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COMPETITION COMMITTEE

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ROUNDTABLE ON THE QUANTIFICATION OF HARM TO COMPETITION BY NATIONAL COURTS AND COMPETITION AGENCIES

-- Note by the Delegation of Hungary --

This note is submitted by the delegation of Hungary to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16 February 2011.

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ROUNDTABLE ON THE QUANTIFICATION OF HARM TO COMPETITION BY NATIONAL COURTS AND COMPETITION AGENCIES

-- Note by Hungary --

1. This contribution discusses the aspects of quantification of harm to competition in the competition law enforcement activity of the Gazdasági Versenyhivatal (Hungarian Competition Authority, hereinafter referred to as the 'GVH') and the Hungarian Courts.

2. The submission follows the structure of the questionnaire of the OECD Secretariat.

1. The role of quantification of harm to competition in public and private enforcement of national antitrust legislation

3. Quantification of harm does not play a special role in the enforcement of competition law in Hungary, although harm to competition is of course a crucial element in enforcement. For example, according to Hungarian Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter referred to as the 'Competition Act'):

a) one of the criteria of issuing an order opening an investigation is that the proceeding is necessary to safeguard the public interest;

b) the investigation may be terminated if the continuation of the procedure does not serve the public interest.

4. According to the practice of the GVH, in both of the above cases, the definition of safeguarding/serving the public interest includes some form of quantification of harm to competition. This quantification is not based on hard-core economic evidence, and it is more or less a simple estimation, based on common sense. For example, in case Vj-42/2008, the Competition Council[1] terminated part of the proceeding because the Competition Council concluded that the harm to competition caused by the agreements under investigation was minor and only theoretical.

5. Finally, it should also be added that some form of quantification of harm to competition arises when the Competition Council finds that a certain agreement has the effect of distorting competition. Once again this is only a quasi- logical (theoretical) deduction that usually has no economic background based on calculations. For example, in case Vj-51/2005, where the two market leader insurance companies agreed with individual automobile dealers that they would accept higher hourly wages in return for new insurance contracts, the Competition Council concluded that harm to competition must have arose, because, for example, other insurance companies on the market also had to apply higher hourly wages and increase their expenses, (it is worth admitting that in this case the agreements were found to be unlawful even by object).

[1] The Competition Council is the decision-making body within the GVH.

2. Admissibility

6. As we have no knowledge of judgments that deal with damage actions in the field of competition law, we can only base our submission on the general rules of Act IV of 1959 on the Hungarian Civil Code, and Act III of 1952 on Civil Procedures.

7. According to the Act on Civil Procedures, any natural or legal person can sue or can be sued. A claimant can only enforce its claim if it has standing, i.e. its rights or interests are affected by the legal dispute, or it is authorised by law to bring an action.

8. It is worth mentioning here that there are special legal provisions that in some cases authorise public authorities to bring actions against the illegal behaviour of those who have caused damage to a significant number of consumers (private individuals acting outside their business or profession). The GVH is also authorised by the Competition Act to file an action to enforce the civil law claims of consumers. This is possible where the conduct of the undertaking that infringes the provisions of the Competition Act concerns a large group of consumers, the identity of whom is unknown, but which can be defined based on the circumstances of the infringement. In such a claim, the existence of a uniform legal basis of the claim put forward, together with a common uniform amount of damages claimed; have to be verified as a consequence of the fact that the consumers concerned by the claim are in an identical situation. The court admitting such a claim shall oblige, by its judgement, the undertaking to satisfy the demand raised by the claim and shall identify the group of consumers entitled to request the fulfilment of the obligation imposed by the judgement and determine the data required for verification the an individual is part of the group of consumers concerned. Nevertheless such actions, mainly due to the fact that this possibility is relatively new, have not yet been initiated by GVH, though in cartel cases affecting consumers directly (eg. price fixing of consumer products) using such means may also be considered.

9. The Civil Code enables any injured party to sue the alleged tortfeasor. For a successful action, the general elements of liability have to exist (i) illegal conduct, (ii) existence of damage, (iii) causal link between the illegal conduct and the damage, and (iv) fault.

2.1 Indirect customer

10. We do not see any obstacles as to why an indirect customer would not be able to sue. As mentioned above, anyone who has standing can sue, and the fact that a customer is not in a direct relationship with the defendant does not pose as an obstacle to suing.

