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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE DISCUSSION ON PRIVATE REMEDIES: CLASS ACTION/COLLECTIVE ACTION; INTERFACE BETWEEN PRIVATE AND PUBLIC ENFORCEMENT

-- Hungary --

This note is submitted by the Hungarian Delegation to WP3 FOR DISCUSSION at its forthcoming meeting to be held 7 June 2006.

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1. Collective Action/Class Action

1. An action for damages in connection with the breach of competition rules can be brought pursuant to the general rules of civil procedure.[1] Any natural or legal person of full capacity can sue or be sued in court.[2] Under certain circumstances foreign natural or legal persons may also initiate a lawsuit before a Hungarian court. However, a plaintiff can only enforce its claim in a lawsuit if it has standing. A plaintiff has standing if (i) its rights or interests are affected by the legal dispute that is the subject-matter of the lawsuit; or (ii) it is authorized to bring an action by law (e.g. a public prosecutor). Accordingly, a claim for damages can be brought by the person who suffered damage.

1.1. Collective actions

2. Two main types of collective actions are available in Hungary. The first group is that of joint actions when plaintiffs or defendants form a group in the procedure. According to the legal basis of their joint action their position might be uniform or it can be more independent of each other. The other group is the actions initiated by bodies because of an infringement of the interest of a large number of customers. Only joint actions may end in the awarding of damages in an antitrust case.

1.1.1 Joint actions

3. Two or more plaintiffs may initiate a joint action if (i) the subject-matter of the lawsuit is a joint right or obligation that can be judged only uniformly, or if the judgment would affect the joint plaintiffs irrespective of one of the plaintiffs' absence from the procedure; (ii) the plaintiffs' claims are based on the same legal relationship; or (iii) the plaintiffs' claims have similar legal and factual bases and the same court has jurisdiction for all defendants.[3] Consumers can therefore initiate a joint action either under the first or the third option.

4. In the case of the first type of the joint actions the principle of dependency applies to the plaintiffs party to the same joint action. This means that the acts of one plaintiff during the procedure can not be evaluated independently of the other plaintiffs' acts. Due to this dependency the failure to act of one plaintiff has no consequences if any of the other plaintiffs have acted. The procedure, due to the nature of its subject influences the rights of persons absent from it. This does not affect their right to initiate a separate action but it would most likely be unified with the ongoing procedure. On the other hand if the first procedure is over, its outcome qualifies as *res iudicata* in respect of that persons action who did not join the joint action.

5. In the case of the second and third type of joint actions the plaintiffs can not benefit or suffer disadvantages from the other plaintiffs acts or non acting.

6. A special rule relates to the first two types above according to which, parties who were entitled to participate in the joint action as plaintiff may join it until the end of the last trial before the bringing of the first instance judgment. This provision further extends the possibilities for joint actions.

7. There are no special rules on the initiation of a joint action, but the court checks the existence of the legal conditions. The parties can quit the litigation according to the general rules, the joint nature of the action does not restrict them in this sense. In joint actions the calculation and the allocation of damages has no special rules either.

[1] Act III of 1952 on the Civil Procedures (the ''Civil Procedures '')
[2] Article 48 of the Civil Procedures
[3] Articles 51-53 of the Civil Procedures

1.1.2 Actions of entitled bodies on behalf of a large number of consumers or in the public interest

8. In a number of cases certain bodies are entitled to initiate actions in the public interest. These procedures however could almost never end up in the compensation of damages. Most of these procedures do not affect competition law at all and relate to the infringement of public procurement rules, provisions on equal treatment etc.

Actions of entitled bodies in case of infringement of the Competition Act

9. According to Article 92 of the Competition Act a consumer protection organization, the competition authority (GVH) or an economic chamber may start an action on behalf of consumers against anyone who, through the violation of the Act harms a large number of consumers or causes significant harm to consumers. The action can be brought on behalf of both identified and unidentified consumers.

10. The court can only oblige the infringing person to lower the price, to repair or replace the product, or to refund the price but it can not order the compensation of damages. Further, the court can empower the plaintiff to publish the court's judgment in a national daily at the infringer's cost. The infringing person shall perform its court-ordered obligations *vis-á-vis* each consumer in accordance with the terms of the judgment. The lawsuit has importance because it can lead to the judicial establishment of the infringement enabling the parties injured to initiate their own related civil law claims (e.g. claim for damages) in a separate lawsuit, without the burden of proving the infringement itself. It should be noted that if the infringement directly affected consumers and not only through the passing on of the damages, ordering the reduction of the price could be considered as a kind of compensation. Such a reimbursement would cover damages directly inflicted on consumers, but not those deriving from e.g. dead weight loss. A judgment on the compensation of damages could form a basis of direct execution without follow on claims by consumers.

