines without reasonable justification. The use of references to foreign turnover will be one of the most telling aspects of the Competition Office's approach to calculating fines in future.

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