2.2 Passing on defence

11. Please see the answer to point E.

2.3 Rebuttable presumptions

12. Article 88/C of the Competition Act contains the following rebuttable presumption (emphasis added):

> In the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or indirectly fixing selling prices, sharing markets or setting production or sales quotas that infringes Article 11 of this Act or Article 81 of the EC Treaty, *when proving the extent of the influence that the infringement exercised on the price applied by the infringer, it shall be presumed, unless the opposite is proved, that the infringement influenced the price to an extent of ten per cent*.

13. Anyone who sues can rely on this presumption, so it makes no difference whether a direct, indirect customer is suing, or whether it is a single or class action. It is for the defendant in such cases to prove that no damage has occurred as a result of its conduct. This could happen, for example, if the conduct has no influence on the price, or the extent of the influence on price is less than 10 %.

14. In absence of any judgments, it is not clear whether this presumption only applies to the sum of the damage or whether it also touches upon the causal link.

3. Defining harm to competition

15. Once again we have to emphasise that our answer is based on the rules of the Hungarian Civil Code and the practice of the courts in other – non- competition law related – fields of damages actions.

16. Damage in civil law involves (i) pecuniary damage: actual damage, lost profit and cost in connection with reducing the damage, as well as (ii) non-pecuniary damage. As a general principle, all damage suffered by the person suing should be compensated.

4. Methods

17. We do not know what methods would be applied when estimating the damages. As mentioned earlier, there has been a rebuttable presumption since June 2009 that the extent of influence on price is 10%. However, this does not automatically mean that there is 10% damage.

18. As to cases which took place before this presumption of law came into effect, and that, therefore, could not apply this presumption, we know that there are ongoing cases where the claimants are relying on international studies, according to which the harm caused by cartels is usually 16 %. As far as we know, no economic-based study/calculation is prepared by the claimant. There have been no judgments in any of these cases up until this point and we, therefore, have no knowledge of how the court will handle this method, but we feel that the claimant should produce harder evidence (more evidence) on the quantity of harm, it is not enough for a successful claim to say that according to international studies the harm is usually 16 %.

5. Pass-on defence

19. The Hungarian courts have no established practice on this issue either. We think that passing on should be dealt with under the 'damage' or 'causal link' elements of the liability. For example, as a simple method one could say that if a price increase is passed on then the direct customer suffered no harm, unless the customer can prove other harm (e.g. less sold quantity).

6. Data availability

20. Without having any practice on private enforcement, we feel that the issue of data availability is going to be one of the key issues.

6.1 Stand alone cases

21. Hungarian civil procedure does not entail discovery rules that are known in the United States or the United Kingdom. As a general principle, the facts, based on which the case can be decided, shall be adduced by the party bearing a vested interest in persuading the court to recognise them as true. The court shall order the taking of evidence on its own initiative if permitted by law. At the request of the party bearing the burden of proof, the court may order the opposing party to present any document that is in his possession that he is otherwise liable to submit or present under the rules of civil procedure. This

obligation is in particular bestowed upon the opposing party if the document in question was made out to the benefit of the party adducing evidence, or if it embodies a relationship pertaining to him, or if it pertains to a hearing connected to such a relationship. The consequence of not fulfilling the court's request is a procedural fine, which is rather low (cc. 2000 Euros maximum)

1. Where a document is held by a person who is not involved in the action, then this person shall be heard as a witness and shall be ordered to present the document during questioning. However, this person can refuse to produce the document if he has a legal obligation to protect the content of the document as a business secret.
2. Regarding documents in the possession of another court, authority, etc. the court shall take the necessary steps to obtain them if they cannot be released directly to the party. Once again if the document contains a business secret then the court has to request a waiver and if the waiver is denied the document cannot be admitted as evidence.
3. To summarise the above, it is not easy for a claimant to collect data that could support the claim as he probably does not have the necessary data. The business secret defence can be used by third persons, and the defendant will not be willing to produce the requested documents.

6.2 Follow-on actions

22. We do not think that the situation is better in the case of a follow-on action regarding data, as the file of the Competition Authority does not typically include the data that is necessary for quantifying the harm. In case it does, it would probably be a business secret and the rules mentioned above would apply, which means that in the absence of a waiver the data cannot be used as evidence. (We have to mention at this point that there is slight uncertainty as the Public Administrative Procedures Act[2] states that access to a file cannot be denied based on the business secret "defence" if the denial impedes rights guaranteed by law. Is seems though that there is a contradiction between the Civil Procedure Act and the Public Administrative Procedures Act regarding the question of access to business secrets.)

7. Integration of economics in legal processes

23. N/A

8. General experiences

24. N/A

[2] Act CXL of 2004 on Public Administrative Procedures