11. The GVH may bring such an action concerning cases falling within its competence within one year from the date of the breach if it has already established the infringement in an administrative decision. The deadline makes practically inapplicable the provision for the GVH as its decisions in antitrust matters are actually never brought within a year. In fact the time frame for the initiation of a lawsuit was not adjusted to the changes of the deadlines of the administrative proceedings of the GVH. However as the GVH was not active in initiating such actions, not the simple extension of the statutory deadline but a thorough revision of this form of action would be necessary because under the present rules once the GVH has established the infringement in its own procedure, prohibited the behavior, imposed fine and published the decision a follow on action would not bring much benefits only if damages were available. The main problem therefore, as it was mentioned above is that the actions initiated by the GVH can not result in the compensation of damages or in payments for public purposes. Consumers should therefore submit subsequent claims. Though the preceding litigation makes the consumers' claim less complex it can be said that if they were not stimulated to initiate a follow on action after the GVH has brought its administrative decision than their willingness to sue after a collective action of the GVH would not rise significantly either.

The role of the public prosecutor

12. The public prosecutor has a general authorization in the Act on Civil Procedures to start a lawsuit if the person entitled for it is unable to protect its rights. In certain Acts the public prosecutor has more specific entitlements too. Though according to e.g. the Act on Consumer Protection when someone harms a large number of consumers the prosecutor is entitled to start a lawsuit, the general authorization of the Act on Civil Procedures should according to the Constitutional Court be interpreted narrower. The Constitutional Court has established that the prosecutor may not restrict individuals right to such an extent

that it initiates procedures even if they are not unable to protect their rights. It stated that individuals have a right for non action too and that would be unduly restricted by the prosecutor in cases where the individual is not completely unable to protect its own rights. Their great number does not qualify as such a circumstance.

13. The prosecutor's general authorization however does not apply either if other agencies or persons are exclusively entitled to start action. Therefore it seems that under the Competition Act the prosecutor is not entitled to start actions because, as it was mentioned above, consumer protection organizations, the GVH and economic chambers are specifically empowered for it. The prosecutor could therefore only step forward at the court if the original infringement was on the borderline of competition and consumer protection provisions. These cases however would certainly not be of antitrust nature.

1.2. Perspectives

14. According to legal firms the current system in Hungary is not satisfactory if the goal is to ensure that consumers are compensated for damage suffered as the result of some anticompetitive behavior. It is not practical that each and every consumer sues the tortfeasor separately or in a joint action. The above goal can be achieved only by introducing an appropriate form of group litigation, e.g. class action, into the Hungarian legal system. However, the class action would be a novelty in the Hungarian legal system and would rise several procedural issues, e.g. who would be entitled to bring such an action, and, in case of unidentified victims, how would the damages awarded by the court be divided among the victims. For the time being, Hungarian law does not have the answers to these questions.

15. It is true that one of the main reasons of ineffective private enforcement is the reluctance of consumers and customers to initiate even follow on actions. This is mainly due to two reasons. One is that individual incentives for action could be very low if the damage inflicted per consumer is small. The other reason is the lack of awareness for the damage or the fear of negative consequences in future business relations with the sued party. The stimulation of law firms with the introduction of class actions could be a solution for the first reason. However it is questionable whether the procedural system can be amended this way especially if it were introduced exclusively in respect of damage claims based on the infringement of antitrust rules. An other approach could be the reconsideration of actions in public interest. If the courts could rule on damages or on payments for public interest, consumer organizations and other entitled authorities would be more active in starting actions. As to the second reason it can be said that through the development of competition culture parties could become more conscious to their rights and more active in private law enforcement.

2. Interface between Public Enforcement and Private Enforcement

16. One of the main relationships between public and private law enforcement is that decisions brought by the GVH bind the courts. The prerequisite question of illegality of the defendant's behavior is therefore already decided in the civil law procedure if the GVH investigated the issue. The other connection of the two areas related to the exchange of information and the expectations of undertakings applying for leniency in the administrative procedure. The GVH does have a leniency program and although there are no special rules on private enforcement to avoid conflicts between incentives for leniency application and the threat of future damage claims, this situation has not caused problems up till now as there were no private actions at all. Moreover, the corporate statements of the leniency applicants were not part of the case-file[4] and they would not be accessible by the other parties / complainants. It is however recognised that the conflict would cause problems if private parties turn to court more actively, especially given the fact that the Hungarian Leniency Notice was changed this year and since 15 February,

[4] The GVH has used leniency applications only as « roadmaps » to the investigations, similarly to the USDOJ, but they has never been used as evidences.

corporate statements can be directly used as evidences and therefore are accessible and may be copied by the parties.[5]

2.1. Courts' access to hard data collected by the GVH

17. It is considered that the main source of problem is that the undertaking applying for leniency submits data that could be used for the calculation of damages and therefore would constitute an essential evidence for plaintiffs. However the GVH is of the view that cooperation between competition authorities and the courts is important in order to make private enforcement a meaningful option for victims of anticompetitive behaviour, and to ensure the consistent application of the competition laws which is needed to create legal certainty. Having this approach in mind, the institution of *amicus curiae* introduced by Regulation 1/2003/EC in respect of cases based on Article 81 and 82 EC was expanded to purely national competition law cases as well in 2005.

18. In follow-on cases, the decision of the GVH is an important precondition to launch a successful action, and may also provide some useful information in connection with other aspects of the case, e.g. proving the damage. Some of that useful information may be found in documents contained in the competition authority's file but the parties do not have direct access to such documents. One possible alternative to make the data available to the court could be if the GVH intervenes as *amicus curiae* and provides help in the assessment of the amount of damages. However it is not clear whether the role of *amicus curiae* is only restricted to the presentation of legal opinions or could it be extended to a more substantial intervention, like the transmission of hard data.

19. The other possibility is that upon the request of a party, the court can obtain documents from other authorities, notaries or other organisations, provided that the party cannot obtain the documents directly.[6] The transfer of the documents can be denied only if it contains state, service or business secrets, in which case the waiver of the rightholder must be obtained.[7] A court can order evidence taking *ex officio* only if it expressly allowed in the given situation as foreseen by an Act.[8] Under the existing rules, the court would not order any evidence taking *ex officio* in a lawsuit for damages based on the infringement of competition laws, but would only issue such order at the request of a party in the case.

20. In the absence of any precedent case, we cannot report on the practical issues of the above rules in follow-on actions for damages related to antitrust cases. Nevertheless certain problems can be anticipated. Most of the information that could be used in a private action (e.g. for proving the damage caused by the anticompetitive behaviour), is protected as business secrets in the GVH's file, and the public version of the documents may not be too helpful for the client in the lawsuit.[9] It is likely that the defendant would claim in the private lawsuit as well that the data in question still qualifies as business secret. Therefore it would not grant the waiver required for making the documents already available in the GVH's file part of the court's file. On the other hand it is questionable that data already transmitted to an administrative procedure should be withheld from a court procedure. Having regard to the fact that the court is bound to keep such information confidential it seems to be unjustified to enable the parties to apply such restrictions. This possibility also restricts the parties right to seek judicial remedy. The consideration of the amendment of the relevant legislation might therefore be necessary.

[5] According to Art. 55 of the Hungarian Competition Act, the right of access to the file contains also the right to make copies of the documents.
[6] Article 192 (1) of the Civil Procedures
[7] Article 192 (2) of the Civil Procedures
[8] Article 164 (2) of the Civil Procedures
[9] Article 55 (3) of the Competition Act

21. It might happen however even under the present system to avoid the application of the above provision enabling the party to disallow the transmission of data from the GVH to a court. I might happen in many cases that actually there was a valid justification for qualifying the relevant information as business secrets in the course of the GVH's investigation (e.g. recent sales figures), but such legal protection may not be necessary some years later when the follow-on action is pending before the civil courts. Therefore, it seems practical to transfer the given documents to the court in a sealed envelope, and to require the defendant to give a reasoned justification why the information contained in the documents should still be treated as business secrets. Then the court could make a decision on how to handle the document containing business secrets.[10]

2.2. Safeguarding incentives for leniency application

22. It is another important question how to handle leniency applications in the above context in order not to discourage cartel members from approaching the authorities because of the consequences of a follow-on action for damages, in which case the information contained in the leniency application could be used against cartel members, including the leniency applicant. For the time being, there is no legal provision addressing this issue.

23. Under Hungarian civil law, members of a cartel would qualify as joint tort-feasors who are jointly and severally liable to the victims for the injury caused to them. To each other, the tort-feasors are liable based on the proportion of their fault.[11] Among themselves, the tort-feasors' liability is shared equally if the proportion of their fault can not be established.[12] A court may decide not to impose joint and several liability on the tort-feasors if (i) it does not jeopardise or delay compensation for the plaintiff's injury, or (ii) the plaintiff contributed to the injury or has been late with ascertaining his claim without a valid reason.[13] In other words, there are already some cases under Hungarian law in which the general rule of joint and several liability of joint tort-feasors is not applied.

24. According to law firms it is worth considering to exempt a leniency applicant from joint and several liability, or even to make its liability secondary to the other cartel members (i.e. it should pay only if the victim cannot collect damages in full from the other cartel members). These rules would be justified by the fact that the leniency helped the competition authorities to conclude the case with success, which also probably serves as the basis for a successful private action for damages. Nevertheless, this "leniency in private action" should not deprive the victims from receiving adequate remedies for their injuries.

[10] See Article 119 (2) of the Civil Procedures
[11] Article 344 (1) of the Civil Code
[12] Article 344 (2) of the Civil Code
[13] Article 344 (3)